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155 Cal. 528

GOMEZ et al. v. SCANLAN et al. (S. F. 4,887.)

(Supreme Court of California. May 13, 1909. Rehearing Denied June 12, 1909.)

1. HUSBAND AND WIFE (§ 270*)—ACTIONS—RIGHT OF ACTION BY WIFE—FALSE IMPRISONMENT.

Though a right of action for the false imprisonment of a wife is community property, the wife is a necessary party plaintiff to such action.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 976½; Dec. Dig. § 270.*]

2. PARTIES (§ 59*)—SUBSTITUTION—PERSONAL REPRESENTATIVE.

Since husband and wife were properly joined as plaintiffs in an action for false imprisonment of the wife, upon the husband's death pending the action, his personal representative was properly substituted as a plaintiff.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 93; Dec. Dig. § 59.*]

3. SHERIFFS AND CONSTABLES (§ 157*)—LIABILITY ON BOND—TRESPASS OF CONSTABLE.

Sureties on a constable's bond are not liable for trespasses committed by him not under color of office or in the line of his official duty.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 356; Dec. Dig. § 157.*]

4. SHERIFFS AND CONSTABLES (§ 97*)—LIABILITY—TORTS.

A constable is liable for torts committed by him, whether in the line of his official duties or otherwise, though his sureties would only be liable in the former case.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 137; Dec. Dig. § 97.*]

5. TRIAL (§ 296*)—INSTRUCTIONS—AMBIGUOUS INSTRUCTION—CURE BY OTHER INSTRUCTION.

In an action for false imprisonment against a constable and his sureties, any ambiguity in instructing that, if the constable unlawfully violated plaintiff's personal liberty, the jury must find for plaintiff, because they did not restrict the sureties' liability for wrongs committed by the constable in his official capacity, was removed by a subsequent instruction that the sureties would only be liable if the constable wrongfully restrained plaintiff while acting in his official capacity.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 718; Dec. Dig. § 296.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

6. TRIAL (§ 256*)—INSTRUCTIONS—REQUESTS—NECESSITY—ADDITIONAL INSTRUCTIONS.

Where, in an action for false imprisonment against a constable and the sureties on his official bond, the court limited the sureties' liability to acts committed in the constable's official capacity, if defendants desired an instruction as to the circumstances under which the constable might be considered as acting in his official capacity, they should have requested it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 636; Dec. Dig. § 256.*]

7. SHERIFFS AND CONSTABLES (§ 170*)—LIABILITIES ON OFFICIAL BOND—EXTENT OF LIABILITY—MEASURE OF DAMAGES.

The liability of sureties on a constable's bond is coextensive with that of their principal, so that, in an action against the sureties of the constable for compensatory damages for false imprisonment, the measure of damages is the amount which will compensate plaintiff for all detriment proximately caused by the injury, as provided by Civ. Code, § 3333, in tort actions, and not the measure of damages provided in contract actions.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 409, 413; Dec. Dig. § 170.*]

8. FALSE IMPRISONMENT (§ 36*)—EXCESSIVE DAMAGES.

Plaintiff was arrested after 5 o'clock p. m. and compelled to accompany the arresting constable, who refused to permit her to send word to her husband, and roughly pushed her along the street, and, when she reached the jail, refused to take her before a justice, and attempted to force her into the jail, and refused bail offered, and compelled her to stand in the crowded street for three or four hours, when he released her. Plaintiff was shivering with cold and agitated by humiliation, so that she could hardly walk home, and was sick in bed two days thereafter. *Held*, that a verdict for $2,000, in an action against the constable for false imprisonment, was not excessive.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. § 114; Dec. Dig. § 36.*]

9. TRIAL (§ 140*)—JURY QUESTION—CREDIBILITY.

The credibility of witnesses is for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 334, 335; Dec. Dig. § 140.*]

10. FALSE IMPRISONMENT (§ 36*)—MEASURE OF DAMAGES—DISCRETION AS TO AMOUNT.

The amount of damages awarded for false imprisonment, especially under circumstances causing humiliation to the party injured, is largely in the sound discretion of the jury.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 113, 114; Dec. Dig. § 36.*]

11. NEW TRIAL (§ 76*)—GROUNDS—EXCESSIVE DAMAGES.

A court is justified in setting aside a verdict as excessive only when it is so obviously disproportionate to the injury proved as to show that it did not result from the cool and dispassionate discretion of the jury.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 153; Dec. Dig. § 76.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; Wm. S. Wells, Judge.

Action by Magdalena Gomez and another against Michael J. Scanlan and others. From a judgment for plaintiffs and from an order denying a motion for a new trial, defendants appeal. Affirmed.

See, also, 2 Cal. App. 579, 84 Pac. 50.

A. L. Frick and R. H. Latimer, for appellants. Wm. M. Cannon and H. V. Alvarado, for respondents.

SLOSS, J. This is an action to recover damages for false imprisonment of the plaintiff Magdalena Gomez by the defendant Scanlan. Scanlan was constable of the Eleventh township of the county of Contra Costa, and his codefendants were sureties on his official bond. After the commencement of the action, John H. Gomez, who, as husband of Magdalena, had joined as plaintiff, died. His wife obtained letters of administration of his estate, and, as administratrix, was substituted for the decedent. Individually, and as such administratrix, she recovered judgment for $2,000. The defendants appeal from the judgment and from an order denying their motion for a new trial.

1. The death of John H. Gomez and the appointment of Magdalena Gomez as administratrix of his estate were made to appear by means of a supplemental complaint. The defendants demurred to this pleading on the ground of misjoinder of parties plaintiff, and, the demurrer having been overruled, set up the alleged misjoinder in their answer. It is contended that the action was, originally, one to recover community property, and, as such, should have been brought by the husband alone. In such action the wife, it is claimed, cannot properly be joined as plaintiff either with the husband or with his personal representative. This position is fully refuted by a reference to the authorities on the point. In McKune v. Santa Clara V. M. & L. Co., 110 Cal. 481, 42 Pac. 980, the court said that: "Though the right of action and the damages recovered are community property, this form of action is an exception to the rule that the husband has control of the community property, and may sue or be sued alone where it is concerned. The wife is a necessary party." The doctrine so declared has been established as the law of this state by a long line of prior decisions. Sheldon v. Steamer Uncle Sam, 18 Cal. 526, 79 Am. Dec. 193; Matthew v. C. P. R. R. Co., 63 Cal. 450; Tell v. Gibson, 66 Cal. 247, 5 Pac. 223; Baldwin v. Second St. C. R. Co., 77 Cal. 390, 19 Pac. 644; McFadden v. Santa Ana R. Co., 87 Cal. 464, 25 Pac. 681, 11 L. R. A. 252; Neale v. Depot R. Co., 94 Cal. 425, 29 Pac. 954. If the husband and wife were properly joined as plaintiffs in the first instance, there can be no objection to substituting for the deceased husband his personal representative. Gomez v. Scanlan, 2 Cal. App. 579, 84 Pac. 50.

2. It is contended that the complaint is insufficient as against the sureties for want of allegations tending to show that Scanlan,

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in arresting and detaining the plaintiff Magdalena, was acting under color of his office. It is undoubtedly true, as urged by appellants, that the sureties on a constable's bond are not liable for his trespasses committed not under color of office nor in the line of official duty. Felonicher v. Stingley, 142 Cal. 630, 76 Pac. 504. The complaint in this case, however, sufficiently shows the official character of Scanlan's acts. It alleges that Scanlan, acting in his capacity as constable, did arrest and imprison the plaintiff Magdalena Gomez on a pretended charge of grand larceny. On such charge, one of felony, he had authority, as a peace officer, to make an arrest without a warrant. Pen. Code, § 836. Even if the averment that Scanlan was "acting in his capacity as constable" be rejected as a statement of a conclusion of law, the other allegations are enough to make out a case of a trespass committed by Scanlan, "while attempting to perform some official act in the general line of his official duties." Felonicher v. Stingley, supra. As against a general demurrer—the only form in which defendants attempted to make this objection—the complaint certainly cannot be treated as totally lacking in averment of essential facts.

3. The cause was tried before a jury. Certain instructions given by the court are assailed. One of them directs the jury that, if they find that Scanlan unlawfully violated the personal liberty of the plaintiff Magdalena Gomez, they "must find a verdict for the plaintiffs." Another that if Scanlan, after making the arrest, restrained Mrs. Gomez of her liberty for an unreasonable time without taking her before a magistrate, such detention constituted a false imprisonment, and in such case the jury "must find a verdict for the plaintiffs." The criticism directed against these instructions is that they do not inform the jury that the liability of defendants would arise only if the wrong committed by Scanlan was one done by him in his official capacity. This qualification, however, was applicable only to the defendants who were sued as sureties. Scanlan himself was, of course, liable for any wrongful act committed by him, whether officially or otherwise. The instructions merely state that the plaintiffs are, under the circumstances stated, entitled to a verdict, not that such verdict must go against all of the defendants. In a later instruction, dealing specifically with the responsibility of the defendant sureties, the jury were instructed that a verdict against such sureties should be rendered only if Scanlan was guilty of a false imprisonment of Mrs. Gomez, "while acting in his capacity of constable of the Eleventh township." This removed any ambiguity that might be thought to reside in the earlier instructions, taken by themselves. To the suggestion that the court should have stated the circumstances under which the constable might be held to have acted in his official capacity, the answer is that it was incumbent on the defendants to request an instruction on this precise matter, if they desired it.

The court instructed the jury that "the measure of damages is the amount which will compensate the plaintiffs for all the detriment proximately caused by the injury, whether it could have been anticipated or not." This was a statement of the rule for fixing the damages in cases of tort, or "obligations not arising from contract." Civ. Code, § 3333. The measure of damages for the breach of an obligation arising from contract is, ordinarily, "the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom." Civ. Code, § 3300. It is argued that, inasmuch as the action against the sureties is one upon a contract, i. e., their undertaking, the proper measure of damages as to them is that declared by section 3300. The plaintiffs, it is said, should have been limited to compensation for the detriment likely to result from the breach, instead of being permitted to measure their damage by the detriment proximately caused, "whether it would have been anticipated or not." But this argument overlooks the true nature of the obligation of the sureties. By their bond they agree to make themselves liable, to the amount specified, for the faithful performance by the principal of his official duties. In reality they undertake to be responsible for all torts committed by the principal in his official capacity. Their contract can be given full effect only by making their liability coextensive with that of the principal, up to the amount of their undertaking. This is the liability which was within the contemplation of the parties as likely to result from a breach of official duty by the principal. We are here speaking of compensatory damages alone. No question of the liability of sureties for punitive damages is presented by this record.

4. It is claimed that the damages awarded are excessive. Mrs. Gomez testified that she was arrested by the defendant Scanlan after 5 o'clock in the afternoon, at the town of Pinole. The constable, refusing to give her an opportunity to send word to her husband, ordered her to accompany him. He "pushed her along the street as if she were a man." When they reached the jail, he insisted upon her entering. At that time her husband arrived, and demanded that she be brought before a justice of the peace. Scanlan refused to comply with this demand, and attempted by force to compel Mrs. Gomez to go into the jail. He refused the offer of various persons to furnish bail, and detained his prisoner on the street, which was crowded with people, for three or four hours, until night came. Finally he released her. She "was shivering with cold and the

shame," and could hardly walk. When she got home, she had hysterics and spasms and was sick in bed for two days. There was testimony which conflicted with the foregoing statement in various particulars; but, if the jury accepted Mrs. Gomez' version of the occurrence, as they had a right to do, we cannot, as matter of law, say that a verdict of $2,000 was so great as to show that it was rendered "under the influence of passion or prejudice." Code Civ. Proc. § 657. The amount of money which will compensate one for an unwarranted restraint of his person is not the subject of exact computation. Especially is this true where the invasion of the right of personal liberty is accompanied by circumstances causing humiliation, shame, and public disgrace to the party injured. In cases of this kind the extent to which the allowance may go must, in large measure, be left to the sound discretion of the jury. A court is justified in overturning a verdict as excessive only where its amount is "obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the jury." Morgan v. S. P. Co., 95 Cal. 501, 508, 30 Pac. 601, 603. We cannot say that such disproportion is shown here.

The judgment and order appealed from are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

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10 Cal. App. 397

HEITMAN v. PACIFIC ELECTRIC RY. CO.

(Civ. 616.)

(Court of Appeal, Second District, California. April 14, 1909. Rehearing Denied by Supreme Court June 12, 1909.)

1. Appeal and Error (§ 930*)—Verdict—Review of Evidence.

In determining whether there is evidence sufficient to sustain a verdict, the appellate court must view the evidence with the most favorable inferences that can reasonably be drawn from the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3755; Dec. Dig. § 930.*]

2. Railroads (§ 328*)—Crossing Accident—Contributory Negligence.

Decedent and his driver riding behind a team of mules approached an electric railroad crossing in the country at a slow trot. The road crossed the railroad at right angles, through a cut with banks about eight feet high. The driver listened for a car, but did not hear it. He did not stop to listen, though he admitted that, if he had stopped, he might have heard the noise of the car when there was no noise of the wagon to prevent it. Another witness, who was walking and listening proximately from the same position that decedent occupied, testified that, while no gong was sounded, he could hear the rumble of the car. *Held* that, decedent and the driver having failed to listen for a car which they knew might cross the road from behind the obstruction, decedent was negligent as a matter of law precluding a recovery for his death.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1057–1070; Dec. Dig. § 328.*]

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by Avis Heitman against the Pacific Electric Railway Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

Gibson, Trask, Dunn & Crutcher (Norman S. Sterry, of counsel), for appellant. George A. Skinner, Kemp & Collier, and John W. Kemp, for respondent.

TAGGART, J. An action to recover damages for death by negligence. General verdict and judgment in favor of plaintiff for the sum of $4,000, and defendant appeals from the judgment and an order of the superior court denying its motion for a new trial.

Plaintiff sues as the widow of Theodore J. Heitman, who was fatally injured on April 1, 1906, while riding on a wagon drawn by mules on and along a road or street in the city of Long Beach, known as Anaheim road; the driver of the team being one W. E. Caseboom, who was associated with Heitman in the transfer business. Anaheim road ran east and west and was intersected and crossed by the car tracks of the electric railway line of the defendant, which ran over and along a private right of way extending north and south from said Anaheim road and crossed it at right angles. When the team, which was traveling westerly, reached the crossing of the railway track, one of the defendant's cars propelled by electricity approaching from the south struck the mules, carrying them with the wagon and occupants some 60 or 70 feet into a cut through which the railway ran at this point, throwing Heitman from the wagon and so injuring him that he died shortly thereafter. The negligence alleged by the complaint consisted of the car approaching the crossing at an unreasonable and reckless speed and the failure to give any alarm of such approach. A second count charges the negligence to have been wanton. The answer denies negligence and alleges contributory negligence on the part of the deceased.

In respect to the finding of the jury on the negligence of defendant, appellant concedes that the evidence in the case is such that, if this court considers the sufficiency of the evidence to sustain the jury's conclusion, in the light of the rule that the most favorable inferences that the jury could reasonably draw from the evidence must be indulged in, its appeal in this respect is ineffective (King v. Green, 7 Cal. App. 473, 94 Pac. 777), but urges that the verdict is not supported by the evidence on the issue of contributory negligence. The rule of the Roman law from which the doctrine of contributory negligence was derived is short and explicit: "The harm I bring upon myself, I must bear myself." In determining whether or not the deceased in the case at bar brought upon himself the harm which resulted in his death, it is conceded that the negligence of the driver of the mules is to be imputed to and regarded as the act of the deceased. The same rule conceded by appellant to be applicable to a consideration of its negligence when the sufficiency of the evidence is being reviewed must be applied to the negligence of the deceased. It is primarily for the jury to determine whether the conduct of the deceased and the driver in approaching the crossing was that of ordinarily prudent persons under such circumstances, and we are concluded by this finding, unless the contrary necessarily appears from the undisputed facts. Schneider v. Market St. Ry. Co., 134 Cal. 488, 66 Pac. 734.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The facts as to the approach of the railway track by the deceased, as testified to by the driver, Caseboom, who was a witness for plaintiff, are as follows: "As we were about to approach the tracks, the mules were going in a little jog trot, and as they went over the tracks they started into a walk, and we saw the car and pulled back on the mules, and we couldn't do anything but let the car strike us. I saw the motorman. He was looking right in my face. He was handling them jiggers there about as fast as he could when I seen him. As we were about to approach the track, Heitman says, 'Do you hear any car?' and I listened and says, 'No.' I listened for the car before I came out into the place of danger. If any bell or gong was rung I didn't hear it. I was listening for it. The wind was blowing." On cross-examination this witness said he did not stop the team to listen, but that they kept right along in a slow trot until they voluntarily slowed into a walk when they stepped on the rails. In this slow trot there was considerable noise with the wagon. "If I had stopped still there wouldn't have been any noise from the wagon to prevent my hearing the noise of the car. I couldn't see over the bank sitting on the seat. I didn't look until I got around the corner, and then it was too late. The motorman was apparently doing everything he could." Evidence was introduced by plaintiff to show that some of this testimony was a surprise to her, and, as showing that the witness had made other statements in conflict with his testimony, her attorney testified that the witness Caseboom had told him that the motorman was looking away from the crossing when the witness first saw him, and that he had stated that he was walking his team. As he approached the crossing he slowed down the team the better to hear the car if it was coming. Two other witnesses, who testified to hearing no bell, stated there was no wind. One of these testified to having met the team about 20 to 25 feet from the railway track, and that when he had proceeded about 10 feet further he heard the noise of the collision and looked around, and that when he passed the team the mules were walking. This witness, who was a pedestrian, testified to hearing the noise of the rumble of the car, although he did not hear any gong or bell ring, and said he could have heard it if one had been rung. It appears from the testimony of other witnesses for plaintiff that the horses would have to be on the track before the driver could see a car approaching from the direction in which the car came, on account of both roads going through a cut at the place of intersection, making a bank about eight feet high. We do not think it can be said that the deceased must necessarily have stood upon the seat and looked for the car or have had negligence imputed to him.

Where the question of liability turns upon a finding of fact as to who was guilty of the last act of negligence previous to the injury, without which the accident would not have happened, the necessity of discriminating between different sets of facts presents a matter primarily within the province of the jury; but no question of this kind is here presented. When the driver and the motorman discovered each other, it was too late for the former to withdraw from the track or drive across, and impossible for the motorman to stop the car in time to avoid a collision. The negligence of the motorman being assumed, that of the driver remains to be determined. The latter was familiar with the crossing, and knew that he was approaching a place of danger, and that he could not see the car coming on the private right of way until his mules would reach the first rail of the track, when it would be too late to prevent them being struck by the car if it were coming at the rate which he knew it generally approached the crossing, or even if it had been running at a more moderate rate of speed. The team was either walking or going in a slow trot, and the wagon was making considerable noise. He listened for the car, but did not hear it, but did not stop to listen, although he admitted that if he had stopped he might have heard the noise of the car when there was no noise of the wagon to prevent it. This is further corroborated by the witness King, who was walking and listened from approximately the same position as the deceased occupied. He testified that, while no gong was sounded, yet he could hear the rumble of the car. The witness Caseboom gave as a reason for not stopping to listen: "If I had stopped to think I would have known that the wind and the rumble of the wagon (other witnesses said there was no wind) together would have deadened the sound of the approaching car, but I didn't think of that."

This was not a case where the party acting was called upon to exercise his judgment in a state of mental agitation caused by the presence of danger, but the application of the mind to the determination of what precautions were necessary in approaching a place of danger while occupying a position in which deliberation was invited by the surroundings. We are of opinion that there was no room for a sensible or impartial man to draw more than one reasonable inference as to the negligence of the driver and the deceased. This is the test of whether or not the court may declare, as a matter of law, that negligence does or does not exist. Without assuming to hold that, in all cases and under all conditions, the crossing of an interurban electric railway is to be governed by the same rules as those applied to steam railways, we nevertheless feel that the rule of precaution laid down in Herbert v. Southern Pac. Co., 121 Cal. 227, 230, 53 Pac. 651, is applicable here, and the deceased and his driver failed to observe the requirement to avail themselves of their full opportunity to listen for the car which they knew might cross the road from behind the obstruction which prevented them from seeing its approach. In this the case is to be distinguished from Bilton v. Southern Pac. Co., 148 Cal. 443, 83 Pac. 440, and like cases.

The rule contended for by the respondent would preclude the court from finding as a matter of law that a person injured in crossing in front of a car had been guilty of contributory negligence in all cases in which such person had not deliberately brought about a collision. This is too narrow an application of the rule that a party must bear the harm which he brings upon himself. He is equally responsible where he "takes a chance" and makes a miscalculation (Schwanewede v. Hudson Co., 67 N. J. Law, 449, 51 Atl. 696), and where, as in the case at bar, he fails to think of some ordinarily prudent precaution which proper regard for his own safety, as well as that of those in the car whose lives he imperils by coming in contact with it, demands.

This view renders it unnecessary to mention the other errors assigned, but we have considered the testimony of Caseboom in the light of the inconsistencies due to the claimed surprise of the plaintiff, and have given full weight to the testimony of the impeaching witnesses and to the contradictory evidence of the other witnesses so far as applicable under section 2049, Code Civ. Proc. That is, without passing upon the errors assigned in the ruling and instruction of the trial court in respect to this matter, we have accepted both as correct for the purpose of determining the question of contributory negligence. For the same reason, we have also predicated our opinion upon the finding of the jury, rather than upon the ruling of the court on defendant's motion for a nonsuit.

Judgment and order reversed.

We concur: ALLEN, P. J.; SHAW, J.

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10 Cal. App. 378

CITY OF LOS ANGELES v. GAGER.

(Civ. 593.)

(Court of Appeal, Second District, California. April 10, 1909. Rehearing Denied by Supreme Court June 8, 1909.)

1. EMINENT DOMAIN (§ 124*)—PROCEDURE—CONSTRUCTION OF STATUTE.

The street opening act of 1903 (St. 1903, p. 376, c. 268) does not in terms specify the time as of which the value of property condemned shall be fixed, but section 6 provides that said action shall be governed by such "rules of the Code of Civil Procedure" as may be applicable thereto, except as otherwise provided. *Held*, that the time as of which the value shall be fixed is governed by Code Civ. Proc. § 1249, providing that in assessing compensation in condemnation proceedings, the right thereto shall be deemed to have accrued at the date of the summons, and its actual value at that date shall be the measure of compensation for all property to be actually taken.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 332–344; Dec. Dig. § 124.*]

2. EMINENT DOMAIN (§ 8*) — PROCEDURE — "RULES OF THE CODE OF CIVIL PROCEDURE."

The phrase "rules of the Code of Civil Procedure" as used in Street Opening Act 1903, § 6 (St. 1903, p. 378, c. 268), means the laws or provisions of that Code, and not merely the rules governing pleading and practice as prescribed therein, especially in view of section 37 providing for a liberal construction of the provisions of the act to promote the objects thereof.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 8.*]

3. WORDS AND PHRASES—"RULES"—"LAWS."

The meaning of the word "rules" is of wide and varied significance, depending upon the context; in a legal sense it is synonymous with "laws."

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, pp. 4014–4023; vol. 8, p. 7701; vol. 7, pp. 6271–6272.]

4. EMINENT DOMAIN (§ 123*)—COMPENSATION—CONSTITUTIONAL PROVISIONS.

Code Civ. Proc. § 1249, providing that in assessing compensation in condemnation proceedings the right thereto shall be deemed to have accrued at the date of the summons, and its actual value at that date shall be the measure of compensation for property actually taken, is not violative of Const. art. 1, § 14, providing that private property shall not be taken or damaged for public use without just compensation having first been made.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 326; Dec. Dig. § 123.*]

5. EMINENT DOMAIN (§ 124*)—COMPENSATION—INTEREST FROM DATE OF SUMMONS.

Until a person is deprived of possession of property sought to be condemned, his right to the use and enjoyment thereof as it stood at the time of commencing the action is not abridged, and he is therefore not damaged until the actual taking of the property, and hence is not entitled to interest on the value of the property from the date of summons as part of his compensation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 332–344; Dec. Dig. § 124.*]

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Condemnation proceedings by the City of Los Angeles against J. R. Gager. From a judgment confirming a report of referees, and an order denying a new trial, defendant appeals. Affirmed.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

W. A. Alderson and Elon G. Galusha, for appellant. Leslie R. Hewitt, City Atty., and Howard Robertson, Deputy City Atty., for respondent.

SHAW, J. Defendant was the owner of certain real estate lying between Central avenue and Naomi avenue in the city of Los Angeles, through which the city, under and in accordance with the provisions of the street opening act of 1903 (St. 1903, p. 376, c. 268), initiated proceedings to open Thirty-Fifth street. Pursuant to ordinance duly passed this action was instituted by the city attorney to condemn the land required for use in opening of said street. The complaint was filed therein, and summons issued on June 16, 1905. On March 15, 1906, the referees appointed to ascertain and fix the compensation to be paid to defendant for the land sought to be condemned filed their report, wherein and whereby they fixed the value of said property as of the time of the issuance of the summons in said action, to wit, June 16, 1905. Upon the hearing had by said referees for the purpose of ascertaining the facts necessary to enable them to fix such value, they refused to receive or consider evidence touching the value of the property at other than the time of the issuance of said summons. To this report defendant in due time filed exceptions, assigning as grounds therefor the action of said referees in so excluding evidence of value, and confining their inquiry to June 16, 1905, as well as the fact that they had not allowed defendant interest upon the value so fixed from said 16th day of June, 1905. Upon the hearing had thereon defendant claimed the property had greatly enhanced in value since the date of the issuance of summons in the action, and offered evidence tending to prove that the value of the property in February, 1906, was 25 per cent. greater than on June 16, 1905. The court excluded this evidence, and confirmed the report of the referees, and rendered and caused to be entered an interlocutory judgment in accordance therewith. The appeal is from this judgment, and an order denying the defendant's motion for a new trial.

Appellant contends that he is entitled to the value of the property as of the time when the referees made their report rather than as it stood at the time of the issuance of summons in the action, and that, if the value is fixed as of date June 16, 1905, then he is entitled to interest thereon to the date of payment. The street opening act of 1903 does not, in terms, specify the time as of which the value of property shall be fixed, but section 6 of the act provides that "said action shall, in all respects, be subject to and governed by such rules of the Code of Civil Procedure now existing, or that may be hereafter adopted, as may be applicable thereto, except in the particulars otherwise provided for in this act." As the act is silent as to the time as to which the valuation shall be placed upon the property, we must look to the provisions of the Code of Civil Procedure for a rule applicable to the case. Section 1249, Code Civ. Proc., provides: "For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the summons, and its actual value, at that date, shall be the measure of compensation for all property to be actually taken." Appellant, however, vigorously contends that the provisions of this section are inapplicable. He insists that the word "rules," as used in section 6 of "the street opening act," refers to those rules only which govern pleading and practice as prescribed in the Code of Civil Procedure. The meaning of the word "rules" is of wide and varied significance, depending upon the context. In a legal sense it is synonymous with "laws." In re Higbee, 4 Utah, 19, 5 Pac. 693; Watts v. Holland, 56 Tex. 54; Hunt v. Common Council, 45 N. J. Law, 279. The phrase "rules of the Code of Civil Procedure," as used in section 6 of said act, means the laws or provisions of said Code. By its terms the section does not provide that the action shall be governed by the rules of practice and procedure prescribed in said Code; and, in the absence of such limitation, it is to be governed by the rules or laws of said Code applicable to the action which are not otherwise provided for in the act. Had it been the intent of the Legislature to limit the effect of such provision to the rules of practice, such intent would undoubtedly have found expression in the act itself. See sections 1256, 1257, 1262, Code Civ. Proc. To give the section the narrow and limited interpretation contended for would do violence to section 37 of the act, which calls for a liberal construction of its provisions to promote the objects thereof. We think it clear that it was the intent of the Legislature that section 1249, Code Civ. Proc., should constitute the rule for ascertaining the amount of compensation and damages to be paid for land acquired by proceedings had under the provisions of the street opening act of 1903. Even in the absence of statutory provision upon the subject, the authorities bearing upon the question are by no means uniform in decision. No good purpose could be subserved, however, by citing or discussing these cases. Suffice it to say, that in this state we have a provision of law which, if constitutional, excludes all consideration of other than the value of the property at the date of the issuance of the summons in the action.

But appellant contends that this section 1249, Code Civ. Proc., is contrary to the provisions of section 14, art. 1, of the Constitution of California, and therefore unconstitutional. Counsel has with great industry collected a vast array of authority from other jurisdictions in support of such contention. If the question could be regarded as an open one in this state, his able and exhaustive presentation and authorities in support thereof would merit the most careful and painstaking consideration. Inasmuch, however, as the Supreme Court of this state has, since 1882, repeatedly and uniformly held to the contrary, the provision must be deemed immune from attack on constitutional ground. California Southern R. Co. v. Kimball, 61 Cal. 90; Tehama v. Bryan, 68 Cal. 57, 8 Pac. 673; San Jose & A. R. Co. v. Mayne, 83 Cal. 566, 23 Pac. 522; City of Santa Ana v. Brunner, 132 Cal. 234, 64 Pac. 287; Pacific Coast Ry. Co. v. Porter, 74 Cal. 261, 15 Pac. 774; Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585.

Appellant next insists that, at all events, he is entitled to interest on the value of the land from the date of the issuance of the summons. The contrary has been held in San Francisco & San Joaquin Valley Ry. Co. v. Leviston, 134 Cal. 412, 66 Pac. 473. The same question was discussed by the Supreme Court of the United States in Shoemaker v. United States, 147 U. S. 282, 13 Sup. Ct. 361, 37 L. Ed. 170, under provisions for condemnation proceedings almost identical with those under consideration, and the court, speaking through Mr. Justice Shiras, said: "Interest accrues, either by agreement of the debtor to allow it for the use of money, or in the nature of damages, by reason of the failure of the debtor to pay the principal when due. Of course neither ground for such a demand can be found in the present case. No agreement to pay the interest demanded is pointed to, and no failure to pay the amount assessed took place. That amount was not fixed and ascertained till the confirmation of the report. * * * It is true that, by the institution of proceedings to condemn, the possession and enjoyment by the owner are to some extent interfered with. He can put no permanent improvements on the land, nor sell it, except subject to the condemnation proceedings. But the owner was in receipt of the rents, issues, and profits during the time occupied in fixing the amount to which he was entitled, and the inconveniences to which he was subjected by the delay are presumed to be considered and allowed for in fixing the amount of the compensation. Such is the rule laid down in cases of the highest authority. Reed v. Hanover Branch R. Co., 105 Mass. 303; Kidder v. Oxford, 116 Mass. 165; Hamersley v. New York, 56 N. Y. 533; Norris v. Philadelphia, 70 Pa. 332; Chicago v. Palmer, 93 Ill. 125; Phillips v. South Park Com'rs, 119 Ill. 626, 10 N. E. 230." Until a citizen is deprived of possession of the property sought to be condemned his right to the use and enjoyment thereof as it stood at the time of commencing the action is in no wise abridged. Therefore it cannot, in a legal sense, be said that he is damaged until the actual taking of the property.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

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10 Cal. App. 375

Ex parte THOMAS. (Cr. 116.)

(Court of Appeal, Second District, California. April, 10, 1909.)

1. CONSTITUTIONAL LAW (§ 81*) — POLICE POWER.

The courts have not attempted to define the extent of, and limitations upon, the exercise of the police power, but determine whether or not legislation is justified under the police power in the particular cases as they arise.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 148; Dec. Dig. § 81.*]

2. MUNICIPAL CORPORATIONS (§ 594*)—POLICE POWER—ORDINANCES—VALIDITY—REASONABLENESS.

The police power of a state extends to control in a proper manner of its parks, streets, and alleys, and the protection of the rights of the general public therein, and an ordinance making it unlawful to hold a public assemblage, or make public speeches, in any public park, or street, in a defined district within the city, was a valid exercise of its police power; and, in the absence of a showing of unreasonableness in fixing the boundaries as provided thereby, it will be presumed that the council fixed proper boundaries consonant with the purpose of the ordinance.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 594.*]

In the matter of the application of May Thomas for a writ of habeas corpus. Writ denied, and petitioner remanded.

Stephen L. Sullivan and Walter, Pratt & Ball, for petitioner. Guy Eddie, City Pros. Atty., for respondent.

PER CURIAM. Habeas corpus. Petitioner prays for her discharge from custody upon the grounds that she is restrained of her liberty by reason of an arrest under a complaint charging her with a violation of Ordinance No. 17,192, enacted by the city council of Los Angeles city, her contention being, first, that the city has no power to pass such an ordinance; and, second, that the same is unreasonable.

This ordinance in general terms makes it unlawful for any person to hold, conduct, or address any assemblage, meeting, or other gathering of persons, or to make any public speech, lecture, or discourse in any public park of the city, or upon any public street or alley within a defined district. No restrictions of any kind or character are sought to be imposed upon any person with relation to any of the streets or alleys outside of such district. The authority of the city of Los Angeles under its charter to make and enforce within its limits all such local, police, and sanitary and other regulations as are not in conflict with general law is derived from the Constitution of the state. "It is impossible to state in terms the extent or the limitation of what is known as the police power, and courts have not attempted to do it. Whether or not that power has been exceeded in particular cases must be determined as the cases arise." In re Flaherty, 105 Cal. 562, 38 Pac. 981, 27 L. R. A. 529. That such police power extends to the preservation and control, in a proper manner, of public parks, streets, and alleys, and the protection of the rights of the general public traveling thereon, and upon every part thereof, without unnecessary interference, cannot well be questioned. This ordinance does not attempt to suppress freedom of speech, or seek to interfere with the citizen in the right to express his views upon any subject, political, religious, or otherwise, as is suggested by petitioner. It simply specifies a certain district within the city wherein no one may do the things prohibited. The question, and the only question, for determination is as to the reasonableness of the restriction in the particular case. There is nothing shown in this application from which a court may determine the reasonableness or unreasonableness in fixing the exterior boundaries of the specified district. Primarily it is for the legislative branch of the city government to determine, in the exercise of proper discretion, what streets, and within what particular portion of the city, the public welfare may demand such regulation. Where no abuse of discretion appears, it will be presumed that such legislative body acted wisely and fixed proper boundaries. Assuming the power of the city in the premises, the character or object of the assemblages prohibited are of no materiality. One may not violate the law, even though by so doing one may be of opinion that he is performing an act the result of which would be of benefit to the public.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Writ denied, and prisoner remanded.

10 Cal. App. 392

BUHRMEISTER v. BUHRMEISTER et al.

(Civ. 554.)

(Court of Appeal, Third District, California. April 14, 1909.)

1. Partition (§ 19*)—Right to Partition—Possession of Defendant.

Under Code Civ. Proc. § 752, providing that, "when several co-tenants hold and are in possession of real property * * * an action may be brought by one or more of such persons for a partition thereof," it is no objection to an action for partition that plaintiff is in possession of the entire premises under an unexpired lease, under which defendant is not entitled to possession of his portion at the commencement of the action.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 19.*]

2. Appeal and Error (§ 1170*) — Review — Effect of Premature Action.

Where plaintiff was entitled to partition at the time of the trial, a proper judgment will not be reversed merely because the action was prematurely brought.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4540; Dec. Dig. § 1170.*]

Appeal from Superior Court, Solano County; L. G. Harrier, Judge.

Action by Wallace Buhrmeister against August L. Buhrmeister and another. From the judgment rendered, defendant August L. Buhrmeister appeals. Affirmed.

Paul C. Harlan, for appellant. F. R. Devlin, for respondent.

BURNETT, J. The action was for partition, and the appeal is from the interlocutory judgment.

The only point urged by appellant is that the action was prematurely brought. On February 18, 1903, H. G. Buhrmeister died testate, devising in equal shares the property sought to be partitioned to his six children, including appellant and respondent. By the terms of the will, as stated by appellant, plaintiff was given the use and occupation, rents, issues, and profits of said property for five years immediately after the death of the testator, at the annual rental of $300, $60 to be paid to each of the other five devisees annually by said plaintiff. These other devisees were directed by the testator, in his will, to execute to respondent a lease of the real property for the terms and upon the conditions already named. The said property was distributed to the six children, in accordance with the terms of the will, "at the expiration of the term of five years from the 18th day of February, 1903, or sooner determination of the right to the use thereof above vested in Wallace Buhrmeister." Plaintiff was in possession under said leasehold right until February 18, 1908, and during the years 1905 and 1907 he bought the interest in the property of all the other devisees, except that of appellant. The suit was begun November 27, 1907, nearly three months before the expiration of said leasehold interest, but it was not tried until some time after said lease had expired.

The facts are, then, that at the beginning of the action plaintiff was the owner of "an estate of inheritance," to wit, the fee in and to an undivided five-sixths of the property in controversy, and was in possession of the whole thereof by virtue of said lease, and the defendant was the owner in fee of the other one-sixth, but was not entitled to its possession until February 18, 1908. It is therefore argued that since one of the parties was not entitled to the possession at the time the complaint was filed, the case is not one in which "the co-tenants hold and are in possession" of real estate, and consequently not within the contemplation of the statute, which provides that "when several co-tenants hold and are in possession of real property as parceners, joint tenants, or tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, an action may be brought by one or more of such persons for a partition thereof according to the respective rights of the persons interested therein, and for a sale of such property, or a part thereof, if it appear that a partition cannot be made without great prejudice to the owners." Section 752, Code Civ. Proc.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

But appellant has misconceived the scope of this proceeding under our statute. The operation of the action of partition as known at the common law has been greatly enlarged. In fact, it is more comprehensive here than in many of the other jurisdictions. The earlier cases in this state are reviewed in Martin v. Walker, 58 Cal. 590, wherein it is said: "The case, therefore, presents but one question on this appeal, and that is, Can a tenant in common, who has never been in the occupancy of the land, maintain a suit in partition against a cotenant, whose possession is adverse and hostile? It is claimed, on behalf of the respondents, that he cannot, that the proper remedy is by ejectment, and that until the possession has been recovered in that form of action, he is not in a position to bring partition. In support of this view of the law section 752, Code Civ. Proc., is relied upon. * * * The terms of the above section, to the effect that 'when several co-tenants hold and are in possession' the action may be brought, give strong countenance to the doctrine advanced by the respondents, and there is no doubt that such is the doctrine laid down in other states of the Union, under statutes more or less similar to ours. But a different rule has been adopted in this state, and that rule has been too long established for us to depart from it, even if it did not receive our full sanction and support. But the rule would seem to be supported by section 759 of the same Code: 'The rights of the several parties, plaintiff as well as defendant, may be put in issue, tried and determined in such action.' This provision of the Code, it seems to us, gives the court in which the partition suit is brought full power and authority to try and determine in that proceeding all questions relating to the title as fully and completely as such questions could be adjudicated in an action of ejectment." In Watson v. Sutro, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64, it was held that an action for partition may be maintained by the owner of an equitable title. "As legal and equitable remedies may be had in the same case, the owner of the equitable title to an undivided interest in land may sue to establish his right, and to obtain a partition of the common estate." It follows from the foregoing that it is no objection to the maintenance of the action that one of the parties here was not in possession. Indeed, it would seem to be a favor to the defendant that partition should be granted him while he is out of possession of the entire estate. The result is that he is awarded the portion to which he is entitled as though he were in possession, and his only real ground of complaint is that he obtains what he owns sooner that he should. His generous desire to postpone the enjoyment of his property, however commendable, really shows that he is not aggrieved by the judgment.

Again, if it must appear that both parties are at least entitled to the possession at the time of the bringing of the action, it should be held that by instituting the proceeding the plaintiff waives his right to the exclusive possession under the lease, and thereby both parties are relegated to their claim under the decree of distribution. But if plaintiff had insisted upon his exclusive possession until the expiration of said lease, under said section 759, Code Civ. Proc., there would seem to be no difficulty in the way of a partition subject to said temporary possession. It has indeed been held in New Hampshire, Hunt v. Hazelton, 5 N. H. 216, 20 Am. Dec. 575, "that no sound reason exists why there should not be a partition of the inheritance, notwithstanding one of the respondents had a subsisting lease of the petitioner's share for years." Even if there were merit in appellant's claim that the action was prematurely brought, no good purpose could be subserved by requiring a new proceeding to be brought to reach the same conclusion, under the same conditions as existed at the time of the trial. There is no contention that the judgment is unjust, or that it was not warranted by the facts as they existed at the time it was rendered, and it would be unreasonable to countenance the expense of a new trial that must lead to the same result as we have before us. Even where it has been held that the proceedings for partition cannot be maintained, or the relief prayed for granted, because of the disseisin of the petitioner, or because of a dispute in the title, it has been determined that the court may retain the action pending proceedings for the settlement of the legal title. Chapin v. Sears (C. C.) 18 Fed. 814; London v. Owerby, 40 Ark. 156.

We think there is no merit in the appeal, and the judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

10 Cal. App. 403

OLIVER v. BURNETT. (Civ. 546.)

(Court of Appeal, First District, California.
April 15, 1909.)

1. EASEMENTS (§ 15*)—DOMINANT AND SERVIENT TENEMENTS—TRACT UNDER ONE OWNERSHIP.

So long as a tract remains in one ownership, there can be no dominant and servient tenements as between different portions of the tract, and the owner may rearrange the quality of any possible servitude.

[Ed. Note.—For other cases, see Easements, Dec. Dig. § 15.*]

2. EASEMENTS (§ 16*)—INTERESTS PASSING BY TRANSFER—SERVITUDES.

Servitudes created by a grant or transfer of land must correspond to the benefits or burdens existing at the time of the transfer.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 43; Dec. Dig. § 16.*]

3. EASEMENTS (§ 36*)—RIGHT OF WAY FOR DITCH—EXISTENCE—EVIDENCE.

Evidence *held* not to show that, at the time of partition of land, there was a ditch right across the middle piece as partitioned, for the benefit of another portion of the tract, so as to pass such an easement to the person taking the other portion, as an appurtenance thereto.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 93; Dec. Dig. § 36.*]

4. FRAUDS, STATUTE OF (§ 60*)—INTERESTS IN LAND—RIGHT OF WAY FOR DITCH.

An agreement between owners of land, giving one of them a ditch right of way over the other's land, concerns an estate in real property within the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 95; Dec. Dig. § 60.*]

5. EASEMENTS (§ 36*)—ADVERSE USER—EVIDENCE.

Evidence *held* not to show adverse user of a ditch, running across the middle portion of partitioned land onto another portion thereof, after the partition, so as to give the owner of the other portion an easement therein.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 93; Dec. Dig. § 36.*]

6. EASEMENTS (§ 7*) — CREATION — ADVERSE USER—DURATION OF USE.

Adverse user of a ditch right of way over land of another for one year would not be sufficient to establish an easement therein.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 17; Dec. Dig. § 7.*]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by O. Oliver against Robert B. Burnett. Judgment against plaintiff, and judgment for defendant on his cross-complaint. From an order denying a new trial plaintiff appeals. Affirmed.

Everts & Ewing, for appellant. M. K. Harris, for respondent.

HALL, J. Plaintiff and defendant are owners of adjoining tracts of land situate in Fresno county. As appurtenant to his land, plaintiff claims to have a right of way across the land of defendant for the purpose of maintaining a ditch to carry water from the main ditch of the Fresno Canal & Irrigation Company to the lands of plaintiff for irrigating purposes, and brought this action to obtain a judgment establishing such right, and restraining defendant from interfering with plaintiff in repairing said ditch. Defendant denied the right of plaintiff, and by a cross-complaint sought damages caused by plaintiff to the land of defendant in repairing said ditch. The court found that plaintiff was not the owner of any such right of way across the land of defendant, and accordingly gave judgment that plaintiff take nothing by his action, and that defendant recover damages on his cross-complaint in the sum of $1. Plaintiff moved for a new trial, which was denied, and thereupon appealed to this court from the order denying his said motion.

Plaintiff's contention is that the evidence does not support the findings of the court to the effect that plaintiff was not the owner of any right of way for ditch purposes across the land of defendant. Both the lands of plaintiff and of defendant at one time were a part of a larger piece belonging to one William C. Caldwell. After his death the entire piece (which we will hereafter designate as the Caldwell tract) was, together with other property, distributed in undivided parts—one-half to his widow Paulina Caldwell, and one-half to his five minor children. This decree of distribution bears date March 26, 1877. The widow, Paulina Caldwell, died in 1887, and in 1891, as the result of a partition suit brought by the administrator of her estate, D. P. Blevens, against the other distributees of the estate of William C. Caldwell, or their successors in interest, the Caldwell tract was divided into three equal parts, and the western portion awarded in severalty to Margaret J. Caldwell Graff, the middle portion to Emily Caldwell Blevens, and the eastern portion to Laura Caldwell Ellis. The decree is dated April 7, 1891. The western portion was conveyed by Margaret J. Graff and her husband to plaintiff (Oliver) January 20, 1903. The middle portion was conveyed by Emily Caldwell Blevens and her husband to John M. Allison March 5, 1897, and by him and wife to George M. Rock and wife October 27, 1900, and by them to defendant (Burnett) January 29, 1904. The eastern portion, by mesne conveyances from Laura Caldwell Ellis, has been vested in Jane Young.

At some time long prior to the partition suit above mentioned, and when the Caldwell tract was held by one owner, or by several as tenants in common, a right to free water for irrigating said tract was acquired from the Fresno Canal & Irrigation Company. The decree in partition makes no mention of this water right, or any right of way for a ditch or for any purpose over the middle or Burnett piece for the western or Oliver piece. Plaintiff, however, contends, as we understand him, that the evidence shows without conflict: (1) That at the time of the partition of the Caldwell tract, and for a long time prior thereto, water had been conveyed in a ditch across the middle or Burnett piece for irrigating the western or Oliver piece, and that in consequence thereof the right to such ditch for such purpose passed under the decree of distribution with the western or Oliver piece as an easement appurtenant thereto; (2) that it was agreed by parol by Mrs. Blevens that Margaret J. Caldwell Graff should have a ditch right across the middle piece for the benefit of the western piece, as consideration for her consenting that the middle piece be awarded to Mrs. Blevens; and (3) that a ditch right across the middle or Burnett piece, for the benefit of the western or Oliver piece, has been acquired by adverse user.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

1. Undoubtedly it is the law that: "A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed." Civ. Code, § 1104; Pogue v. Collins, 146 Cal. 435, 80 Pac. 623; Pendola v. Ramm, 138 Cal. 517, 71 Pac. 624; Jones v. Sanders, 138 Cal. 405, 71 Pac. 506. And it may be conceded for the purposes of this discussion that the proceedings and decree in partition had the same effect, as between Mrs. Blevens and Mrs. Graff, who took under said decree the middle or Burnett and the western or Oliver piece of the Caldwell tract, respectively, as a deed would have had. But, unfortunately for appellant, it cannot be said that the evidence shows without conflict, or at all for that matter, that any such state of facts existed as would, between a grantor and grantee, raise an easement or ditch right over the middle or Burnett piece in favor of the western or Oliver piece.

The evidence shows that during the lifetime of Mrs. Paulina Caldwell she rented the entire Caldwell tract to some Chinese, who in 1884 and 1885 took water out of the canal of the Fresno Canal & Irrigation Company onto the Caldwell tract, for irrigating the same. By plowing furrows they made a ditch over the most natural grade, through which they ran water for those two years across what are now the Young and Burnett pieces, onto what is now the Oliver piece, for irrigation purposes. At this time, however, the entire Caldwell tract was held in one ownership, and so continued until the partition in 1891. There is abundant evidence in the record that no water was run over the Burnett piece for irrigating any portion of the Oliver piece after 1885 until after the partition in 1891. Chas. F. Ellis, a witness for plaintiff, testified to the fact that the Chinese ran water across the Burnett piece in 1884 and 1885. Ellis was a son-in-law of Mrs. Caldwell, and his wife got the eastern piece in the partition in 1891. He rented the Caldwell tract from Blevens, the administrator of Mrs. Caldwell's estate in 1888. He testified that in 1889 water ran through the ditch on the Burnett piece onto the Oliver piece, but not to irrigate it. The water ran through onto the Caldwell piece, and formed a pond, and drowned out some barley. This testimony only showed the use of the ditch for the benefit of the Oliver piece in 1884 and 1885. Although he also testified that water ran through the ditch to the Oliver piece in 1889, it was not for irrigating such piece, or for its benefit, but was accidental and unintentional, and to the injury of the Oliver piece, which he then had planted to grain. He said: "This was in 1889. It run through several times. It frequently broke over me—too much water in the ditch, and it came through before it would be noticed." We can find nothing in the record tending to show that any water ran across the Burnett piece to the Oliver piece prior to the partition of the Caldwell tract, save during the years 1884 and 1885, when it was used for the benefit of the Oliver piece, and in 1889, when it ran onto the Oliver piece, through accident and to its injury, and was in no sense used for its benefit.

On the other hand, D. P. Blevens, the son-in-law of Mrs. Caldwell and administrator of her estate and husband of Mrs. Blevens, who took the middle or Burnett piece under the partition decree, testified that he had been familiar with the Caldwell tract since 1876. He testified that the ditch made by the Chinese was annihilated by plowing. "From 1885 for the next five or six years this ground was put in grain, and cultivated with gang plows, and they ran harrows over it, and you could not tell where the ditch was. Charlie Ellis plowed it two years himself. The ditch had been annihilated." He further testified that he made a new ditch, but never ran the water beyond the house. "I never in my time ran the water beyond the house." (The house was near the middle of the Burnett piece, and the ditch entered the Caldwell tract at the eastern boundary thereof. The Oliver piece is the western portion of the Caldwell tract.) Blevens made his ditch in 1890, and used it until his wife sold the Burnett piece to Allison in 1897, but never ran water through it for the purpose of irrigating the Oliver piece. He never ran the water beyond the house, which would be near the middle of the Burnett piece, and would not reach the Oliver piece at all. It is thus clear that at the time of the partition no ditch across the middle or Burnett piece was obviously, permanently, or at all used to convey water to the western or Oliver piece, for its benefit, or at all, nor had any such ditch been so used at any time since 1885, which was six years prior to the partition. This ditch had long since been abandoned and annihilated, and no other since constructed to carry water to the Oliver piece, nor had any water been in any way since 1885 taken across the Burnett piece for the benefit of the Oliver piece. So long as the entire Caldwell tract remained in one ownership there could be no such thing as a dominent and servient tenement between different portions of the tract. During such ownership the owner may rearrange the quality of any possible servitudes. The servitudes created by a grant or transfer must correspond to the benefits or burdens existing at the time of the transfer. Quinlan v. Noble, 75 Cal. 250, 17 Pac. 69; Cave v. Crafts, 53 Cal. 139. The contention of appellant that a ditch right across the Burnett piece passed to the Oliver piece, as appurtenant thereto under the decree in partition, cannot be sustained.

2. There is some evidence, given by the witness Ellis, to the effect that it was agreed between Mrs. Blevens and Mrs. Graff that Mrs. Graff should have a ditch across the middle piece for the benefit of the western piece, in consideration that she (Mrs. Graff) should allow Mrs. Blevens to take the middle piece. If it be conceded that this evidence was not contradicted, it was not in writing, nor carried into the decree of partition. That such an agreement concerns an estate in real property, and is within the statute of frauds, may not be gainsaid. Hayes v. Fine, 91 Cal. 391, 27 Pac. 772. We have been pointed to nothing in the evidence to take the alleged parol agreement, under the rules of equity, out of the operation of the statute of frauds.

3. The claim of adverse user must of course be predicated on user after the severance of the tenancy in common. We find in the record no evidence of any adverse user, save possibly during the year 1903. Mr. and Mrs. Blevens were in possession of the middle piece from the date of the partition till she sold to Allison in 1897. Blevens testified that during that time not a drop of water ran through the ditch for the purpose of running water onto the Oliver place. While Allison owned the middle or Burnett tract in 1899 and 1900, he ran water through the Burnett piece onto the western or Oliver piece, of which he was then lessee, to irrigate some nursery stock that he had thereon. He also permitted Mr. Atkinson, a subtenant of his of part of the Oliver place, to use water from the ditch to irrigate his holdings. Subsequently Mr. Rock, the grantee of Allison of the Burnett place, ran water through the Burnett piece to irrigate the nursery stock, which had also been sold to him. It is perfectly apparent that none of these acts amounted to an adverse user. They were by and with the consent of the then owners of the Burnett piece, and for the use and benefit of such owners. The only evidence that can plausibly be said to show an adverse user relates to a use during the season of 1903. It is very doubtful if this was in fact adverse; but, if it be conceded that it was, it was for but one year, and is, of course, insufficient to establish an easement by adverse use.

Appellant calls our attention to some rulings upon objections to the admission of testimony. We find no error in any of these rulings, and none of them are of sufficient importance to require discussion.

The order is affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

10 Cal. App. 388

BELL v. CAMM et al. (Civ. 567.)

(Court of Appeal, Third District, California. April 12, 1909.)

1. Courts (§ 12*)—Jurisdiction—Parties—Venue.

Code Civ. Proc. § 395, provides that, in all other cases including an action on a note, the action must be tried in the county in which the defendants or some of them reside at the commencement of the action, subject to the power of the court to change the place of trial. *Held*, that the service of summons and a copy of the complaint or the voluntary appearance of a defendant invests the court with jurisdiction of the parties and control of all subsequent proceedings as provided by section 416.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 33–45; Dec. Dig. § 12.*]

2. Bills and Notes (§ 471*) — Action — Attorney's Fees—Complaint.

Where a note provided that, in case of collection by suit, a reasonable attorney's fee should be allowed, a complaint thereon, alleging that $200 was a reasonable attorney's fee, was not objectionable for failure to allege what, if any, sum had been agreed on between plaintiff and his counsel as an attorney's fee for prosecuting the action.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1467; Dec. Dig. § 471.*]

3. Costs (§ 260*)—Frivolous Appeal—Damages.

Plaintiff sued on a note, the validity of which was not denied. Defendants demurred, and, their demurrer being overruled, failed to answer. Judgment was entered against them by default, from which an appeal was taken. Notice of appeal was filed June 2, 1908, and the record on September 16th following, after which appellants' counsel applied for an extension of time to file his opening brief, alleging that he had been making diligent efforts to settle the action and was satisfied that it would be settled in a short time. *Held*, that it appeared from such affidavit that the appeal was taken for delay, and that damages would be allowed on affirmance.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 983–1003; Dec. Dig. § 260.*]

Appeal from Superior Court, Napa County; H. C. Gesford, Judge.

Action by W. J. Bell against F. B. Camm and another. From a judgment for plaintiff, defendants appeal. Affirmed, with damages.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

E. L. Webber, for appellants. H. B. McClure, for respondent.

HART, J. This is an action on a promissory note. The defendants demurred to the complaint generally and specially. The court overruled the demurrer and gave the defendants 10 days within which to answer. The defendants failed to answer within the time allowed for that purpose, and thereupon defaults were entered against them, and judgment rendered and entered in favor of plaintiff for the principal sum of the note with interest, and for $150 as attorney's fee. This appeal is from said judgment.

The note declared upon is for $3,000, with interest at the rate of 8 per cent. per annum, said interest payable annually, and, if not so paid, to be compounded with the principal and thereafter bear a like rate of interest. The note was executed at Visalia, in Tulare county, and by its terms is payable at that place. It provides that, in the event of the necessity of its collection through legal proceedings, the makers "agree to pay a reasonable attorney fee to the holder of this note," etc. The complaint alleges that the sum of $200 is a reasonable attorney's fee for the prosecution of the action for recovery upon the note. The defendants demur specially upon the grounds, among others which it is unnecessary to particularly notice, that the court "has no jurisdiction over the persons of these defendants or the subject of the action," and that the complaint is "uncertain, in this, that it cannot be ascertained therefrom whether or not plaintiff has agreed to pay his attorney herein the sum of $200, or what sum plaintiff has agreed to pay his attorney herein." The demurrer was properly overruled.

Section 395 of the Code of Civil Procedure authorizes the institution of an action of the nature of the one at bar "in the county in which the defendants, or some of them, reside at the commencement of the action * * * subject, however, to the power of the court to change the place of trial," as provided by said Code. The service of the summons and of a copy of the complaint or the voluntary appearance of a defendant invests the court with jurisdiction of the parties and control of all the subsequent proceedings. Section 416, Code Civ. Proc. There can be absolutely no question that the court acquired jurisdiction of the subject of the action and of the persons of the defendants.

The point that the complaint is uncertain because it does not allege what, if any, sum was agreed upon by the plaintiff and his counsel as an attorney's fee for prosecuting this action is devoid of merit. The note provides in general terms that, in case of its collection through a lawsuit, a reasonable attorney's fee shall be allowed. The evident meaning of this provision is that such fee should be awarded as the judgment of the court trying the action might, from all the circumstances, deem reasonable. The plaintiff and his counsel could, of course, have made an agreement as to the amount of the fee to be paid; but, from the silence of the complaint upon the point, it must be assumed that they did not. We can perceive no objection to the course taken by the plaintiff in relying upon a quantum meruit as to the value of the services of his attorney, and thus leaving the determination of the question to the judgment and sound discretion of the court.

Respondent, claiming that this appeal is frivolous and was taken for delay only, asks that this court award damages against the appellants as provided in cases where appeals are made purely for purposes of delay, by section 957 of the Code of Civil Procedure. It is plainly manifest that there is absolutely no merit in this appeal, and, furthermore, from the affidavit of counsel for appellants, upon which an enlargement of the time within which to file his opening brief was requested, it clearly appears that counsel himself knew that the appeal was without merit. The appellants made no denial of the due execution or validity of the note declared upon, but objected through a proceeding which obviously could be of no avail to them upon the point, that the proper place of trial was in another county than the one in which the action was brought. If they had desired in good faith to finally defend against the allegations of the complaint or plead to the merits, and they were entitled to a change of the place of trial, they should have proceeded in the only way pointed out by the Code for securing a change to the proper county. Section 396, Code Civ. Proc. But, having failed, at the time of interposing their demurrer, to file an affidavit of merits and a demand in writing for a change of the place of the trial of the action, they thereby waived their right to such change, even if the facts in reality entitled them to it. Cook v. Pendergast, 61 Cal. 78. The judgment in this action was rendered on the 4th day of May, 1908, and was entered on the 13th day of May, 1908. The notice of appeal from the judgment was filed on the 2d day of June, 1908, and the transcript containing the record on appeal was filed in the Supreme Court on the 16th day of September, 1908. The affidavit upon which counsel for appellants based his application for an extension of time beyond that allowed by rule 2 of the Supreme Court, within which to file his opening brief, recites, among other things, "that affiant has been making diligent efforts to settle the affairs of H. H. Brown with a view to settling the present action now pending out of court," etc., and "that affiant is satisfied that this case will in a short time be settled, and to that end he believes that it would be a hardship to require the appellants to go to the expense of printing a brief," etc. From the foregoing statement in the affidavit referred to, we think it is not only clear that counsel himself had no faith in his appeal, but that the same was taken for no other reason than to delay the execution of the judgment.

The judgment is affirmed, with damages awarded against the appellants in the sum of $50.

We concur: CHIPMAN, P. J.; BURNETT, J.

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10 Cal. App. 383

MIGLIAVACCA v. CITY OF NAPA et al.

(Civ. 614.)

(Court of Appeal, Third District, California. April 16, 1909.)

MUNICIPAL CORPORATIONS (§ 46*)—AMENDMENT OF CHARTER—CONSTRUCTION OF PROVISIONS.

Under Const. art. 11, § 8, relating to the freeholders' charter, and providing that "the charter so ratified may be amended at intervals of not less than two years," a proposed amendment, which was defeated at the election thereon, does not prevent submission of another proposition for amendment within two years.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 46.*]

Original application for writ of prohibition by Joseph A. Migliavacca against the City of Napa and others. Heard on demurrer to petition. Petition dismissed.

F. E. Johnston, for petitioner. Wallace Rutherford, for respondents.

HART, J. This is a direct application to this court for a writ of prohibition, the purpose of which is to restrain the respondents—the city of Napa and its mayor, city clerk, and councilmen—from submitting to the voters of the said city of Napa certain proposed amendments to the charter, to be voted upon by said voters at the general municipal election to be held in said city on the 3d day of May, 1909.

The city of Napa, as a municipal corporation, is governed by a freeholders' charter, adopted in accordance with the requirements of section 8 of article 11 of the Constitution. It appears from the averments of the petition that on the 20th day of January, 1909, under an ordinance previously adopted by the city council for that purpose, a special election was held in said city at which were submitted certain proposed amendments to said charter. None of these proposed amendments received the required number of votes for their ratification, and were therefore rejected by the electors voting at said election. On the 16th of February, 1909, "another petition, duly signed by more than 15 per cent. of the qualified voters of the said city of Napa, requesting the legislative authority thereof to submit certain proposed amendments to the charter of the said city to the qualified voters thereof for approval, was presented to and filed with the legislative authority of the said city," and in pursuance thereof the said legislative authority, on the 1st day of March, 1909, passed an ordinance, the same having been approved by the mayor on the same day, "for the purpose of submitting said last-mentioned proposed amendments to the said charter to the qualified voters of said city of Napa for approval." The respondents have interposed a general demurrer to the petition, and the single question thus submitted for consideration hinges upon the meaning of section 8 of article 11 of the Constitution. So much of that section of the Constitution as is pertinent to the inquiry here reads as follows: "* * * The charter, so ratified, may be amended at intervals of not less than two years by proposals therefor, submitted by the legislative authority of the city to the qualified electors thereof at a general or special election, held at least forty days after the publication of such proposals for twenty days in a daily newspaper of general circulation in such city, and ratified by a majority of the electors voting thereon, and approved by the Legislature as herein provided for the approval of the charter." St. 1905, p. 1064, c. 28.

It is the contention of the petitioner that the foregoing provision of the Constitution means that the mere proposal of amendments of a freeholders' charter, without regard to whether they are ratified by the electors or not, exhausts the right of the legislative authority of a municipal corporation operating under such a charter to submit or propose other amendments to such charter within two years after the first proposal. In other words, it is the claim that it is immaterial whether proposed amendments are ratified or rejected by the electors to whom submitted, for the power cannot be exercised by the legislative body to propose either the same or other amendments within two years after amendments have already been proposed and voted upon. In thus construing the said provision of the Constitution, and in support of his position, the petitioner cites the case of Harrison v. Roberts, 145 Cal. 173, 78 Pac. 537. In that case a writ of mandate was asked to compel the board of election commissioners and the registrar of voters of the city and county of San Francisco to so arrange the ballots to be used at the general election held on the 8th day of November, 1904, as to enable the electors to indicate their votes upon certain amendments to the charter of said city and county, which had theretofore been proposed by an ordinance adopted for that purpose by the legislative authority of said city and county. It appeared from the petition for the writ of mandate that on December 4, 1902, a special election was held in the city and county of San Francisco, "at which election there were submitted to the electors thereof for ratification certain proposed amendments to the charter," some of which amendments so proposed

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"were ratified by the necessary majority of the electors," and thereafter, by concurrent resolution, approved by the Legislature. It will thus be seen that the date of the election at which it was sought to coerce the submission to the electors of the proposed amendments was a little less than two years from the election held in December, 1902, at which certain of the amendments to the charter then proposed were ratified by the electors. There were suggested in that case two different constructions of the constitutional provision in question, viz.: (1) That none of the steps necessary to the taking effect of an amendment to a charter—that is, the proposal, the ratification by the electors and the approval by the Legislature—can be taken within two years after approval by the Legislature of a prior amendment. (2) That no charter amendment must be approved by the Legislature within two years after a prior approval by the Legislature of an amendment of the same character. Neither of these constructions was sustained by the Supreme Court; but it was held that the provision as to the limitation of time within which proposals for the amendment of the charter may be made means that such proposals may be made at any time after the expiration of two years from the date of the election at which the electors have voted upon any prior amendment or amendments. The point thus decided in the case under review was the only one essential to the decision; but counsel for the petitioner here particularly rely upon the following language contained in the opinion in that case: "Our conclusion upon this question is that the only effect of the limitation is to prohibit a submission for ratification by the electors of any proposed amendment within two years from the submission for ratification of any prior amendment; in other words, that proposals for amendments may be submitted at elections only at intervals of two years."

This language would appear to sustain the position of the petitioner, and we would be compelled to so hold if it involved anything more than mere dictum; for it is clear that the language was not necessary to a decision of the only point in the case, viz., whether the time limit began with the election at which prior proposed amendments were voted upon or from the time of the approval of the ratified amendments by the Legislature. But we do not think it was the intention of the court to hold that, where proposed amendments to the charter were rejected at an election by the electors, the right to submit the same or other amendments at an election held within two years from the date of the prior election at which such proposed amendments were refused ratification is foreclosed under the terms of the Constitution. Among our reasons for this assertion is that the court in the case cited in effect declares, and obviously it is true, that the main reason for the provision that amendments of a charter shall be made only at intervals of two years is, to use the language quoted in the opinion in that case from Blanchard v. Hartwell, 131 Cal. 263, 265, 63 Pac. 349, 350, "to insure some degree of permanency, and to prevent frequent changes," and that such is the constitutional policy established by the provision of the Constitution concerned here. If proposed amendments to a charter are defeated at an election by the electors, certainly there could be no contravention of the "constitutional policy calculated to insure some degree of permanency, and to prevent frequent changes," in the exercise of the right to submit proposals for amendments at an election held within two years from the date of the election at which the prior proposals were defeated, for the very obvious reason that the attempt to amend in the first instance would be abortive and the result the same as if no effort had been made in that direction. But it seems to us that the language itself of the constitutional provision is so clear and definite that there is no necessity for resorting to construction to arrive at its true meaning. It plainly and unambiguously declares that "the charter so ratified may be amended at intervals of not less than two years," and then proceeds to point out how such proposed amendments may be made; that is, as to the mode for exercising the power to amend, it provides that such amendments may be made "by proposals therefor submitted by legislative authority of the city, to the qualified voters thereof at a general or special election," etc., and, if ratified by the electors, by approval thereof by the Legislature. It is to be noted that the language of the provision is not that amendments of such charter may be proposed "at intervals of not less than two years," as counsel's construction of the provision would inevitably compel it to read, but that "the charter may be amended" at the intervals prescribed. In other words, the provision grants the power to amend, and at the same time points out the mode by which proposed amendments may be made.

The argument of counsel for petitioner necessarily assumes that the limitation as to time applies to that portion of the provision prescribing the mode of making amendments, rather than to that portion granting the right to amend. Of course, it is as apparent as language can make it that there is nothing in the language of the provision warranting any such assumption. The language of the provision of the Constitution we are considering could not, in our opinion, be less obscure as to the intention of the framers of our organic law with reference to the subject to which it relates, and, if it does not possess the meaning here claimed for it, then, indeed, it must be admitted that the task of finding language which would make a proposition plainer or clearer is well-nigh insurmountable.

Our conclusion is that, all the proposed amendments submitted at the prior election, held on the 20th day of January, 1909, having been defeated by the electors, the respondents are clearly within their rights, under the plain terms of the Constitution, in the matter of the submission, at the general municipal election to be held on the 3d day of May, 1909, proposals for amendments to the charter of the said city of Napa.

Therefore, and for the reasons given in the foregoing, the demurrer to the petition is sustained, and the alternative writ herein issued discharged.

We concur: CHIPMAN, P. J.; BURNETT, J.

155 Cal. 577

SEALE v. CARR. (S. F. 4,753.)

(Supreme Court of California. May 27, 1909.)

APPEAL AND ERROR (§ 882*)—WAIVER OF OBJECTIONS.

Where, in partition, a defendant assented through his attorney to an award of attorney's fees to the codefendant and requested an award for services of his own attorney, he was estopped on appeal from urging that the awards were erroneous, because the services were not for the common benefit of the parties, within Code Civ. Proc. § 796.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591–3610; Dec. Dig. § 882.*]

In Bank. Appeal from Superior Court, Monterey County; B. V. Sargent, Judge.

Action by Jessie D. Seale against Larkin W. Carr and another. From an order awarding attorney's fees to defendants, defendant Larkin W. Carr, appeals. Affirmed.

Dougherty & Lacey, for appellant. John K. & Roy L. Alexander, for respondent plaintiff. Jesse W. Bryan and John T. Williams, for respondent defendant.

HENSHAW, J. The action was in partition. At a hearing, before the entry of final judgment, the court made an award of attorney's fees to plaintiff in the sum of $2,000, to Sterling D. Carr, defendant and respondent, in the sum of $2,000, and to Larkin W. Carr, defendant and appellant, in the sum of $1,500. These awards must have been granted under the provisions of section 796, Code Civ. Proc. That section, so far as applicable, declares that "the costs of partition, including reasonable counsel fees expended by plaintiff, or either of the defendants, for the common benefit * * * must be paid by the parties respectively entitled to share in the lands." The interests of the three parties to the partition is not in dispute, and is one-third each. The appellant contends that upon the evidence before the court the award to himself, as well as to his codefendant, Sterling D. Carr, was unauthorized, improper, and erroneous, because it was not shown to the court that services for the common benefit had been rendered by Larkin W. Carr or Sterling D. Carr, or the attorneys of either of them.

If this matter were open for consideration upon the merits, much force would attach to and much support be found for appellant's contention in this regard; but it appears from the record that when the attorney for Sterling D. Carr asked, on behalf of his client, for an allowance by way of attorney's fees, and stated the nature of the services which he had rendered, and which he contended were for the common benefit, Mr. Andersen, the then attorney for Larkin W. Carr, appellant herein, and representing him at the hearing, sought on behalf of this appellant a similar allowance, addressing the court as follows: "The defendant Larkin W. Carr urges upon the court the right of compensation to his attorney in this matter, and urges that right upon the same ground urged by Mr. Williams, representing Sterling D. Carr, that the work so done by the attorney for Larkin W. Carr, the defendant, was for the common benefit of the estate, and that the interests of the defendant Larkin W. Carr were mutual with those of Sterling D. Carr, and for those reasons we ask that $1,500 be allowed as a fee for the services rendered." Without further quoting from the record, it is shown that Mr. Andresen was assenting to the allowances claimed by plaintiff and by Sterling D. Carr, and that the court finally stated: "I think that the amount asked for by each side is reasonable." If in fact, as appellant now contends, the court fell into error in making these allowances to defendants for the services of their attorneys, it is plain that the error was invited by appellant, and that he is estopped from here complaining of it. He distinctly gave his assent through his attorney to the award to Sterling D. Carr, and affirmatively invited and requested the award to himself, which he now urges to have been erroneous. It is too well settled to require the citation of authorities that the assent in the one case and the invited error in the second case precludes the party from taking advantage of the alleged error upon appeal.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The order appealed from is affirmed.

We concur: LORIGAN, J.; SHAW, J.; ANGELLOTTI, J.; MELVIN, J.

(155 Cal. 534)

TRUE v. FOX et al. (L. A. 2,271.)

(Supreme Court of California. May 17, 1909.)

MUNICIPAL CORPORATIONS (§ 445*)—STREET IMPROVEMENT CONTRACT — ASSESSMENTS — VALIDITY.

The presence, in a street improvement contract, of a stipulation that all loss or damage arising from the nature of the work to be done under the contract shall be sustained by the contractor, renders the assessment and all subsequent proceedings therein void.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1065; Dec. Dig. § 445.*]

Beatty, C. J., and Shaw, J., dissenting.

In Bank. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Bella M. True against E. R. Fox and another. Judgment for plaintiff, and defendant Fox appeals. Affirmed.

E. R. Fox, in pro. per. Elon G. Golusha, for respondent.

PER CURIAM. This is an action to cancel a bond issued upon a street assessment and to enjoin the execution of a deed pursuant to a sale in the proceedings. Judgment was given for the plaintiff, canceling the bond. The defendant Fox appeals.

The contract for the street improvement in question required the work to be done under specifications which provided that "all loss or damage arising from the nature of the work to be done under this agreement * * * shall be sustained by the contractor." The presence of this stipulation, in a street improvement contract, has been held to render the assessment and all subsequent proceedings therein void, in repeated decisions of this court. Blochman v. Spreckels, 135 Cal. 665, 67 Pac. 1061, 57 L. R. A. 213; Goldtree v. Spreckels, 135 Cal. 673, 67 Pac. 1091; Woollacott v. Meekin, 151 Cal. 701, 91 Pac. 612; Van Loenen v. Gillespie, 152 Cal. 222, 96 Pac. 87; Hatch v. Nevills, 152 Cal. xvi, 95 Pac. 43; Stansbury v. Poindexter (Cal.) 99 Pac. 182.

Upon the authority of those decisions, and upon the reasons stated therein, the judgment is affirmed.

LORIGAN, J., did not participate in the foregoing decision.

We dissent from the judgment, for the reasons given in the dissenting opinion in Woollacott v. Meekin, 151 Cal. 708, 91 Pac. 612: BEATTY, C. J.; SHAW, J.

(155 Cal. 579)

PEOPLE v. HAM TONG. (Cr. 1,479.)

(Supreme Court of California. May 27, 1909.)

1. ROBBERY (§ 17*) — INFORMATION — SUFFICIENCY.

An information for robbery, which contains allegations charging larceny, but which fails to state that the property was taken from the prosecutor, does not charge robbery, but only charges larceny.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. § 16; Dec. Dig. § 17.*]

2. CRIMINAL LAW (§ 991*)—CONCLUSIVENESS—IRREGULAR JUDGMENT—CRIMINAL CASES.

The rule that, where a court has power to hear and determine a question, the fact that it erred in the determination does not render the judgment void applies in criminal, as well as in civil, cases.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2528; Dec. Dig. § 991.*]

3. CRIMINAL LAW (§ 185*)—FORMER JEOPARDY—DISCHARGE OF JURY—EFFECT.

Under Pen. Code, § 1140, authorizing the court to discharge the jury on there being no reasonable probability that they can agree, a discharge of a jury for failure to agree does not permit accused to avail himself of the plea of once in jeopardy.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 344; Dec. Dig. § 185.*]

4. Criminal Law (§ 204*)—Former Jeopardy—Waiver.

Where a verdict, whether valid in form or not, has been rendered on an indictment, either good or bad, and accused for any cause moves in arrest of judgment, or applies to the court to vacate the judgment, he will be presumed to waive any objection to being put a second time in jeopardy, and he may ordinarily be tried anew.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 319; Dec. Dig. § 204.*]

5. Criminal Law (§ 192*)—Former Jeopardy—Reversal of Conviction.

Where the court erroneously determined that an information charged robbery, while in fact it only charged larceny, and the jury found, under the instructions of the court, that accused was guilty of robbery, accused, on reversal of the conviction, could be tried for larceny against his objection that he had once been in jeopardy.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 376; Dec. Dig. § 192.*]

In Bank. Appeal from Superior Court, Contra Costa County; William S. Wells, Judge.

Ham Tong was convicted of robbery, and he appeals. Reversed.

Peter J. Crosby and Nathan C. Coghlan, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

MELVIN, J. This case was identical with that of the People of the State of California v. Ho Sing, and followed the same course in the District Court of Appeal. 6 Cal. App. 752, 93 Pac. 204. That court held that the information did not properly charge the crime of robbery, but that there was a full and adequate allegation of the crime of grand larceny. In the information there was no statement that the property was taken from the possession of Chung Kee, and the District Court of Appeal, following the authority of People v. Walbridge, 123 Cal. 274, 55 Pac. 902, determined that there was not a sufficient pleading of the crime of robbery. The Attorney General concedes the correctness of this ruling, and also of the one whereby it is found that there is an averment of grand larceny. The only question presented for our determination is whether or not the Court of Appeal properly ordered the discharge of the defendant from custody upon the authority of People v. Arnett, 129 Cal. 306, 61 Pac. 930. In that case the defendant had been charged with the crime of assault with intent to commit murder, and had been convicted of assault with a deadly weapon. The verdict was held to be a nullity (People v. Arnett, 126 Cal. 680, 59 Pac. 204) and on a second appeal (People v. Arnett, 129 Cal. 306, 61 Pac. 930) it was determined that the defendant had been once in jeopardy, and that he was entitled to his discharge, as it appeared from the minutes of the trial court, which were before the Supreme Court, that he had not consented to the discharge of the jury without verdict. If it be the doctrine of the cases of People v. Arnett, 129 Cal. 306, 61 Pac. 930, People v. Smith, 136 Cal. 207, 68 Pac. 702, People v. Tilley, 135 Cal. 61, 67 Pac. 42, and People v. Curtis, 76 Cal. 57, 17 Pac. 941, that the defendant has been once in jeopardy in every case wherein a verdict of guilty of a crime not strictly embraced within the pleadings has been returned, and the jury has been discharged without consent, then those cases should be overruled. Section 1140 of the Penal Code, which is the basis of the decision in the cases just cited, is as follows: "Except as provided in the last section, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree." In the case before us the learned district attorney attempted to set forth a charge of robbery in the information. The defendant was tried, and the jury instructed, upon the theory that the crime of robbery was fully alleged and supported by testimony sufficient, if believed, to establish the fact of the commission by defendant of the crime. There was a demurrer to the information, which the court overruled. The court had the right to hear and determine this question. Pen. Code, § 1002 et seq. It is a general rule that, where a court has power to hear and determine a question, the fact that it erred in such decision does not render its judgment void. Sherer v. Superior Court, 96 Cal. 654, 31 Pac. 565; Buckley v. Superior Court, 96 Cal. 119, 31 Pac. 8; Washburn v. Kahler, 97 Cal. 58, 31 Pac. 741; Disque v. Herrington, 139 Cal. 4, 72 Pac. 336; Franklin Union No. 4 v. People, 220 Ill. 355, 77 N. E. 176, 4 L. R. A. (N. S.) 1009, 110 Am. St. Rep. 248. We see no reason why this rule should not be applied in criminal, as well as in civil, cases.

It has been well settled by decisions in this state that the discharge of the jury for failure to agree does not enable a defendant to avail himself effectively of the plea of once in jeopardy. People v. Greene, 100 Cal. 140, 34 Pac. 630; People v. James, 97 Cal. 400, 32 Pac. 317. It is true that section 1140 of the Penal Code gives the judge a right to discharge a jury without verdict when there is no probability that an agreement can be reached, but there is authority for the same rule in many American jurisdictions where no such statute exists. People v. Green, 13 Wend. (N. Y.) 55; U. S. v. Perez, 9 Wheat. 580, 6 L. Ed. 165. In People v. James, supra, although the jury refused to agree upon a verdict, under a condition of the record entitling the defendant to an ac-

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quittal, and although such refusal was in the face of an instruction to acquit, this court held that a plea of former jeopardy could not be effectively set up upon the discharge of the jury. In the opinion in that case Mr. Justice McFarland wrote: "No doubt it would have been the duty of the jury to have acquitted the appellant, under these circumstances, at the first trial; and, if they had returned a verdict of guilty, the court would, no doubt, have granted a new trial. But we do not see that appellant is in a position different, in point of law, from that of any other defendant whom the jury should have acquitted, but failed, through erroneous notions of some of the jurors, to agree upon a verdict, and, after a reasonable time, were discharged." Can it not be said with greater force in this case that failure of the jury to return a verdict upon the charge of grand larceny was mere error, entitling the defendant only to a new trial? The jurors were acting under the law as given them by the court. It is true that the court was in error upon the question of the sufficiency of the information to charge robbery—error which seems to have been shared by the district attorney who drafted the information, and by defendant's attorneys, who specified in their demurrer, not that the crime stated was grand larceny, instead of robbery, but that both robbery and grand larceny had been alleged. The decision of the court that there was a valid, sufficient, properly drawn information averring robbery was the law of that case until the ruling was set aside or reversed, and the jury, acting under that law, rendered "their verdict," as that term in section 1140 of the Penal Code should be interpreted. If the information, though purporting to be one charging robbery, had contained no sufficient allegation of any crime at all, the case would be under the rule announced in People v. Lee Look, 137 Cal. 590, 70 Pac. 660, and People v. Lee Look, 143 Cal. 216, 76 Pac. 1028. In those cases it was held that the original information was defective because it contained no statement that the person killed was a human being, but this court decided that the defendant had not been in jeopardy upon the first trial. The difference between the Lee Look Cases and this one is that in this case there was a disregarded pleading, in which the defendant was accused of grand larceny; but he was not called upon, under the court's instructions, to defend against that accusation. Under the circumstances he was never in danger of conviction upon a charge of grand larceny. In other jurisdictions it has been held that a plea of former jeopardy cannot be sustained on proof that the conviction of the accused on the previous trial was set aside because of a void or illegal verdict. See 12 Cyc. 277, and cases there cited. In State v. Redman, 17 Iowa, 329, Mr. Justice Dillon, after reviewing the decisions, wrote: "And we understand the settled doctrine to be that, where the verdict is a nullity (or so defective that no judgment can be rendered upon it), the defendant may again be put upon his trial, certainly where the verdict was intended to be one of conviction, for in such case it is rather a mistrial than a legal putting in jeopardy." In Fitts v. State, 102 Tenn. 141, 50 S. W. 756, the jury found the defendant guilty of murder in the second degree, with a term of imprisonment for 15 years. Upon a former trial, misled by the instructions of the judge, a verdict of guilty of murder in the second degree was returned, fixing the term of imprisonment at 21 years, one year more than the maximum term allowed by the statute. It was held that a plea autrefois convict was properly stricken from the files. The Supreme Court found that "the former verdict was unwarranted, and, being a nullity, no valid judgment could be pronounced upon it. It was therefore no bar to a second prosecution."

There are few questions upon which courts have differed more radically than they have disagreed upon those arising from considerations of jeopardy. We find all shades of opinion. There is the English rule that in felony cases the prisoner must be recommended to a pardon—granted as of course—whenever it appears that the judge at the trial committed error to his prejudice. It is now the generally accepted American doctrine that "whenever a verdict, whether valid in form or not, has been rendered on an indictment, either good or bad, and the defendant for any cause moves in arrest of judgment, or applies to the court to vacate a judgment already entered, * * * he will be presumed to waive any objection to being put a second time in jeopardy, and so he may ordinarily be tried anew." 1 Bishop's Crim. Law (7th Ed.) § 998. Starting with the same rule, which is substantially Blackstone's oft-quoted maxim, "No man is to be brought into jeopardy of his life more than once for the same offense," the courts of England and of the various American states have reached diametrically opposite conclusions in answering the most important question: "Does the reversal for error at the defendant's own request of a verdict of conviction waive jeopardy?" The other problems arising in connection with this subject have received diverse solutions. For example, it is held in some of the states, including California, that conviction of a lesser offense included within the charge of a greater is an acquittal of the major crime (People v. Gilmore, 4 Cal. 376, 60 Am. Dec. 620; People v. Apgar, 35 Cal. 389; People v. Gordon, 99 Cal. 230, 33 Pac. 901; People v. Defoor, 100 Cal. 157, 34 Pac. 642; State v. Martin, 30 Wis. 216, 11 Am. Rep. 567; State v. Belden, 33 Wis. 120, 14 Am. Rep 748; State v. Smith, 53 Mo. 140), while elsewhere there is, as Bishop says, "Some authority either contrary to, or qualifying, this doctrine" (1 Bishop, Crim. Law, [8th Ed.] § 1004). Some courts have decided that a verdict of guilty of a lower degree of a crime is no bar upon a new trial to conviction of the higher offense charged in the indictment. State v. Behimer, 20 Ohio St. 572; Bailey v. State, 26 Ga. 579. In short, so hopelessly at war are the decisions on the subjects of jeopardy, autrefois acquit, and autrefois convict that we find little settled doctrine upon any phase of these matters. Perhaps the safest rule is that announced in Stocks v. State, 91 Ga. 831, 18 S. E. 847, that the question of the propriety of discharging a jury depends upon the facts of each particular case. In the case here considered the entire theory of the court was based upon the supposition that there was a perfect charge of robbery. The court solemnly found and declared the pleading sufficient as an allegation of robbery, by overruling the demurrer, by the charge to the jury, and by denying defendant's motion for a new trial. Why should this form of error entitle a defendant to his discharge any more than should any other misdirection upon a question of law? The jury, acting according to the law as given them by the court, returned "their verdict," erroneous to be sure, but according to that declaration of the law which they were bound to accept as containing the principles to be followed by them in reaching "their verdict."

In view of the above conclusions we see no reason why the defendant should not be tried for the crime of grand larceny charged in the information.

The judgment and the order denying a new trial are reversed.

We concur: ANGELLOTTI, J.; HENSHAW, J.

SLOSS, J. I concur in the judgment. The defendant was in jeopardy as soon as he was placed on trial before a competent court and jury on an information charging grand larceny. If the jury had been discharged without reaching a verdict, and in the absence of one of the statutory grounds for discharging them (Pen. Code, §§ 1123, 1139, 1140), the defendant would be in a position to interpose the plea of once in jeopardy as a bar to a subsequent trial. But the jury were not discharged without reaching a verdict. They found the defendant guilty of robbery. This verdict, when compared with the averments of the information, was irregular, but it cannot be regarded as an absolute nullity. The judgment entered upon it would, if not directly attacked, have constituted a valid adjudication binding upon the defendant. Its sufficiency could not have been questioned collaterally, as, for example, on habeas corpus. The defendant's successful effort to set aside that verdict and judgment by means of a motion for new trial and an appeal is a waiver of his constitutional right to object to being placed again in jeopardy. In effect, he consents to be tried anew.

I concur: SHAW, J.

BEATTY, C. J. I concur in the judgment. The verdict of the jury was not a nullity. Comparing it with the rest of the record, including the charge of the court, it is clear that it could not have been returned except as the result of a finding by the jury of every element of the crime of larceny. In other words, the jury did actually find the defendant guilty of larceny, but under the erroneous instruction of the court called it robbery. The verdict, however, is uncertain for the reason that, whether construed by itself or in connection with other parts of the record it cannot be known whether the jury would have found it to be grand or petit larceny. This renders a new trial necessary.

(155 Cal. 592)

PEOPLE v. DERWAE. (Cr. 1,470.)

(Supreme Court of California. June 4, 1909.)

CRIMINAL LAW (§ 706*)—PROSECUTING ATTORNEY—MISCONDUCT—REVERSIBLE ERROR.

In a prosecution for an attempt to commit burglary, the prosecutor opened defendant's examination by showing that he was a divorced man when he contracted his second marriage, and then inquired whether he knew the chief of police of Green Bay, Wis., where defendant had previously resided, and, on obtaining an affirmative reply, requested to know why defendant had not taken such officer's deposition on the issue of his good character. An objection to this question was sustained, whereupon the prosecuting attorney inquired if defendant had not had trouble with one of his daughters in Wisconsin, and, after an objection had been sustained to this question, asked if he had not attempted incest with his daughter. An objection to this was sustained, and the court instructed the jury fully not to consider such questions or be influenced in any manner thereby. *Held* that, defendant's guilt or innocence being a close question on the evidence, the misconduct of the prosecuting attorney constituted reversible error.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 706.*]

Angellotti and Shaw, JJ., dissenting.

In Bank. Appeal from Superior Court, San Joaquin County; W. B. Nutter, Judge.

A. C. Derwae was convicted of an attempt to commit burglary in the first degree, and he appeals. Reversed.

George F. Buck, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

MELVIN, J. This is an appeal from a judgment of conviction and from an order denying defendant's motion for a new trial.

As we are in accord with the decision of the District Court of Appeal upon all but one subject presented by the record in this

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case, it will be necessary to consider only the matter of the alleged misconduct of the assistant district attorney who conducted the case on behalf of the people. The appellant was charged with the crime of burglary and was convicted of an "attempt to commit burglary in the first degree." The evidence was largely circumstantial; but the defendant, who took the stand in his own behalf at the trial, did not deny any of the essential physical facts put in evidence by the prosecution. He did, however, have an explanation of his conduct which, although it evidently was not believed by the jury, cannot be characterized as intrinsically improbable. The defendant owned in the city of Stockton a building which was occupied in part by a grocery store. At the back part of the store was a door opening into a portion of the building which was occupied by defendant and his family as a residence. Over this door was a transom large enough to admit the passage of a man. The grocers had, from time to time, missed articles from the store, and on Sunday, the 20th of September, 1907, they determined to make an effort to catch the thief. The store was closed at 11 o'clock in the morning, according to custom, and on that evening one of the proprietors of the grocery store and a companion entered the place and secreted themselves. When they went into the store, they noticed that the transom was open, and that there was a ladder inside reaching from the floor to the opening above the back door. From their hiding place the two men saw the defendant several times looking through the transom. Finally he reached inside for the ladder and begun to pull it upwards. At this juncture the witnesses sprang from their place of concealment, pulled the ladder from the grasp of defendant, and telephoned for the police. When the ladder was seized, Mr. Pezze called the defendant an uncomplimentary name and said: "I have been feeding you for the last five years. Now is time to stop you." Defendant replied: "Boys I want you to keep your cat out of the way from here. The cat has been bothering me and making so much racket." It was shown that the cat was in the store at the time and had been making some noise. There was evidence also that defendant offered to pay for anything which might be missing from the store, and that he endeavored to settle the matter with the owners. On this particular Sunday nothing was missed from the stock of the grocers. Defendant testified that he had been attracted to the store at the time he was discovered by sounds which he feared were made by burglars. He also stated that the ladder had been lowered into the store by him and his wife for the purpose of providing for the escape of the cat. It was shown that the defendant was a man of means, and that he had recently bought articles of the kind which had been missing from the grocery store. A number of residents of his old home in Wisconsin testified, by deposition, to his good general reputation for truth, honesty, and integrity.

From the essential facts thus briefly stated, it will be seen that, while there was ample evidence to justify the verdict of the jury, this was not a case in which the evidence was so strong that a conviction would almost necessarily be secured, whether the prosecuting officer indulged in misconduct or not. The explanation of his demeanor and acts which the defendant offered was not on unreasonable one. There were certain admitted facts tending in some slight degree to sustain it. Of course, the jury, having an opportunity to observe the defendant's bearing and manner of testifying, could better weigh his testimony than we can. Ordinarily, we would say that their determination with reference to the truth or falsity of his statements was absolutely final and not reviewable; but, if the conduct of the assistant district attorney was such as would naturally prejudice the jurors against the defendant, who can say that such conduct was not the turning point in the case—that it, and it alone, did not cause the jurors to repudiate and cast aside testimony which otherwise might have availed to acquit the defendant?

The prosecutor opened his examination of the defendant by bringing out the fact that the latter was a divorced man when he contracted his second marriage. Then the assistant district attorney inquired whether or not the witness knew the chief of police of Green Bay, Wis. An affirmative reply having been given, the witness was then asked why he had not taken the deposition of the chief of police upon the issue of good character. Defendant's objection to this question was sustained. The avowed purpose of the inquiry was to show that defendant had not selected men of the standing of the chief of police as his sponsors in that community. Why the chief of police was mentioned by the prosecutor, rather than the postmaster (whose deposition was read later), or any other supposedly prominent person, does not appear; but, in view of what followed almost immediately, it seems more than probable that the jurors discerned some peculiar significance in this reference to the chief of police, because the prosecuting officer, in the face of the court's ruling, improperly insinuated that, while a resident of Green Bay, the defendant had been guilty of a horrible and unnatural crime committed with his own daughter. As soon as the court sustained the objection to the question with reference to defendant's failure to take the deposition of the chief of police of Green Bay, Wis., the assistant district attorney proceeded with the examination, as follows: "Q. How many children did you have? A. Eleven. Q. You had a daughter once didn't you, a daughter among those children? A. I did, I got six. Q. Did you have any trouble with one of your daughters while you were at Green Bay, Wis.? A. Not that I know of. Mr. Buck: Object to that as incompetent, irrelevant, and immaterial. The Court: Objection sustained. I don't think the family relations of this man are material at all in this case. Mr. Rendon: Q. Did you have such relations, or attempted relations, with your daughter that are unnatural with a parent? Mr. Buck: One moment. We object to that as incompetent, irrelevant, and immaterial, and assign it as misconduct on the part of the district attorney. The Court: Objection sustained. And, gentlemen, that objection was sustained, and the court suggested to counsel that the family ties of this man, his children, who they are, or where they live, are immaterial in this case, and the court now instructs you that when you come to decide this case you are to consider only the evidence which has been admitted by the court in the case and allowed to stand, and you are not to consider as evidence any questions asked by counsel upon either side; but you are to consider only the evidence in the case which has been permitted to stand as evidence. And side remarks of counsel, or questions asked by counsel upon either side, are not evidence, and you are not to be influenced thereby or governed in any way by any question they may ask, and the court hereby charges you that is one of the duties of the jurors." The highest commendation should be accorded the learned judge who presided at the trial for the promptness with which he rebuked the improper conduct on the part of the prosecuting officer and the efforts which he made to eliminate from the minds of the jurors the ill effects of the prosecutor's sinister suggestion. That official, however, almost immediately after the court's ruling and admonition to the jury, proceeded to interrogate the defendant with reference to the latter's acquaintance with the chief of police of Depere, Wis., where the defendant had once resided.

Courts have exhibited a strong disinclination to set aside convictions upon the ground of misconduct of district attorneys. This is eminently proper. The state should not be put to the expense and its officers to the trouble of a new trial unless it clearly appears that the rights of a defendant have been invaded and a fair trial has been denied him, because of the behavior of the prosecuting officer; but we cannot see how the highly improper conduct here revealed could fail to make its impression upon the minds of the jurors to the prejudice of defendant's rights. After persistently suggesting that for some reason defendant did not want the opinion of the chief of police of Green Bay, his former home, upon the subject of his general reputation for the moral qualities involved in the prosecution, the representative of the state of California asked this man on trial for his liberty, not if he had committed a similar crime to that for which he was being tried, not if he had been guilty of an ordinary offense (and such questions would have been very improper), but if he had not committed, or attempted, one of the most disgusting and atrocious crimes known. This was done after the court had ruled that the family relations of this man had nothing to do with the case on trial, and was followed by inquiries regarding the acquaintance of witness with another chief of police. It may be that the assistant district attorney showed no heat or malice in his manner, and that the jurors made no demonstration indicating that their passions were aroused against the defendant; but we cannot see how, in spite of the prosecutor's suavity, the apparent imperturbability of the jurors, and the court's prompt declaration of the law, such gross misconduct could fail to make its impression. In the case of People v. Valliere, 127 Cal. 65, 59 Pac. 295, where the court had promptly rebuked misconduct not more serious than that displayed by this record, this court said: "Rebukes do not seem to have any effect upon prosecuting officers, and probably as little on juries. The only way to secure fair trials is to set verdicts so procured aside." See, also, Spencer v. Commonwealth (Ky.) 107 S. W. 342.

The judgment and order are reversed.

We concur: BEATTY, C. J.; HENSHAW, J.; SLOSS, J.; LORIGAN, J.

ANGELLOTTI, J. I dissent. Assuming the fact of misconduct on the part of the district attorney, the only material question is whether such misconduct may have influenced the jury against the defendant in determining the question of his guilt or innocence. If it could not have done so under any reasonable hypothesis, the judgment should not be reversed, for a judgment should not be reversed on account of any erroneous ruling or misconduct not affecting the substantial rights of the defendant.

The claim that the particular misconduct alleged may have operated against the defendant is based wholly, of course, on the idea that it was an intimation by the district attorney that defendant at a time many years previously had, or attempted to have, unnatural relations with one of his daughters; but, so assuming, such intimation was not evidence, and the jury were clearly and unequivocally instructed that it was not evidence and should not be considered by them for any purpose. Nothing could have been clearer or more positive as to the duty of the jurors with regard to this question of the district attorney than the instruction of the trial court quoted in the opinion of this court, which was given immediately upon the asking of the improper question. There is no warrant in the record for the assumption that any of the jurors may not have been able to absolutely disregard the question of the district attorney and any intimation contained therein, and it must be assumed, of course, that they obeyed, so far as they were able to do so, the instruction of the court. To imply otherwise would be to assume that they were either incompetent to discharge their duties, or were willfully disregardful of the oath they had taken.

SHAW, J. I agree with the dissenting opinion of Justice ANGELLOTTI. There is positively nothing in the record, which is fully stated in the prevailing opinion, to indicate that, in asking the questions assigned as misconduct, the district attorney was acting in bad faith expecting to have the question excluded and intending to instill suspicion into the minds of the jury by the inference which he hoped they would draw from the fact of his putting the question. There is nothing to show that he did not believe that the questions were proper and that the fact sought to be elicited was material and relevant. We have therefore nothing more serious in the way of injurious misconduct than the fact that the district attorney put a question to the defendant, first in a form so general that it did not suggest anything more than a possible dispute with his daughter over some trivial matter, and then in more specific form pointing to possible incest, an immediate objection thereto, and a ruling by the court excluding the testimony. In civil cases such ruling alone is usually regarded as sufficient to inform the jury that they are not to consider the matter at all in deciding the case, and it is not customary to specifically instruct the jury to that effect, unless evidence has been actually given in response to the question; but here the court went further and told the jury, clearly and positively, that the matter inquired about was not evidence, and that they must not allow it to influence their decision. The rule announced amounts to this: That in seeking to elicit evidence by questions, and in deciding, as he often must, on the instant and in the necessary hurry and confusion of a trial, as to the relevancy of possible evidence that may be suggested to his mind at the moment, the district attorney must be infallible in his judgment, and that, if he makes a mistake, it is at the risk of committing an error beyond the power of the trial court to cure, an error which, ipso facto, makes further proceedings in the trial useless, and which will constitute a sure cause for a reversal on appeal. It seems to me that the doctrine necessarily assumes that jurors are inherently incapable of performing their duties and observing their oath, and that, instead of it being necessary for it to appear that the misconduct did affect the decision, it is to be in all cases presumed that it did so. While the line cannot be drawn and the rule cannot be stated so as to show precisely the gravity of the misconduct which will justify or require a reversal, it is my opinion that that shown in the present case falls far within the class which should be passed over by the appellate courts as nonprejudicial error.

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155 Cal. 586

Ex parte BLAKE. (Cr. 1,519.)

(Supreme Court of California. May 27, 1909.)

1. CRIMINAL LAW (§ 147*) — LIMITATION OF PROSECUTION.

Pen. Code, § 801, providing that an indictment for any misdemeanor must be filed within one year after its commission, when considered in connection with the legislative interpretation of the matter, as indicated by section 1426a, added by Act April 17, 1909 (St. 1909, p. 979, c. 647), and providing that a complaint for any misdemeanor triable in a justice's or police court must be filed within one year after its commission, does not apply to the misdemeanors of the kind embraced in the charge of obtaining less than $50 by false pretenses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 271; Dec. Dig. § 147.*]

2. HABEAS CORPUS (§ 3*) — EXISTENCE OF OTHER REMEDY.

Under the rule that habeas corpus will not lie for the correction of mere errors which may be reached by motion or on appeal, the statute of limitations, being a mere matter of defense, is not a ground for the discharge of a prisoner on habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 3; Dec. Dig. § 3.*]

3. CRIMINAL LAW (§ 211*)—COMPLAINT—VERIFICATION.

Under Pen. Code, §§ 1426, 1427, providing that proceedings before a justice's or police court for a public offense within the jurisdiction of such courts must be commenced by complaint under oath, and authorizing a justice to issue a warrant if satisfied by the complaint that the offense has been committed, when considered in connection with sections 811–813, relating to the examination of prosecutor and his witnesses before a magistrate, etc., a complaint on information and belief made before a police court charging the offense of obtaining less than $50 by false pretenses is sufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 423; Dec. Dig. § 211.*]

In Bank. Application by R. C. Blake for a writ of habeas corpus against A. Wilson, chief of police of the city of Oakland. Petitioner remanded.

Burton Jackson Wyman, for petitioner. W. H. Donahue, Dist. Atty., and William T. Satterwhite, Deputy Dist. Atty., for A. Wilson, Chief of Police.

MELVIN, J. Petitioner was charged with obtaining a sum less than $50 by false pretenses. The complaint upon which a warrant was issued from one of the police courts of the city of Oakland charges the commission of the alleged crime as of a time more than one year before the verification and filing of the said pleading, and the complaining witness swore to the circumstances of the offense "upon his information and belief." Petitioner contends, first, that the prosecution is barred by the provisions of section 801 of the Penal Code; and, second, that a complaint on information and belief fails to give the police court jurisdiction of the offense. In support of the first proposition, we are asked to re-examine section 801 of the Penal Code in the light of its history, to determine whether or not the Legislature intended that section to apply as well to ordinary misdemeanors, cognizable in justices' and police courts, as to those prosecuted by indictment or information. It is unnecessary to consider petitioner's argument in detail for several reasons. First, because the operation of a statute of limitations is not ground for the release of a prisoner on habeas corpus; second, since the filing of the petition herein, the legislative interpretation of the matter has been indicated by the adoption of section 1426a of the Penal Code (approved April 17, 1909 [St. 1909, p. 979, c. 647]), which provides that "a complaint for any misdemeanor triable in a justice's or police court must be filed within one year after its commission" and because it has long been the settled law of this state that the provisions of section 801 of the Penal Code do not apply to misdemeanors of the kind embraced within the charge against this petitioner. People v. Ayhens, 85 Cal. 86, 24 Pac. 635; People v. Picetti, 124 Cal. 361, 57 Pac. 156; People v. Gray, 137 Cal. 269, 70 Pac. 20. That the statute of limitations is mere matter of defense, and is not a ground for discharge of a prisoner on habeas corpus, has been held in Ex parte Townsend (D. C.) 133 Fed. 75; U. S. v. Cook, 17 Wall. 168, 21 L. Ed. 538; Johnson v. U. S., 13 Fed. Cas. 867 (No. 7,418); In re Bogart, 3 Fed. Cas. 796 (No. 1,596). These decisions are based upon the fundamental rule that habeas corpus will not lie for the correction of mere errors which may be reached by motion or on appeal. In re Fife, 110 Cal. 8, 42 Pac. 299; In re Walker, 61 Neb. 811, 86 N. W. 510; Ex parte Miller, 82 Cal. 455, 22 Pac. 1113; 2 Spelling on Injunction and other Extraordinary Remedies, § 1206.

The other branch of this petition presents a more serious question. At first glance, it might seem that this matter had been determined by the decision of this court in Ex parte Dimmig, 74 Cal. 164, 15 Pac. 619. In that proceeding this court was considering a complaint in which the petitioner was charged upon information and belief with the crime of murder. After the citation of sections 811, 812, and 813 of the Penal Code, the court used the following language: "Under these provisions, a magistrate has no jurisdiction to issue a warrant of arrest without some evidence tending to show the guilt of the party named in the warrant. The original information may be sufficient, though made only upon information and belief, if followed by the deposition of the complainant, or some other witness, stating facts tending to show the guilt of the party charged. Of course, where there was some evidence upon which the magistrate acted, we would not interfere. It may be also true that the original information might be treated as a deposition; and in such view, if it contained positive evidence of facts tending to show guilt, it might be sufficient as a basis for the issuance of a warrant. But a mere affidavit in the form of an information, containing no evidence, and followed by no deposition stating any fact tending to show guilt, is insufficient to support a warrant. The liberty of a citizen cannot be violated upon the mere expression of an opinion under oath that he is guilty of a crime." This would be conclusive of the whole matter if our method of procedure was the same in ordinary charges of misdemeanor made by complaint only, as it is in prosecutions for felony or so-called "higher misdemeanors" cognizable by the superior court and inaugurated in that court by information (after examination before a magistrate) or by indictment. But in California there is a wide difference between the method of commencing and prosecuting criminal actions before justices' or police courts and that by which a prosecution for felony is inaugurated and conducted. Section 1426 of the Penal Code is in part as follows: "All proceedings and actions before a justice's or police court, for a public offense of which such courts have jurisdiction, must be commenced by complaint under oath," etc. There is no provision in the law for the taking of depositions to support the complaint mentioned in this section. But the very next section (1427 of the Penal Code) makes it the duty of the justice of the peace or police judge to issue a warrant of arrest if he "is satisfied therefrom" (that is, from the complaint) "that the offense complained of has been committed." Section 811 of the Penal Code is as follows: "When an information is laid before a magistrate of the commission of a public offense, triable within the county, he must examine on oath the informant or prosecutor, and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them." Section 812 of the same Code sets forth the requisites of the depositions of the prosecutor "and his witnesses," while the following section makes it the duty of the magistrate to issue a warrant of arrest if he is satisfied from the deposition or depositions that the offense complained of has been committed, and that there is reasonable ground to believe that the defendant committed it.

It will be seen, therefore, that there is a wide distinction between the methods of prosecuting charges of felony and those amounting only to ordinary misdemeanors. On the one hand, the magistrate may have opportunity of examining as many witnesses as he desires before issuing the warrant; while in the other case he is limited to the complaint itself as a basis for his action in signing a warrant of arrest. If the rule which petitioner is seeking to have established were adopted, it would be impossible in many cases to prosecute criminals at all. If, for example, each of several people knew a fact or facts, not sufficient alone to justify a conviction, yet in combination pointing directly to the defendant's guilt of a misdemeanor there could be no prosecution because no one could swear positively to the complaint. We do not think the Legislature intended to make such an absurdity possible. There is good reason, too, why the rule with reference to positive pleading should apply more strictly to felonies than to misdemeanors. All misdemeanors are bailable. Some felonies are not. There is little danger of a protracted imprisonment of one charged with misdemeanor. The conviction of a felony carries with it deprivation of citizenship and great lasting disgrace. It is therefore proper that one accused of such a crime should be imprisoned only upon positive evidence at least tending to connect him with the crime. No such great odium attaches to a conviction of a misdemeanor. Perhaps these considerations governed the Legislature somewhat when the rules of pleading in criminal actions were adopted. But, whatever may have been the reasons the Legislature has seen fit to provide these different methods of inaugurating prosecutions for felonies and simple misdemeanors respectively. We cannot bring ourselves to believe that the purpose was to prevent the prosecution of any person charged with a crime triable in a justice's or police court, if no one could swear positively that the offense had been committed. This subject has been carefully considered by the Supreme Court of Wisconsin in State v. Davie, 62 Wis. 305, 22 N. W. 411. In that case it is held, after a review of the leading authorities, that "as to informations and indictments the charge must be positive in all cases." The court then uses the following language: "In reference to the authorities that may hold that in all cases before an accused person can be arrested for crime a complaint must be made in positive terms and by a person who knows of all the facts constituting the offense, we are free to say that they are unreasonable, if nothing more. There would be, and could be, but very few arrests under such a rule. Crime frequently rests upon circumstantial evidence, and very numerous facts in the knowledge of numerous persons, and all such witnesses could not be speedily and summarily brought before the magistrate to make complaint, and they could not be compelled to do so if they could be found. A complaint is not a conviction, any more than an information or indictment, and the accused should not be fully tried upon all the evidence before he is arrested, and his case prejudiced thereby. The indictment or information is a mere charge of an offense; and why should a complaint before a magistrate be anything more to warrant the arrest of the accused? The rule contended for would make the execution of the criminal laws impracticable if not impossible, and many offenders would escape justice. It would be a very humane and safe rule for the criminal, but cruel and unsafe for society. The complainant may be in possession of such facts, by information or otherwise, as would give him good reason to believe that a certain person had committed an offense, and the persons who have knowledge of the facts of the crime may be either unable or unwilling to make complaint. What shall be done? Our statute sufficiently guards and protects the rights of accused persons, and, if strictly followed, there will be no danger of wanton or causeless arrests, and it is by our own statute that this complaint is to be tested." The closing sentence of the above quotation, it seems to us, states the true rule. We must be governed by our statute, and, unless the statute of California upon this subject be construed in such manner as to sustain complaints for minor offenses upon "information and belief," many offenders whose guilt could be easily established would absolutely escape punishment. We are aware of the wide difference of ruling in the courts that have passed upon this subject, but this may be partly explained, at least, by the difference in the statutes construed. In People v. Heffron, 53 Mich. 530, 19 N. W. 170, cited by petitioner, it will be noticed that the court calls attention to the method of procedure in that state, whereby other witnesses than the complainant may be examined before the issuance of the warrant. In Swart v. Kimball, 43 Mich. 451, 5 N. W. 635, the information considered was one for felony. Loder v. Phelps (N. Y.) 13 Wend. 48, was a civil case under a statute requiring a litigant seeking the arrest of his debtor by affidavit to "state the facts and circumstances within his knowledge." In both Garnett v. Guynn, 7 Kan. App. 414, 53 Pac. 275, and State v. Gleason, 32 Kan. 245, 4 Pac. 363, the court's reasoning is based upon the constitutional provision that "no warrant shall issue but on probable cause, supported by oath or affirmation." The case of U. S. v. Collins (D. C.) 79 Fed. 65, had reference to a charge which should be preliminarily examined before a commissioner. That case is analogous to Ex parte Dimmig, supra. In Indiana complaints upon information and belief have been repeatedly sustained. Toops v. State, 92 Ind. 14; Franklin v. State, 85 Ind. 99; State v. Buxton, 31 Ind. 67; Curry v. Baker, 31 Ind. 155; State v. Ellison, 14 Ind. 380; Simpkins v. Malatt, 9 Ind. 543. It is true that the form of affidavit prescribed by the statute in Indiana contains the locution "as affiant verily believes," but in upholding an affidavit containing the formula "as affiant is informed and believes" the court in State v. Buxton, supra, places its ruling upon broad grounds, giving the reason for the ruling as follows: "It frequently occurs that the perpetrator of crime is convicted on the testimony of a number of witnesses swearing to different parts of the transaction constituting the body of the offense. No one person could swear on personal knowledge that the accused was guilty, and yet any one of the numerous witnesses might with a clear conscience have made the affidavit for the arrest." See, also, Sullivan v. State, 68 Ala. 528; State v. Hobbs, 39 Me. 212. Considering, therefore, the peculiar form of our statute prescribing the manner of commencing prosecutions for misdemeanors, and adopting the reasoning which seems most convincing from the decisions that really present less conflict than would at first appear, we are constrained to believe that the complaint upon which the warrant issued for petitioner's arrest was duly and properly verified.

It is ordered that the petitioner be remanded.

We concur: HENSHAW, J.; SLOSS, J.; ANGELLOTTI, J.; SHAW, J.

155 Cal. 562

TURNER v. MARKHAM et al. (L. A. 2,081.)

(Supreme Court of California. May 24, 1909. Rehearing Denied June 23, 1909.)

1. CORPORATIONS (§ 204*)—WRONGS TO CORPORATION—ACTION BY STOCKHOLDER—SCOPE OF ACTION.

An action by a stockholder for and on behalf of the corporation to redress a wrong which it has suffered, brought after the refusal of the officers of the corporation to prosecute, is an action by the corporation, and no recovery can be had for a personal injury to the stockholder.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 204.*]

2. CORPORATIONS (§ 99*)—ACQUISITION OF PROPERTY.

The parties in interest in a corporation owning no property may agree to sell all or any of the stock for anything of value.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 99.*]

3. ABANDONMENT (§ 3*)—INTENT.

Abandonment is governed by intent, and the intention to abandon must be established by declaration or conduct.

[Ed. Note.—For other cases, see Abandonment, Cent. Dig. § 2; Dec. Dig. § 3.*]

4. CORPORATIONS (§ 30*)—AGREEMENT BY PROMOTERS—ABANDONMENT—EVIDENCE.

A parol agreement by the promoters of a corporation to be formed to subscribe for all the stock and to pay for it by securing and conveying to the corporation property of a third person, etc., is not shown to be abandoned by proof that one of the promoters took a contract for the purchase of the property in his own name as trustee for the corporation which had not then been formed, especially where he did this in furtherance of the agreement, and caused himself to be designated as trustee, so that, in the event of his death, there could be no question as to what disposition it was intended should be made of the property.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 30.*]

5. CORPORATIONS (§ 30*)—STATEMENT IN ARTICLES OF INCORPORATION—FRAUD.

A statement in the articles of incorporation of a mining corporation that the entire amount of the stock had been subscribed, and would be paid by the subscribers deeding to the corporation mining locations now owned by the subscribers, was not fraudulent where the subscribers had at the time an equitable interest in the locations by reason of contract made by one of them in his own name as trustee for the corporation for their purchase.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 30.*]

6. CORPORATIONS (§ 30*)—FRAUDULENT STATEMENTS IN ARTICLES OF INCORPORATION—EFFECT.

A corporation was not injured by a false statement in the articles of incorporation, reciting that the entire amount of the stock had been subscribed, and would be paid by the subscribers deeding to the corporation mining locations, where the subscribers subsequently acquired the locations, and conveyed the same to the corporation.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 30.*]

7. CORPORATIONS (§ 30*)—ORGANIZATION—AGREEMENT OF PROMOTERS—PERFORMANCE.

The promoters of a corporation orally agreed to subscribe for all the stock, and to pay for it by securing and conveying to the corporation property of a third person. One of the promoters contracted in his name as trustee for the purchase of the property, and it was conveyed to the corporation. Every person interested in the corporation assented to the plan, but the board of directors of the corporation failed to formally accept the conveyance of the property. *Held*, that the parol agreement was performed, and any subsequent misrepresentation of the promoters in a sale of stock did not wrong the corporation.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 30.*]

8. CORPORATIONS (§ 320*)—WRONGS TO CORPORATION.

The misconduct of officers of a corporation in falsely representing that they were selling treasury stock does not work a wrong to the corporation, but the injury results only to the individuals who purchase on the faith of the misrepresentation, so that a stockholder cannot sue on behalf of the corporation for such injury.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 320.*]

9. CORPORATIONS (§ 320*)—WRONGS TO CORPORATION.

False statements made by an officer of a corporation to disaffected stockholders that he believed that there was about $11,000 in the treasury of the company did not injure the corporation, and a stockholder could not sue on behalf of the corporation therefor.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 320.*]

In Bank. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by W. D. Turner against H. H. Markham and others. From a judgment for plaintiff, defendant H. H. Markham and another appeal. Reversed and remanded.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Wright, Bell & Ward, Benjamin Page and Walter Trask, for appellants. Porter, Sutton & Cruickshank and Hunsaker & Britt, for respondent.

HENSHAW, J. This action was brought by the plaintiff, a stockholder of the American Boy Gold Mining Company, a corporation organized under the laws of Arizona, for and on behalf of the corporation, against the defendants Markham, president and general manager, and Coffin, secretary, to recover moneys alleged to have been misappropriated, and the value of stock of the corporation alleged to have been wrongfully issued to and taken by the defendants. Judgment was given against the defendants for $116,842.81 for moneys found to have been misappropriated and for the value of stock of the corporation wrongfully taken by the defendants. From this judgment and from the order denying their motion for a new trial, defendants appeal.

The following facts are either found by the court or stand uncontradicted on the evidence: In 1889 the defendants Markham and Coffin, together with D. W. Field, F. S. Daggett, and G. D. Patten, were stockholders and the controlling directors of the American Girl Gold Mining Company, a corporation organized under the laws of Arizona, owning mining claims in San Diego county, Cal. The American Girl Gold Mining Company was working and developing its claims, and it was believed by its directors that these claims were of great value. Adjacent to the claims of the Girl Company were other unpatented claims held by Kendrick and Strickland. It was believed by the directors of the Girl Company that their pay vein or lode continued into the Kendrick and Strickland claims. It was believed, also, that the development work upon the Girl claims would prove the Kendrick and Strickland claims of great value. Inquiry being made, it was learned that these claims could be secured for $20,000. Whereupon Markham, Coffin, Field, Daggett, and Patten made and entered into an oral agreement, the terms of which are as follows: A corporation was to be organized by these five associates under the laws of Arizona, to be known as the American Boy Gold Mining Company, with an authorized capital stock of $300,000, divided into 6,000 shares of the par value of $50 each. The entire capital stock was to be subscribed for by the five associates, who were to pay for it by securing and conveying to the corporation the Kendrick and Strickland claims. The allotment of the 6,000 shares was to be as follows: To each of the five associates 800 shares; to one Thomas Johnson, the superintendent of the Girl Company, 400 shares for his services in aiding to secure the Kendrick and Strickland claims at a reduced figure; and 100 shares for which Johnson was to pay at the rate of $10 per share. The remaining 1,500 shares were to be issued to and held by defendant Markham as trustee for the associates. It was further agreed that each of the five was to guarantee and pay to Markham as trustee the sum of $8,000. This money was to be a fund in the hands of Markham, to be used by him in the purchase and for the development of the claims which the Boy Company was thus to acquire. Pending the payment by the individual associates of the $8,000 thus guaranteed, their stock, saving sufficient to enable them to qualify as directors, was to be issued to Markham as trustee. The Girl Company being a "going" mine, with water, power, and machinery, the development of its vein in the direction of the Kendrick and Strickland claims would tend to prove the latter's value, and so it was agreed that Markham in his discretion might expend the money either upon the Boy claims or upon the Girl claims. Coffin was authorized to obtain an option for the purchase for $20,000 of the Kendrick and Strickland claims, which were to be conveyed to the defendant corporation upon its organization. It was understood that portions of the stock should be sold to the public and the proceeds of such sales used in paying for the Kendrick and Strickland claims and in developing the property.

Following this agreement, upon June 21, 1899, a written agreement was entered into between Kendrick and Strickland on the one side, and Coffin, designated in the agreement as "trustee for the American Boy Gold Mining Company," wherein Kendrick and Strickland agreed to sell their claims to Coffin, Coffin agreeing to pay them $20,000, $5,000 to be paid on or before 60 days from June 20, 1899, and $15,000 on or before six months from June 20, 1899. The agreement provided that, upon the organization of the corporation and the payment of $5,000, Kendrick and Strickland would execute a deed of the claims and place it in escrow to be delivered to Coffin upon final payment by him of the $15,000. Articles of incorporation under the laws of Arizona were then prepared, and about the time of their execution a subscription agreement was executed as follows:

"We, the undersigned, do hereby subscribe for the amount of stock of the American Boy Gold Mining Company set opposite our respective names, and we further agree to pay for same by transferring to said corporation certain mines and mining claims, and other properties, money, or services, as may be received by the corporation as payment in full upon said stock.

Name.	Amount.
F. S. Daggett	20 shares.
D. W. Field	20 shares.
G. D. Patten	20 shares.
Thomas Johnson	500 shares.
Geo. D. Coffin	1,000 shares.
H. H. Markham	1,500 shares.
H. H. Markham	2,940 shares."

In explanation of this subscription, it may be added to what has already been said that Coffin and Markham were to handle and dispose of the stock. The 1,500 shares subscribed by Markham was the trustee stock above mentioned. The 2,940 shares, as well as the excess of 200 shares, subscribed by Coffin over and above his 800 share allotment, or, in other words, the 3,140 shares apportioned, 2,940 to Markham and 200 to Coffin, represented, first, Markham's 800 shares, and, next, the 780 shares of the 800 shares actually subscribed for by Daggett, Field, and Patten, but to be held by Coffin and Markham, or sold by them, to make good Daggett, Field, and Patten's guaranty of $8,000 each.

The articles of incorporation were executed by Markham, Daggett, Patten, Field, and Johnson. Coffin, while not appearing as an incorporator, is an affirmative and uncontradicted witness to the effect that he knew of and took part in all of these agreements and transactions. The laws of Arizona required that the articles of incorporation should show "the amount of capital stock authorized and the time when and the conditions upon which it is to be paid in." The articles of incorporation of the American Boy Gold Mining Company declare as follows: "Art. 3. The amount of the capital stock authorized by the corporation shall be the sum of $300,000, divided into 6,000 shares of the par value of fifty ($50) dollars each, and the time when and the conditions upon which it is to be paid in are as follows: The entire amount thereof has been subscribed and will be paid in full upon the filing of these articles with the county recorder of the said county of Yuma, by the subscribers deeding to the corporation certain mines, mining locations and other property now owned by the subscribers in the state of California." On July 8, 1899, the corporation having been formed, a meeting of the stockholders was held in the city of Yuma, the principal place for the meeting of stockholders as named in the articles. At that meeting all of the stock of the corporation was represented in accordance with the terms of the subscription agreement. All of the stockholders were present by proxy, saving Johnson, who was present in person. Markham, Daggett, Field, Patten, and Johnson were elected directors, and by-laws were adopted, which, amongst other things, designated Pasadena, Cal., as the place for holding meetings of the directors. No further business appears to have been transacted. The meeting adjourned, and no other meeting of stockholders has ever been held. On July 17, 1899, a meeting of the directors was held in Pasadena, where officers of the corporation were elected as follows: Markham, president and general manager; Johnson, vice president; Coffin, secretary; Daggett, treasurer. No other business was transacted at this meeting, and no other directors' meeting has been held. Thereafter Markham, as president and general manager, and Coffin as secretary, assumed entire management and control of the corporation property. On July 11 or 12, 1899, $5,000 having been paid to them by Coffin, Kendrick and Strickland signed and acknowledged a deed of their mining claims to the American Boy Gold Mining Company, and deposited it in escrow in accordance with their agreement. On December 13, 1899, on payment of the balance of $15,000, the depositary delivered the deed. Sales of stock were made to the public. Taking up these sales for the moment, upon the theory of the defendants that the associates became the owners of the stock under their guarantees to pay to the trustees the sum of $8,000 each, as to Coffin's allotment of 800 shares it is shown that he sold 699 shares for the total net price of $12,121.85, all of which money was delivered to Markham. Of the 101 shares remaining a certificate for 100 shares was taken by Coffin, and the remaining 1 share stands without certificate issued. Of Daggett's 800 shares, 790 were sold, producing $8,012.50, delivered to Markham, leaving a residue of 10 shares for which no certificate has been issued. Of Field's 800 shares 100 were sold, producing $2,000, and Field personally paid $6,000 additional to Markham. Patten's 800 shares were issued to him in two certificates of 655 and 145 shares respectively, Patten paying to Markham $8,000 therefor. Of Markham's 800 shares, 575 were sold, producing $7,450, leaving 225 shares for which no certificate was issued. Of Johnson's 500 shares, certificates for 400 were issued, and Johnson paid the sum of $1,000, which, under the parol agreement, was all that he was called upon to pay. Of the 1,500 shares, trustee stock, or joint-allotment stock, to be held by Markham for the common benefit of the associates, it is unnecessary to say more than that some of it was sold and the proceeds received by Markham. The total amount of money thus received by Markham was $52,654.35. This money was kept by Markham personally, and used by him in accordance with the understanding of the associates under their parol agreement. Thus $20,000 was paid to Kendrick and Strickland for their claims, $9,476.49 for the legitimate expenses of the corporation and for work on the claims, while the remaining sum of $23,177.86 was expended upon the properties of the American Girl Gold Mining Company and for the benefit of that corporation. Two thousand eight hundred and eighty shares of the stock are found to have been appropriated by Markham and Coffin and issued by them to various parties without consideration, and without authorization from the corporation, and they are charged with the reasonable market value of that stock at the rate of $20 per share, or $57,600. These sums of $23,177.86 and $57,600, the value of stock with interest, make the judgment of $116,842.81 awarded against

Markham and Coffin for the benefit of the defendant corporation.

The facts above set forth outline the conflicting views or theories of appellants and respondents upon this appeal. By respondents it is insisted (and such is the effect of the findings of the trial court) that the oral agreement was not consummated, but was abandoned; that, therefore, all of the stock of the corporation was and continued to be its own treasury stock, saving such portions of it as were properly sold; that the mining claims of Kendrick and Strickland were bought with moneys derived from the sale of the treasury stock; that all of the stock of the corporation taken or caused to be issued by Markham and Coffin, excepting such as was sold to "outside" stockholders at full market value (found by the court to be $20 per share), was misappropriated stock, for the value of which, at $20 a share, Markham and Coffin were accountable to the corporation. Upon the other hand, the contention of the appellants is that the oral agreement of the associates was legal and was fully effectuated; that by its effectuation the associates became, in equity, the owners of all the capital stock of the corporation, and that in their subsequent dealings and transactions with this stock and with the moneys derived from the sale thereof the corporation, for whose benefit this action is maintained, and for whose benefit only it can be maintained, has suffered no wrong either at law or in equity. In terms appellants' views are presented under attacks upon the sufficiency of the evidence to sustain the findings, and to a consideration of this question of all controlling importance we are now brought.

At the threshold of this inquiry, however, it is proper to pause to point out what is the exact nature of the action before us. In its essence it is an action brought by the corporation itself to recover redress for some legal wrong which the corporation itself has suffered. To prevent a failure of justice, as where the governing board of directors or trustees of the corporation refuses to prosecute such an action, the law permits a stockholder to begin and maintain it on behalf of the corporation. But the fact that a stockholder is the nominal plaintiff in such an action, whether he prosecutes it as an individual stockholder or as a representative of a class of disaffected stockholders, does not in any manner or to the slightest extent enlarge the rights and remedies of the action. The action must still be founded upon some wrong which the corporation, as a corporation, has suffered, and for which, if itself were plaintiff, it could secure legal or equitable redress. Therefore, if the evidence shall establish that the corporation itself has suffered no wrong, cognizable either at law or in equity, it will matter not how just and how grievous may be the complaint of the individual stockholder, nor how complete may be the proof of his personal loss, damage, or injury. In this action on behalf of the corporation no recovery can be had, and the stockholder will be compelled to proceed by his individual action to obtain a personal recovery. 3 Pomeroy's Equity Jur. (3d Ed.) p. 2123 et seq.; Cook, Stock and Stockholders, § 692; Davenport v. Dows, 18 Wall. 626, 21 L. Ed. 938; In re Ambrose, etc., L. R. 14 Ch. Div. (Eng.) 390; Langdon v. Fogg (C. C.) 18 Fed. 5; Stewart v. St. Louis R. R. Co. (C. C.) 41 Fed. 736; Foster v. Seymour (C. C.) 23 Fed. 65. No conflict arises, or indeed could arise, over so plain a proposition, and it may seem superfluous thus to emphasize it. But it is here emphasized, first, because it is all important and to be continually borne in mind in considering the evidence; and, second, because of the conviction which an examination of that evidence forces upon us that, by oversight, the learned judge of the trial court failed to carry this distinction throughout the case, and erroneously confounded the wrongs and equities of the individual stockholders with the wrongs and equities of the corporation.

Stripped to its essentials, what, then, was the condition at the time of the organization of the defendant corporation? It was this: There stood a corporation, owning no property, whose stock was therefore absolutely valueless. It was perfectly legal and proper for all the parties in interest in such a corporation to do as here they agreed to do—sell all or any part of the stock of the corporation in return for mining claims, or for anything else of value. The stock could acquire a value only by the corporation acquiring property, and, if it chose to issue its 6,000 shares of stock for property of the value of five or ten or twenty thousand dollars, it did what it had a perfect right to do, and committed no wrong. If it issued its stock in exchange for property worth $20,000, the logical result would be that each of the 6,000 shares would be worth $3.33, and, if in that condition of its affairs its stock was sold for more than $3.33 a share, the enhanced price would be a "made" value, based upon the representations of the sellers and the anticipations of the buyers. Not only is a transaction such as that contemplated in the oral agreement of the associates good in law, but it is one of common, indeed almost of daily, occurrence in the formation of corporations. Chater v. Sugar Refining Co., 19 Cal. 219; Smith v. Ferries & C. H. Ry. Co. (Cal.) 51 Pac. 710; Kellerman v. Maier, 116 Cal. 416, 48 Pac. 377; Scadden Flat G. M. Co. v. Scadden, 121 Cal. 33, 53 Pac. 440; Garretson v. Crude Oil Co., 146 Cal. 184, 79 Pac. 838; Morawetz on Corp. § 267; Cook, Stock and Stockholders, § 38.

Since the agreement which the associates and incorporators proposed to carry out was not illegal, and since the court found that the agreement was entered into, the court must have concluded either that the agreement was abandoned, or that by reason of the fraud of the defendants (which fraud it must be borne in mind must have been a fraud perpetrated upon the corporation and not upon any individual stockholders thereof) they are estopped from asserting that it was effectuated. The findings of the court are not specific upon the question. It is found, for example, that the stock of the defendant corporation was not sold by the subscribers, but was sold for the corporation. It is found that none of the stockholders, excepting Markham, Coffin, Johnson, Field, Patten, and Daggett, knew of the agreement. It is found that all of the moneys which came into the hands of the defendants were received by them as the proceeds of the sale of the stock of the corporation, and that none was received as contributions from either Markham or Coffin. It is found that defendants Markham and Coffin themselves, and by their agents, represented to persons to whom stock was offered for sale and who afterwards purchased it that it was the stock of the corporation, and that the money received from the purchasers of the stock was to be used by the defendant corporation in paying for and developing the mining claims purchased from Kendrick and Strickland, and that these representations were made for the purpose of inducing these persons to buy the stock; that none of the subscribers to the articles of incorporation or to the stock conveyed or transferred to the mining company any mines, mining locations, or other property; that all of the stock issued and appropriated by the defendants was the property of the mining company. All these, and other findings to like effect, mean, as has been said, either that the parol agreement was abandoned and not effectuated, or that, if effectuated, it was effectuated under such circumstances of fraud as forbid recognition of it at the instance of the defendants.

Was the agreement abandoned? Abandonment is governed by intent, and the intention to abandon must be established by declaration or by conduct. All of the associates were witnesses in this case, save Patten, who was dead, and all testified to their understanding and belief, not only that the parol agreement was not abandoned, but was fully effectuated. The circumstance that Coffin took his contract of sale for the Kendrick and Strickland claims in the name of himself as trustee for the corporation which had not even then been formed certainly was not evidence of abandonment, and the circumstance is explained by Coffin that he did this in furtherance of the agreement, and caused himself to be designated as trustee, so that, in the event of his death, there could be no question as to what disposition it was intended should be made of the properties. Article 3 of the articles of incorporation above quoted, it is said, is too indefinite in its description, and contains a false statement to the effect that the subscribers own certain mining claims. But the indefiniteness amounts to nothing in view of the fact that it is not at all in dispute but that the property, and the only property, contemplated by the article, which the corporation was to acquire or ever expected to acquire, was the Kendrick and Strickland claims which were conveyed to it. And that there was an overstatement of the fact in the declaration that the mining properties were "now owned" by the subscribers was not a circumstance of fraud, first, because there was a certain equitable interest or ownership which they had in the property by reason of the contract made with Coffin; and, second, because, so long as the particular property was conveyed to the corporation, the corporation was not injured in the statement that the incorporators were the then owners of it. So far as the corporation and its rights are concerned, the case then stood that its articles show an executory contract (Pinney v. San Nelson, 183 U. S. 144, 22 Sup. Ct. 52, 46 L. Ed. 125; San Joaquin L. & W. Co. v. Beecher, 101 Cal. 70, 35 Pac. 349), whereby the corporation agreed to issue its stock to certain named subscribers in consideration of their deeding to it the Kendrick and Strickland mining claims. And, as the corporation owned no property and its stock was therefore valueless, it could acquire a value only by an exchange of its stock for property, coupled with the energetic efforts of the subscribers to increase the value of the property which was thus acquired. Every person, then in interest in the corporation, every person who by any possibility could be considered an officer or stockholder, joined in and assented to this plan. At the stockholders' meeting all of the stock upon the books of the company is shown as issued stock held in private ownership. By this we do not mean to be understood that the shares were actually issued, torn from the stock book, and delivered to the owners, but the stock itself was declared to be held and owned in private ownership and was all so voted. Here clearly there was no abandonment, but rather positive evidence of a prosecution to completion of the oral agreement. The corporation might have been heard to insist that the issuance of its stock should follow the conveyance to it of the Kendrick and Strickland claims, but it did not so object. The Kendrick and Strickland claims in due course were conveyed to and accepted by it, and the transaction thus became completely closed, saving for the one omission upon the part of the board of directors to have formal recognition and acceptance of the transaction entered upon their minutes. But can it be doubted that this omission was the result of mere inadvertence, and that it would have been supplied since the same subscribers remained as directors during all the time, if attention had been directed to it? And by its absence was the corporation injured? For that, after all, is the single question that forever must present itself in this case. The corporation, in effect, had agreed in its articles of incorporation and in the subscription list to sell all of its stock for the Kendrick and Strickland claims. It gave up its stock, it received and accepted the claims. As to it, the transaction was complete, and, except for some fraud put upon it, it was not in a position to repudiate the transaction. Every officer of the corporation knew the terms under which the stock was given up and the property received. Every one assented to it, and we are unable to perceive how from any possible view point it can be said that by this transaction the corporation was injured or defrauded to the slightest extent. The findings themselves throw light upon the matter. Those findings, while declaring that the use of the $23,000 spent by Markham and Coffin in developing the Girl mine was improper, assert in the same sentence that Markham and Coffin "believed that they had the right so to do under the oral agreement set forth." So, in finding that 2,880 shares of the stock was misappropriated by Markham and Coffin and issued and taken by them with authority of the corporation, it still again finds that they "believed that they had the right so to do under the oral understanding set forth." They could not have believed that they had the right so to do, as the court finds, unless they also held the belief, not that the oral agreement was abandoned, but that it had been fully effectuated. If it was so effectuated, then the case of the respondents is at an end. That the transaction was consummated to the last detail, saving only for the absence of a formal resolution of ratification upon the books of the corporation, this evidence, as we have reviewed it, clearly establishes, and that the absence of a resolution of acceptance is not a ground for complaint or repudiation upon the part of the corporation which has accepted the claims is also we think quite plain.

If the transaction, then, as we have said, was thus carried through, the subsequent conduct and representation of the defendants, whatever they may have been, could not have wronged the corporation, and here we think that the learned trial judge misconceived the effect of the evidence touching the later conduct and transactions of these defendants. Thus the books of account of the corporation, it is found, were wrongfully and erroneously kept. Under the theory that all the moneys derived from the sale of the stock belonged to the corporation, they were certainly imperfectly and erroneously kept. But the testimony of the treasurer of the corporation, Daggett, is that the corporation never had a dollar of money, and that of Coffin, the secretary, by whom in fact the books were kept, goes to the effect that while, in terms, they were named as account books of the corporation, all the moneys were received by Markham under the agreement, and the expenditures made by him, and in most instances by his personal check, and the books which he (Coffin) kept, were but a convenient method of showing to the parties in interest the dispositions made of the fund. So, too, the finding against Markham of depositing the funds of the corporation to his private account and expending them without authority, though in the belief that he had the right so to do, are pertinent and grave, under the view that these moneys were the moneys of the corporation, but amount to nothing more than what Markham had the right to do, if the oral agreement was consummated. And, indeed, it may be proper here to say that the case presents no feature of the misappropriation of any of these moneys for the individual benefit of any of the associates. The expenditure of every dollar which Markham received is shown to have been for the positive benefit of the corporation, either directly upon the properties themselves, or indirectly, though no less substantially, upon the adjoining Girl claims, whose development it is conceded would prove the value of the Boy properties. It is found, as above adverted to, that Markham and Coffin represented to certain of the stockholders that they were selling corporation stock or treasury stock, and these representations, it is argued by respondent, show that the defendants were then engaged in committing gross, actual, and intentional fraud, or that they then considered that the stock which they were selling belonged to the corporation. It is said also in this connection that these representations so found to have been made work an estoppel against the defendants from here denying that the stock was in fact the stock of the corporation. Precisely here we think the error of the trial court crept in. There seems to have been a confounding of the injury which may thus have resulted to the individual stockholder who purchased upon the faith of the representation, with an injury to the corporation, as well as the raising of an estoppel by the declarations of a party to one person, not in favor of that person, but in favor of another to whom the declarations were not made, nor even knowledge of them to be conveyed. Thus, if A. upon the street sells to B. his own stock, under the representation to B. that it is treasury stock, the corporation is not injured, nor is A. estopped in an action by the corporation from asserting that the stock was his own. B., to whom the representations were made, may have suffered by them, may have his cause of action for redress, and may insist upon an estoppel against A., but that estoppel only runs for his benefit and to prevent A. from taking advantage of the wrong which he has perpetrated, not upon the corporation, but upon B. And so, whatever may have been the representations of Markham and Coffin as to the treasury stock, only those who purchased in reliance upon such representations can be heard to complain. The same is true of the declarations made by Markham to the disaffected stockholders after work had ceased and the mining claims appeared to be of no value. He said he would furnish them a statement, and believed there was about $11,000 in the treasury of the company. These declarations did not injure the corporation, and the law preferring an interpretation of conduct that makes for fair dealing, rather than for fraud, they are certainly open to the explanation that what Markham in fact meant was that he had employed all of this money, as in fact he had, for the benefit of the corporation, and not for the individual benefit of himself or of any other person, and that he believed there was about $11,000 unexpended.

The conclusion thus reached, that the principal findings are unsupported, and that the conduct of Markham and Coffin and their associates, so far as the corporation is concerned, was not facinorous, renders unnecessary, we think, a consideration of any of the other propositions advanced by appellants.

For the foregoing reasons the judgment and order are reversed and the cause remanded.

We concur: ANGELLOTTI, J.; SHAW, J.; MELVIN, J.; SLOSS, J.

10 Cal. App. 410

BERKELEY DEVELOPMENT CO. v. MARX. (Civ. 573.)

(Court of Appeal, First District, California. April 20, 1909. Rehearing Denied by Supreme Court June 17, 1909.)

1. MUNICIPAL CORPORATIONS (§ 898*)—STREET IMPROVEMENT WARRANTS—REQUISITE.

Street Improvement Act (St. 1885, pp. 155–157, c. 153, §§ 10–12, and section 9 as amended by St. 1891, p. 205, c. 147, § 6), authorizing the issuance of assessment warrants to the contractor, his agents, or assigns, and recognizing the assignee of the contract as one succeeding to the rights of the contract, when liberally construed as required by St. 1889, p. 168, c. 151, § 8, and St. 1893, p. 96, c. 79, § 16, does not require that the name of the contractor shall appear in the warrant, and a warrant issued to an assignee of the contractor, which omits the name of the contractor, is not void.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1883; Dec. Dig. § 898.*]

2. COVENANTS (§ 119*)—COVENANT AGAINST INCUMBRANCES—BREACH—EVIDENCE.

In an action by an assignee of a grantee for breach of a grantor's covenant against incumbrances, based on the existence of a lien of a street assessment, under Street Improvement Act (St. 1885, p. 147, c. 153, as amended by St. 1891, p. 196, c. 147), the warrant, assessment, diagram, and certificate of the city engineer, together with the affidavit of demand and nonpayment made by section 12 of the act (St. 1885, p. 157, c. 153) prima facie evidence of the regularity and correctness of the assessment, are admissible to show a lien on the property in favor of the holder of the warrant.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 218; Dec. Dig. § 119.*]

Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by the Berkeley Development Company against Jacob Marx. From a judgment for defendant, and from an order denying a new trial, plaintiff appeals. Reversed.

Titus, Wright & Creed, for appellant. George D. Metcalf and George M. Shaw, for respondent.

KERRIGAN, J. This is an appeal from a judgment in favor of the defendant, and from an order denying plaintiff's motion for a new trial.

Louis Titus was the grantee named in a deed of grant, bargain, and sale made by the defendant, and this action is by the assignee of Titus for an alleged breach of the covenant against incumbrances implied in the grant deed. The incumbrance is alleged to consist of the lien of a street assessment, created through proceedings taken by the city of Oakland, pursuant to the provisions of the so-called Vrooman act (St. 1885, p. 147, c. 153). By the complaint it appears that a part of the land conveyed to Titus was included within the assessment district defined by the resolution of intention. The assessment, warrant, diagram, and certificate were issued and recorded November 14, 1904. The deed of conveyance was executed November 30, 1904. In order to discharge the lien of the assessment Titus paid the amount thereof on December 30, 1904. The complaint also shows that E. B. & A. L. Stone Company was the contractor; that before the work was finished J. Y. Eccleston by mesne assignments became the holder of said contract, and to him on November 14, 1904, the superintendent of streets issued the assessment, and attached thereto was a warrant authorizing "J. Y. Eccleston, his agents or assigns," to demand and receive the several assessments therein set out. The vital question in this case is: Was the assessment void by reason of the omission of the contractor's name from the warrant?

Section 9 of the Vrooman act (St. 1885, p. 147, c. 153, as amended by St. 1891, p. 205, c. 147, § 6) provides as follows: "To said assessment shall be attached a warrant, which shall be signed by the superintendent of streets and countersigned by the mayor of the city. The warrant shall be substantially in the following form: Form of Warrant. By virtue hereof, I (name of superintendent of streets) of the city of ——— county of ——— (or city and county of ———) and state of California, by virtue of the authority vested in me as said superintendent of streets, do authorize and empower (name of contractor), (his or their) agents or assigns, to demand and receive the several assessments upon the assessment and diagram hereto attached, and this shall be (his or their) warrant for the same. * * *"

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The act itself recognizes the assignee of the contractor as one who succeeds to all the rights and privileges of the contract. St. 1885, pp. 155–157, c. 153, §§ 9–12. And, liberally construing the act—as we are required to do—according to its terms (section 8, St. 1889, p. 168, c. 151; section 53, St. 1893, p. 96, c. 79), we are convinced that it is not essential to the validity of the assessment that the name of the original contractor should appear in the warrant. The case of Palmer v. Burnham, 120 Cal. 364, 52 Pac. 664, is not authority to the contrary. There the Supreme Court of this state, at the first hearing of the case in bank, upheld the judgment of the trial court against the validity of the assessment upon several grounds, one of them being that the warrant, not having been issued in the name of the original contractor, was void. Upon a rehearing, however, that opinion was modified by omitting all that portion which held that the warrant was void because issued in the name of the assignee. The case as thus modified is reported in 120 Cal. 364, 52 Pac. 1080.

The question was again raised in Hadley v. Dague, 130 Cal. 207, 62 Pac. 500. There John T. Long was the original contractor, and the warrant was issued in the name of the "Western Contracting & Construction Company, assignee of John T. Long, agents or assigns." There the court said: "The form of the warrant which is prescribed in the street improvement act in terms authorizes and empowers the contractor, his agents, or assigns to demand and receive the several assessments, and the act declares that the warrant shall be 'substantially' in this form. The right of the contractor to assign the contract prior to the completion of the work is recognized in many portions of the act, and has been recognized by this court. Anderson v. De Urioste, 96 Cal. 404, 31 Pac. 266. After he has ceased to have any interest in the contract, or in the assessment therefor, there would seem to be no reason for the issuance of the warrant in his name, especially since the statute does not specially require it. Sections 9 and 10 of the act designate the assignee as the proper person to whom the warrant and assessment are to be delivered." It is to be noticed that Long nowhere in the warrant was designated as the contractor. In that case all that follows the name of the assignee is descriptio personæ. Litchfield v. Flint, 104 N. Y. 543, 11 N. E. 58. That part, so far as the validity of the warrant is concerned, might just as well be omitted. Hence the warrant here is just as much of a compliance with the act as was the warrant there.

The street improvement act provides that the assessment, diagram, and warrant, when recorded, shall create a lien on the property within the assessed district (section 9); that the contractor or his assignee may bring suit to recover the amount of the several assessments and interest; that in such suit the assessment, diagram, and warrant shall be prima facie evidence of the plaintiff's right to recover (section 12). The trial court in the case of Hadley v. Dague, after referring to these provisions of the act, said that as the record of the assessment, diagram, and warrant creates the lien, it follows that the lot owners will be protected by such record, and that they will be entitled to a release of the lien upon payment to the person who, on the face of the warrant, is entitled to receive the money. Taylor v. Palmer, 31 Cal. 241, 249.

The omission of the name of the contractor from the warrant, and its issuance in the name of an assignee, does not in any way, it appears, affect the interest of the lot holders, and therefore we are of the opinion that the deviation in the warrant complained of was not a substantial departure from the terms of the act. In the case of Taylor v. Palmer, supra, cited by defendant, it was held that a warrant, issued in the name of the contractor, notwithstanding that it had been assigned prior to the issuance of the warrant, was not void. It did not hold that the warrant would be void if issued in the name of an assignee. On the other hand, the opinion goes far to sustain our position. There it is said: "The form of the warrant recognizes the assignable quality of these contracts, and the statute nowhere gives color to the suggestion of counsel that the recognition is confined to assignments made after the work has been performed. * * * The property holder may safely pay to any one who, on the face of the warrant, is entitled to receive the money, especially in the absence of any notice to the contrary. * * * If there is an assignee, and he chooses to allow his assignor to receive the warrant, and collect the money, thereby making him his agent for that purpose, and to take no steps to prevent it or to assert his claim in person, it is difficult to perceive why the property holder, who can under such circumstances safely make payment to the original contractor, should become so solicitous about the interests of any supposed assignee of his." If we do as the trial judge did in Hadley v. Dague, supra, and reversing the conditions present in the case of Palmer v. Taylor, supra, it can be said with equal force that, where there is an assignee and the street superintendent has ascertained the fact, and recognized his rights under the law by making the warrant payable to him, * * * and the property owner can safely make the payment to the assignee, who, on the face of the warrant, is entitled to receive the money, it is difficult to see why such property holder should become so solicitous about the imaginary interests of the contractor, or the observance, with extreme nicety, of a part of the form which was not intended to, and could not, affect his rights.

The trial court sustained an objection to plaintiff's offer in evidence of the warrant, assessment, diagram, and certificate of the city engineer, together with the affidavit of demand and nonpayment. The objection to this evidence was based on two grounds: First, that the assessment was void because of the form of the warrant; and, second, that the rule of evidence declared in section 12 of the act was available only in actions to foreclose the lien of the assessment. By what has been said on the main point in the case we have fully covered the first ground of objection, and only the second ground need be noticed. Section 12 of the street improvement act provides: "The said warrant, certificate and diagram, with the affidavit of demand and nonpayment, shall be held prima facie evidence of the regularity and correctness of the assessment and of the prior proceedings and acts of the superintendent of streets and city council upon which said warrant and assessment are based, and like evidence of the right of the plaintiff to recover in the action." In this case the plaintiff, as assignee of the grantee, Titus, was entitled to recover upon the covenant against incumbrances, provided the property was incumbered within the true intent and meaning of the deed to Titus. The evidence offered was admissible for the purpose of showing the regularity and correctness of the assessment, and that it created a lien upon the property in favor of the holder of the warrant within the meaning of the language of the section, and thus created an incumbrance which justified Titus in the payment made by him, and so formed the basis of plaintiff's action to recover in this case. Titus was entitled to the land free from incumbrances, as implied in the grant deed. If the evidence was such that it would make a prima facie case to foreclose the lien of the street assessment, it was admissible, for the purposes of this case, to show that there was an incumbrance upon the land conveyed to Titus.

No other point made need be discussed.

The judgment and order are reversed.

We concur: COOPER, P. J.; HALL, J.

(155 Cal. 535)

PEOPLE v. LE DOUX. (Cr. 1,403.)

(Supreme Court of California. May 19, 1909. On Rehearing, June 24, 1909.)

1. JURY (§ 70*)—SUMMONING SPECIAL VENIREMAN—DISQUALIFICATION OF SHERIFF.

An unqualified opinion as to defendant's guilt, founded on an investigation of facts, disqualifies a sheriff from summoning special veniremen, and is ground for a challenge to the panel, under Pen. Code, § 1064, on account of bias of the officer, though he testifies that he acted fairly and impartially.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 327; Dec. Dig. § 70.*]

2. SHERIFFS AND CONSTABLES (§ 85*)—POWERS—DISQUALIFICATION TO ACT.

The disqualification of a deputy sheriff does not disqualify the principal, but the deputy cannot act where his principal is disqualified.

[Ed. Note.—For other cases, see Sheriffs and Constables, Dec. Dig. § 85.*]

3. JURY (§ 70*)—SPECIAL VENIRE—DISQUALIFICATION OF SHERIFF.

A deputy cannot summon special veniremen, when his principal is disqualified by reason of an opinion as to the guilt of the accused.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 70.*]

4. CRIMINAL LAW (§ 395*) — EVIDENCE — INCOMPETENCY — EVIDENCE WRONGFULLY OBTAINED.

Letters written by a woman accused of murdering her husband, showing her love for another, are admissible to show motive, though taken from her house in violation of the constitutional guaranty against unreasonable searches and seizures.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 877; Dec. Dig. § 395.*]

5. BIGAMY (§ 1*)—EVIDENCE—PREVIOUS MARRIAGE.

Proof of a former marriage in fact is essential to sustain a charge of bigamy.

[Ed. Note.—For other cases, see Bigamy, Cent. Dig. §§ 1–15; Dec. Dig. § 1.*]

6. BIGAMY (§ 9*)—EVIDENCE—PREVIOUS MARRIAGE.

A certified copy of an unacknowledged marriage certificate is not competent evidence of marriage in fact to prove a charge of bigamy unless accompanied by proof of the signature of the person making it, and of his authority to solemnize the marriage, although the certificate is recorded in the territory where the marriage ceremony was performed.

[Ed. Note.—For other cases, see Bigamy, Cent. Dig. §§ 34–53; Dec. Dig. § 9.*]

7. CRIMINAL LAW (§ 442*)—EVIDENCE—DOCUMENTARY EVIDENCE.

Where the prosecution claimed that the accused poisoned her husband to escape the consequences of her bigamous relations with another, a marriage certificate, subscribed by the accused and the deceased, accompanied by proof of her signature, was admissible to prove motive, by showing her belief in the existence of a former legal marriage.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1027; Dec. Dig. § 442.*]

8. HOMICIDE (§ 166*) — EVIDENCE — ADMISSIBILITY—MOTIVE.

Where the prosecution claimed that deceased was defendant's husband, and that she poisoned him because of her love for another, she was entitled to show that deceased lived on her earnings as a prostitute.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 320–331; Dec. Dig. § 166.*]

9. CRIMINAL LAW (§ 778*)—TRIAL—INSTRUCTIONS—NECESSITY—PRESUMPTIONS OF INNOCENCE.

Where much evidence had been introduced to show defendant's motive for poisoning her husband, she was entitled to have the jury instructed with particularity as to the application of the presumption of innocence when conflicting presumptions arise.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 778.*]

10. CRIMINAL LAW (§ 778*)—TRIAL—INSTRUCTIONS—NECESSITY—PRESUMPTIONS OF INNOCENCE.

An instruction that the presumption of innocence is the only presumption allowable in a criminal case, and that it is not overcome by any other presumption, but overcomes all other presumptions of whatsoever kind or nature, is erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846–1857; Dec. Dig. § 778.*]

11. HOMICIDE (§ 233*)—EVIDENCE—SUFFICIENCY—MOTIVE.

Where the prosecution claimed that the accused poisoned her husband to escape the consequences of her bigamous relations with another, it was sufficient to prove that she believed that she had been legally married to the deceased, and that the marriage had not been annulled.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 233.*]

12. CRIMINAL LAW (§ 484*) — OPINION EVIDENCE—EXAMINATION OF EXPERTS.

The best method for obtaining the expert opinion of a witness is through the medium of a hypothetical question; but, where the facts are simple, salient, and few, and the witness has heard the testimony, it is not necessarily error to ask him to state his opinion upon those facts without restating them.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1072; Dec. Dig. § 484.*]

13. CRIMINAL LAW (§ 484*)—EVIDENCE—EXAMINATION OF EXPERT.

A physician, upon stating that he had heard the testimony of certain witnesses, was asked: "Assuming each and all of the facts and circumstances testified to as true, what in your opinion was the cause of the death of the deceased," the victim of the homicide. *Held* error, because it was impossible to determine upon what facts the witness based his opinion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1072; Dec. Dig. § 484.*]

On Rehearing.

14. CRIMINAL LAW (§ 1166½*)—APPEAL AND ERROR — REVIEW—HARMLESS ERROR—OVERRULING CHALLENGE TO PANEL.

The rule that the Supreme Court will not review an alleged improper ruling on a challenge to an individual juror, when it appears that the jury was completed without the exhaustion by the accused of all peremptory challenges, is inapplicable to a challenge to the panel for bias of the summoning officer.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3115–3117; Dec. Dig. § 1166½.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

15. JURY (§ 70*)—SUMMONING SPECIAL VENIRE—QUALIFICATION OF SUMMONING OFFICER.

The court may, on its own motion, determine whether the summoning officer is qualified to execute a special venire, before ordering its issuance to him, without a challenge for disqualification supported by affidavit.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 327; Dec. Dig. § 70.*]

Angellotti, Sloss, and Shaw, JJ., dissenting in part.

In Bank. Appeal from Superior Court, San Joaquin County; W. B. Nutter, Judge.

Emma Le Doux was convicted of murder, and she appeals. Reversed.

Charles H. Fairall and Charles H. Crocker, for appellant. U. S. Webb, Atty. Gen., J. Charles Jones, Deputy Atty. Gen., and C. W. Norton and Geo. F. McNoble, Dist. Attys., for the People.

HENSHAW, J. Defendant was indicted for the murder of Albert N. McVicar. Upon trial she was found guilty of murder in the first degree, and the death penalty was imposed. From the judgment, and from the order denying her motion for a new trial, she prosecutes her appeal.

It is not contended that the evidence is not sufficient to sustain the verdict and judgment, but complaint is made of the ruling of the court upon challenge to the panel of jurors, of certain of its rulings in admitting and refusing to admit evidence, and of other rulings refusing to give instructions proffered by the defendant. To the better understanding of these questions the facts which the prosecution undertook to establish require brief narration.

Evidence was offered to show that the defendant married Albert N. McVicar, the deceased, in Bisbee, Ariz., in 1902. Thereafter she separated from him, and lived more or less continuously with her mother, near Jackson, Amador county, Cal. In August, 1905, she went with one Eugene Le Doux, who resided near her mother's place in Amador county, to Yolo county, where a marriage license was procured, and the two were married before a justice of the peace. After this marriage to Le Doux she returned with him to her mother's house, where they lived together as man and wife. Upon March 11, 1906, she met McVicar by appointment at Stockton, Cal. McVicar was employed as a timberman in a mine at Jamestown, was about 37 years of age, weighed about 185 pounds, was vigorous, and in good health. Defendant and McVicar took a room together at the California Hotel at Stockton, and remained there one night, McVicar registering, in the presence of the defendant, as "A. N. McVicar and wife." The next day the two went to a furniture store in Stockton, purchased household furniture, gave their residence as Jamestown, and ordered the furniture which they had purchased shipped to that place. That day, or the next day, they went to San Francisco, and from San Francisco the furniture company in Stockton received a telephone message from the defendant, in which she asked if the furniture had as yet been shipped to Jamestown, stating that, if it had been, it was to her regret, as she desired to make other shipping arrangements. On the 15th day of March the defendant and McVicar left San Francisco, and traveled directly to Jamestown, spending the night at one of the hotels, where again they were registered by McVicar as "A. N. McVicar and wife." On the following day McVicar resumed his work at the mine. The defendant informed the friends and acquaintances of McVicar that they had come to Jamestown to reside, and the two visited houses located near the mine with the apparent purpose of selecting a residence. The furniture which they purchased had arrived, and was at the depot. McVicar continued in his employment until Wednesday, the 21st day of March. At that time he ceased work, and drew from the company all the money due him, amounting to $163. The two left Jamestown together by train on the morning of March 23, 1906, which was Friday, and came directly through to Stockton, reaching the city just before the noon hour. They gave as a reason for their change of plans that defendant had represented to McVicar that her mother in Amador county would employ him upon better terms and wages than he was receiving; that he was to aid in farming operations, and in driving, or superintending the driving, of her mother's teams, which were engaged in hauling tailings from a mine. About 2 o'clock in the afternoon of the day of their arrival at Stockton they went again to the furniture store to make substitutions for furniture which they had purchased, stating that, because of a change in their plans, many of the articles which they had selected would be of no use to them. The proposed exchanges were agreed to by the furniture company, and McVicar, in the presence of the defendant, said that the articles were to be shipped to Amador county, and upon the suggestion of the defendant, gave the consignee's name as Eugene Le Doux, "my brother-in-law."

After transacting this business the two went again together to the California Hotel, again registered as "A. N. McVicar and wife," and were assigned to the room which they had previously occupied. They were seen going in and out of the building together upon the afternoon and evening of that day. McVicar appeared on the streets at half past 8 o'clock in the evening, and purchased two or three flasks of whisky at a neighboring saloon. The two were in their room at 9:15 o'clock, and the light was then burning as late as half past 12 o'clock. Early on the following morning, which was Saturday, the defendant was seen by several persons in the corridor of the hotel. At about 10 o'clock in the morning she went to a store about half a block from the hotel, and purchased a trunk, for which she paid, giving directions to have it sent to the California Hotel, and to room 97, which was the room she and McVicar had been occupying. Soon after this she went again to the furniture company, and discussed the matter of the exchange of the goods which had been purchased. She spent about an hour in the store looking over different articles, and purchased several. She left the store about half past 11. A few minutes thereafter she entered another store, where she purchased a rope, stating that she wanted to use it to rope a heavy trunk in which she intended to ship some dishes. This rope she carried away with her. From there she went to an express stand upon the street, and engaged an expressman, sending him to the depot to bring a suit case, and enjoining him to make haste as, upon his return, she would have a trunk for him to take to the 1 o'clock train. The trunk had been delivered at room 97, but, the door being locked, it was left standing in the hall. The expressman obtained the suit case, and in like manner, and for the same reason, left it in the hallway. At about 15 minutes past 12 the defendant appeared again at the stand of the expressman, and told him that she could not be ready to take the 1 o'clock train, asking him to come at 2 o'clock and get the trunk. She then went to a millinery store, purchased and paid $8 for a hat, next to a dry goods store, where she purchased and paid for articles of wearing apparel to the value of $15.75. In the store she stated that it was necessary for her to go to San Francisco, but that she would return by the first train in the morning, as her husband was coming down from Jamestown to meet her. About 2 o'clock in the afternoon she sent a telegram to one Joseph Healy in San Francisco, asking him to meet her upon the train's arrival. About the same time the expressman went to the California Hotel, and, assisted by another man, took the trunk which was in room 97, the trunk being packed, roped it with the rope which was lying in the room, carried it to his wagon, and delivered it at the Southern Pacific depot. The defendant had been at the depot before the expressman arrived, and had displayed considerable uneasiness over the fact that her baggage had not come, and undertook to telephone to the California Hotel concerning it. It was at this time that the expressman came in sight, and she abandoned her effort to telephone. The expressman delivered the trunk and the suit case in the baggage room of the depot, and went away.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The trunk was put upon one of the baggage trucks of the company, and remained there for about an hour, until the 4 o'clock train reached the station. It was put into the baggage car of that train. It was then discovered that the trunk bore no check or other identification mark. Upon this discovery the trunk was put back upon the truck, where it remained until 5 or 6 o'clock in the afternoon. It was then carried into the baggage room, where it remained until about half past 8 o'clock in the evening. In moving the trunk the suspicions of the baggageman were excited by a peculiar thumping noise, which came from it when it was turned over or on end. One of the baggagemen, who had been in that employment for 14 years, and had handled dead bodies every week, smelled at the lock of the trunk, and detected an odor which he believed to be that of a human body. The chief of police and the district attorney were sent for, and the trunk was opened. Inside of the trunk was found the body of Albert N. McVicar. The body was entirely dressed except for the absence of a coat and shoes. An autopsy was performed that evening, and from a visual inspection every vital organ appeared in a normal and healthy condition, and there were no external wounds of consequence, and no evidence of the use of any irritant or corrosive poison. Certain portions of the various organs of the body, including the bladder holding the urine, were removed for further examination. These parts were taken to San Francisco, and there analyzed by a chemist, whose examination revealed the presence of morphine in quantity more than sufficient to have caused death. The defendant took the 4 o'clock train from Stockton to San Francisco, and remained in San Francisco at a hotel, registered under the name of M. T. Williams. Joseph Healy met her in San Francisco. The next day she purchased a ticket for Stockton, and took the Santa Fé train, but proceeded no further than Antioch, in Contra Costa county. Healy accompanied her as far as Point Richmond. Leaving the train at Antioch, she went to the Arlington Hotel, and registered as Mrs. Jones. This was on Sunday. The following day she was placed under arrest. It was further shown in evidence that, while McVicar and defendant were in San Francisco, the defendant had received from Dr. Dillon a vial filled with half-grain morphine tablets, and that thus the defendant was in possession of the kind of poison which caused McVicar's death. It was also shown that the defendant had represented that McVicar was in very poor health, and had not long to live, while, in fact, he was in excellent health. Defendant after her arrest asserted that there was a third person in the room at the time of McVicar's death, a man by the name of Joe Miller; that Miller had gone to San Francisco with her on the train after the death, and came across the bay with her to San Francisco from Point Richmond, and then decided not to accompany her further. But it was shown by the witness Healy that it was he who had accompanied her. The watch and chain of the deceased was in the possession of the defendant at the time of her arrest. From these facts the prosecution argues that the defendant deliberately planned to trick and deceive McVicar, for whom manifestly she could have had no affection, into drawing his money, going with her to Stockton, purchasing and paying for furniture to be shipped to Eugene Le Doux, whom she represented to be her brother-in-law; that then, out of love for Le Doux, and to avoid exposure of her dual life and bigamous relationship with him, it became necessary, as a part of her plot, to kill McVicar as she did. The defense offered to prove that the defendant had been a common prostitute, and had been put in a house of prostitution by McVicar.

During the impanelment of the jury the court ordered a special venire to issue for 75 men. The order was directed to the sheriff of the county. Code Civ. Proc. § 226. Upon the return of the venire the defendant challenged the panel, under section 1064 of the Penal Code, on account of the bias and prejudice of the sheriff. Evidence was taken upon this, from which it was made clearly to appear that the sheriff had been engaged in gathering evidence for the people; had procured witnesses for the people; had talked with these witnesses; and had thus come to entertain an unqualified opinion that the defendant was guilty. True, the sheriff testified that, notwithstanding this opinion, he could try the case, "probably as well as any man that would sit upon the jury," and that he would be governed entirely by the law and the evidence. But this answer does not to the slightest extent avoid the effect of his previous declarations. So far as the challenge for bias is concerned, the sheriff in such a case is put by the law precisely in the position of a trial juror (Pen. Code, § 1064), and a state of mind which would disqualify a juror equally disqualifies the sheriff. The possession of such an opinion absolutely disqualifies, saving only where the opinion is founded upon public rumor, statements in public journals, or common notoriety (Pen. Code, § 1076), and where, notwithstanding such an opinion so founded, it is made to appear to the court that the person can and will act impartially and fairly upon the matter to be submitted to him. But where the opinion is founded, as is here shown to be founded, not upon public rumor, or statements in the public journals, or common notoriety, but upon a direct investigation of the facts, the disqualification is absolute, and the testimony of the juror or sheriff that, notwithstanding such opinion, he could and would act fairly and impartially is utterly without substance or weight. People v. Landis, 139 Cal. 429, 73 Pac. 153; People v. Helm, 152 Cal. 532, 93 Pac. 99.

Section 1064 of the Penal Code declares that, when the panel is formed from persons whose names are not drawn as jurors, a challenge may be taken to the panel on account of any bias of the officer who summoned them which would be good ground for challenge to a juror. The sheriff to whom the order was issued, having clearly been shown to be disqualified, the question is presented, does the disqualification of the sheriff extend to his deputy? or, phrasing it differently, is a deputy qualified to act where his principal is disqualified? It is not disputed, and indeed has been decided, that the deputy who actually summons the veniremen under section 1064 may be disqualified, and the panel successfully challenged for such disqualification under the section above cited. People v. Ryan, 108 Cal. 583, 41 Pac. 451. Moreover, it is unquestioned that a disqualification of the deputy does not disqualify the principal. But, within the range of an extended investigation, we have discovered no authority, and none has been pointed out to us by the respondent, which holds that the disqualification of the principal does not disqualify his deputies. Yet this is the position which the respondent takes, and which manifestly, from the necessity of the case, it is obliged to take. The contention is that the disqualification under section 1064 is a personal disqualification, going only to, and extending no further than, the person actually summoning the jurymen. But to this position there are insuperable objections. A deputy is merely the agent of his principal. He acts solely by virtue of the power conferred upon his principal; and, when the power of the principal is withdrawn, the legal ability of the deputy to act ceases absolutely. The law recognizes deputies only through their principals, and their acts must be done in the name of their principals. Joyce v. Joyce, 5 Cal. 449; Rowley v. Howard, 23 Cal. 402. The law has never recognized the existence of the power of the deputy to act in a given matter, where that same power has been withdrawn or withheld from the principal. The reasons for this are twofold. First, as a matter of simple logic, since a deputy is but an agent, acting solely and exclusively within the power conferred upon the principal, if upon the principal has not been conferred a given power, the attempted act of the deputy is wholly without the principal's authority, and therefore absolutely void; second in case of the disqualification of the principal, as by interest, whatever may be the nature of that interest, it would be manifestly unjust to the adverse party if, while the law forbade the sheriff to execute a process for this reason, he could direct the execution by a deputy owing his position and its emoluments to his favor. It is too plain to require discussion that in such case the possibility of wrong or evil, sought by the law to be avoided in the disqualification of the principal, would be but perpetuated, if his deputies were allowed to act. So it will be found that in no case where a principal is disqualified does the law make the slightest recognition of the deputies, or ever attempt to empower them to act. Says Blackstone (3 Black. Comm. 355): "If the sheriff be not an indifferent person, as if he be a party in the suit, or be related by either blood or affinity to either of the parties, he is not then to be trusted to return the jury, but the venire shall be directed to the coroners, who in this, as in many other instances, are the substitutes of the sheriff, to execute process when he is deemed an improper person." Sections 4191 and 4192 of the Political Code are but enactments of this common-law rule, and, as declared in People v. Fellows, 122 Cal. 233, 54 Pac. 830, are to be construed with section 226, Code Civ. Proc., from which authority to direct the special venire in this case is drawn.

An examination of the authorities will disclose that they are in unison upon the proposition. In Minott v. Vineyard, 11 Iowa, 90, the question arose, and the court declared as follows: "By section 411, Code 1851, the sheriff is made responsible for the acts of his deputy, and when the principal is disqualified on account of interest, prejudice, partiality, consanguinity, or from being a party to the record, his deputy is also." In May v. Walters, 2 McCord (S. C.) 470, the sheriff was disqualified. It was held that the writ should have been served by the coroner, and not by the sheriff's deputy. In Wood v. Carpenter, 9 N. H. 153, a writ of replevin was directed to the sheriff or his deputy. The writ was served and returned in the name of the principal by a deputy. The sheriff was the person sued. It was held that the disqualification of the principal disqualified the deputy, and that the writ should have been directed to, and served by, the coroner. In Hillyer v. Pearson, 118 Ga. 815, 45 S. E. 701, the sheriff was a party to the suit. It was declared that, where such a disqualification arises, it is mandatory that process shall be directed, not to the sheriff or his deputies, but to the coroner, and that, where process was directed to the sheriff and his deputies, service of the process was void, even though made by one of the sheriff's deputies. In Knott v. Jarboe, 58 Ky. 506, where the sheriff was a party to the suit, though not personally interested in it, and served process, the Supreme Court said the act of a sheriff in executing process in cases in which he is a party or is interested is so manifestly inconsistent with public policy, and with the impartial administration of justice, that its performance has always been prohibited, and the court proceeds: "The sheriff is never allowed to execute his own process; and, so careful is the law in guarding the interest of the defendant in such a case, not even the deputy is permitted to execute the process, but it must go to the coroner, an officer not supposed to be under the influence of the sheriff. A deputy, it is true, is appointed by the principal sheriff, and regularly acts in the name of the principal, and the principal is liable for any improper conduct of the deputy in the exercise of the office. But the recourse which may be had to the principal may not be adequate to guard the interest of the defendants against the wily acts of an interested deputy." In McLeod v. Harper, 43 Miss. 42, it is declared that a sheriff is incompetent to serve a process in a suit to which he is a party, or in which he is interested, and process addressed to such interested officer will be quashed on timely application to the court. Thus it is seen that all of the authorities agree upon the principle, and announce the rule that, where the principal is disqualified, his deputy is likewise disqualified and process served under these circumstances is voidable. Therefore the challenge to the panel should have been allowed.

It has been said that the motive which the people ascribed for the crime, and in proof of which they introduced evidence, was twofold: First, because of defendant's love for Le Doux, with whom the people contend she had contracted a bigamous marriage; and, second, to escape the legal consequences of this bigamous relationship, when it was apparent that that relationship could no longer be concealed from McVicar. As evidence under the first ground, the people introduced certain loving and endearing letters, written by defendant to Le Doux. These letters were obtained by a deputy sheriff of Amador county, acting under instructions of the sheriff of San Joaquin county, but without warrant or authority. It appears that this deputy sheriff went to the house where defendant had resided, entered upon the premises, and took such letters and papers as he found, without the authority of a search warrant, or any other authority, though without the objection of any person present. The only person present, who in any sense could have represented the family, was a minor brother of defendant. It is contended, and indeed it may not be disputed, that such search and seizure was absolutely unwarranted in law, though had under color of authority of an officer of the law. It was in clear violation of the constitutional guaranty, state and federal, of the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. Const. Cal. art. 1, § 19; Const. U. S. Amend. art. 4. But the question here presented is whether these documents, thus improperly obtained under the circumstances indicated, were for that reason not entitled to be received. In Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, there came under the court's review the provisions of a customs revenue law, which authorized a court of the United States, in revenue cases, on motion of the government attorney, to require the defendant or claimant to produce in court his private books, invoices, and papers, or else the allegations of the attorney were to be taken as confessed. It was held that the law does not require actual entry upon the premises, and search for, and seizure of, papers, to constitute an unreasonable search and seizure within the meaning of the fourth amendment. A compulsory production of a party's private books and papers, to be used against himself or his property in a criminal or penal proceeding, or for a forfeiture, is within the spirit and meaning of the fifth amendment of the Constitution of the United States, which declares that in a criminal case a defendant shall not be compelled to be a witness against himself. It is further said that the seizure or compulsory production of a man's private papers to be used in evidence against him is equivalent to compelling him to be a witness against himself; and, in a prosecution for a crime, penalty, or forfeiture, is equally within the inhibition of the fifth amendment. In the later case of Adams v. New York, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575, the question arose as to the admissibility in evidence of papers and documents illegally taken from the possession of the defendant. It was there decided that the court considers only the competency of the evidence, and not the method by which it was obtained. The rule laid down in 1 Greenleaf, § 254, is quoted as the correct rule. It is to the following effect: "It may be mentioned in this place that, though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility, if they are pertinent to the issue. The court will not take notice of how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question." In the Adams Case it was contended that the incriminatory evidence was illegally obtained, because the search warrant under which the officer acted was limited in character, but the Supreme Court held that the ground was untenable, saying: "Evidence which is pertinnent to the issue is admissible, although it may have been procured in an irregular, or even in an illegal, manner." Boyd v. United States, supra, is reviewed and distinguished, and the decision in the Boyd Case, however general its language may be, is limited solely to the case where the defendant is compelled himself to give evidence against himself, or where, if he did not produce the demanded evidence, it was to be a confession of the truth of the matters charged. It thus appears that whatever wrong may be perpetrated by the invasion of one's constitutional rights against unreasonable search and seizure, the redress for that wrong is not in the exclusion of pertinent evidence which may be obtained by the seizure. The courts, upon the mere question of admitting or rejecting evidence, will not take cognizance of the mode of its production, unless it be shown that the defendant has been compelled himself to give or produce it. So it is said by this court in People v. Alden, 113 Cal. 264, 45 Pac. 327, "nor does the competency of evidence in any way depend upon the means by which it is brought to the court, where it is offered in evidence." The letters were, therefore, properly admitted in evidence.

The evidence to establish the marriage between defendant and the deceased consisted of declarations by defendant to several people; introductions to many people of the defendant by McVicar as his wife; her acceptance of this role; a telegram from defendant signed by herself as Mrs. McVicar; the repeated registration in hotels by McVicar, in the presence of defendant, of her as his wife; the cohabitation of the two; and their repute as husband and wife. The rule of Lord Mansfield, declared in Morris v. Miller, 4 Burr. 2057, making necessary proof of a marriage in fact, where the charge is bigamy or criminal conversation has been adopted and consistently adhered to in this state. Case v. Case, 17 Cal. 598; People v. Anderson, 26 Cal. 129; White v. White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799; People v. Beevers, 99 Cal. 289, 33 Pac. 844. Even the declarations or admissions of a defendant, together with proof of cohabitation and repute, are not sufficient evidence to establish such a criminal charge, without some further proof of an actual marriage. People v. Beevers, supra. As tending to prove the marriage in fact, the court admitted in evidence the original of a marriage license, issued in the territory of Arizona, authorizing the marriage of the deceased and this defendant under the name of Emma T. Williams, and also the indorsement upon the same instrument of the certificate of Rev. H. W. Studley, to the effect that at Bisbee, Ariz., he, a minister of the gospel, did join "in the holy bonds of matrimony, according to the laws of this territory, A. N. McVicar of the county of Cochise, territory of Arizona, and Emma T. Williams, county of Cochise, territory of Arizona." The court also admitted in evidence a duly certificated and authenticated copy from the records of the county of this license and certificate. It is contended that these papers were improperly admitted, in that there was no independent proof, either of the facts contained in the declaration of the minister, no proof that Studley was an "ordained" minister, and thus authorized under the laws of the territory to join in marriage, and no authentication of the signature of Studley. And it is said, and truly said, that such a marriage certificate is but a private writing, that proof of its execution and truth of its contents should have been made, and that the mere fact that it was a miscellaneous record of the county of Cochise, Ariz., did not prove any of these matters, nor entitle it to admission in evidence without such proof; that the certificate of recordation did not render it admissible, but merely placed the foreign record on the same footing as a domestic, leaving its admissibility depending entirely upon the pertinent rules of evidence. Ordway v. Conroe, 4 Wis. 45; Ferguson v. Harwood, 7 Cranch, 408, 3 L. Ed. 386. Appellant's position in this respect is absolutely sound. Wherever it is necessary, as in a criminal charge of bigamy or criminal conversation, to prove a marriage in fact as distinguished from a marriage by inference and circumstance, often termed a "common-law marriage," it must be shown that the person who solemnized the marriage was one having authority so to do (26 Cyc. 358), and a paper purporting to be a marriage certificate, signed by one purporting to be authorized by the laws to solemnize a marriage, is not competent evidence of the marriage, unless accompanied by proof that the person making the certificate was in fact authorized to solemnize such marriage (State v. Horn, 43 Vt. 21; Faustre v. Commonwealth. 92 Ky. 34, 17 S. W. 189). A marriage certificate does not prove itself. Proof of the signature of the person by whom it purports to have been signed, and of his authority to perform the marriage ceremony, is necessary. Hill v. Hill, 32 Pa. 511; Erwin v. English, 61 Conn. 502, 23 Atl. 753; State v. Hodgskins, 19 Me. 155, 36 Am. Dec. 742; State v. Winkley, 14 N. H. 480; People v. Crawford, 62 Hun, 160, 16 N. Y. Supp. 575; Finlay v. Finlay, 31 L. J. P. & M. 149; People v. Imes, 110 Mich. 250, 68 N. W. 157; Ellis v. Ellis, 11 Mass. 92. The record of such an unacknowledged private writing as this is not made evidence of the truth of the recitals contained in it. Brown v. Griffith, 70 Cal. 15, 11 Pac. 500; Grant v. Oliver, 91 Cal. 163, 27 Pac. 596, 861; McCarthy v. Hart, 8 L. C. Rep. 369; Bowman v. Little, 101 Md. 273, 61 Atl. 223, 657, 1084; State v. Thompson, 31 Utah, 228, 87 Pac. 709.

Where a private writing is acknowledged, the certificate thereof becomes prima facie evidence of the execution (Code Civ. Proc. § 1948), but these writings were not acknowledged. Where not acknowledged, a writing must be proved in one of three ways: By any one who saw the writing executed, or by evidence of the genuineness of the handwriting of the maker, or by a subscribing witness. Code Civ. Proc. § 1940. Such execution must be shown before it is entitled to admission. Sinclair v. Wood, 3 Cal. 98. In an effort, then, to establish a marriage in fact in proof of a criminal charge of bigamy, the evidence here offered, without supporting proof of the facts and the execution, would be clearly inadmissible. But it is to be remembered that the criminal charge in this case was not bigamy. The evidence was offered as tending to establish a motive, and not to convict the defendant of the crime of bigamy. In establishing the motive, it was not compulsory upon the people to prove that the relation was in fact bigamous. It was sufficient to prove that the defendant believed that it was bigamous, or, in other words, believed that she was in law the wife of McVicar at the time when she subsequently married Le Doux, and at the time when, as alleged, she took McVicar's life. The motive for the crime would be as strong in the one case as in the other. Her conduct would be governed by her belief of the fact, and not by the existence of the fact. To prove her guilty of bigamy the marriage in fact would have to be shown, as otherwise there could be no second illegal marriage, and consequently no crime. But a motive for the homicide is satisfactorily established by showing the defendant's belief in the existence of a former legal marriage, no corpus delicti. The truth of the matter upon which that belief is founded becomes an inconsequential matter. Now, in admitting the license and certificate, it was established that the affidavit required by the laws of Arizona for the procurement of a marriage license was made by this defendant, and that the signature to this affidavit was her own. It is thus shown that she contemplated contracting a marriage with McVicar in Arizona, and took steps to the end that such marriage might be legally consummated. Additionally it was shown that to the marriage certificate signed by the minister, Studley, were subscribed "A. N. McVicar, groom, Emma T. Williams, bride," and the signature "Emma T. Williams" was proved to be that of the defendant. Here is furnished some evidence, so far as this defendant is concerned of the truth of the declarations contained in the certificate; and, whether or not this marriage to McVicar was in point of law legal, the evidence certainly went to establish that the defendant had contracted a marriage in fact which she believed to be legal, and we hold that, by virtue of the proved signature of the defendant to this certificate, it was admissible in evidence upon the question of her motive.

As has been stated, the theory of the prosecution was that the defendant killed the deceased because of the love she bore Le Doux, and by reason of the fact that McVicar was about to discover that her relations with Le Doux were bigamous. As tending to disprove this theory of motive, the defendant offered to show, and endeavored to show, that her relations with McVicar were and had been illicit since 1903, that she had been placed in a house of prostitution by McVicar, and that he lived off of her earnings as a common prostitute. Appellant contends that she was entitled to have this evidence go before a jury upon the question of motive; that upon this evidence could be founded a reasonable argument against the prosecution's theory; that it would tend to overthrow any inference of her love for Le Doux; that it was not probable that a man would place his wife in a house of prostitution, while he might be willing that a mere mistress should so live; that it would be evidence of her love and devotion to McVicar that she would so prostitute herself at his request, and give him the earnings of her shame; that it would tend to establish that her affections were centered rather upon McVicar than upon Le Doux. Clearly we think this evidence was admissible. Its weight, of course, was for the jury. Where marriage is asserted by one party and denied by the other, and where, as here, the motive of a crime is sought to be established before a jury, the whole conduct, life, and character of the parties as affecting this question is open to inquiry. Bell v. Clarke, 45 Misc. Rep. 272, 92 N. Y. Supp. 163.

Finally, upon the question of motive, the defendant asked certain instructions as follows: "The jury are further especially charged that the presumption of innocence is the only presumption allowable in a criminal case, and it is not overcome by any other presumption. There cannot be two presumptions standing together, one for the guilt, and the other for the innocence, of the accused. Consequently the presumption of knowledge, the presumption of the continuance of a fact, state, or condition shown once to exist, the presumption of the continuance of life or of marriage, are all overcome by the presumption of innocence. You are instructed that the presumption of innocence overcomes all other presumptions, of whatsoever kind or nature." "If you believe from the evidence that the defendant and Albert N. McVicar were married in September, 1902, at Bisbee, Ariz., and further believe that the defendant married Eugene Le Doux in August, 1905, at Woodland, Cal., then, in that event, the court instructs you that, before you can ascribe to the defendant, as a motive for committing the crime charged, a desire to avoid any question of a bigamous marriage, or any result therefrom, it must be fully and satisfactorily proved, beyond all reasonable doubt, that the marriage between Albert N. McVicar and the defendant had never been annulled, and that the defendant knew that it had not been." These instructions were refused. In support of the refusal it is not asserted that the matter of these instructions was covered by others actually given. It is contended that the court repeatedly instructed upon the presumption of innocence, and that this was sufficient. It was not. Since so much of the evidence had been directed to this question or motive, the defendant was entitled to have the jury instructed with particularity as to the application of the presumption of innocence where conflicting presumptions might be said to arise. The matter is discussed in Hunter v. Hunter, 111 Cal. 261, 43 Pac. 756, 31 L. R. A. 411, 52 Am. St. Rep. 180. Speaking now without specific reference to the instructions asked, we hold that the defendant was entitled, upon request, to proper instructions upon this subject-matter. As to the instructions actually propounded, the court was justified in its refusal to give them, for they go further than is warranted by the law. The instructions declare that the presumption of innocence is the only presumption allowable in a criminal case, that it is not overcome by any other presumption, but does overcome all other presumptions of whatsoever kind or nature. Such, however, is not the law. All presumptions are evidence. Conclusive presumptions (Code Civ. Proc. §§ 1961, 1962) are not overcome by the presumption of innocence, nor are many disputable presumptions so overcome. Over certain disputable presumptions, though not over all, the presumption of innocence will prevail. Instances of disputable presumptions over which the presumption of innocence will prevail are given in Hunter v. Hunter, supra. But, on the other hand, it is a presumption that every person is sane. Insanity may be shown, and thus overcome the presumption. Yet, in the absence of evidence, the presumption of innocence would not prevail so as to justify a jury in presuming against sanity. Furthermore, the proposed instructions declare that the prosecution must fully and satisfactorily prove beyond all reasonable doubt that the marriage between McVicar and the defendant had never been annulled, and that the defendant knew it had not been. So far as motive is concerned, to which this evidence was introduced, it was sufficient for the prosecution to satisfy the jury that the defendant believed that a legal marriage between herself and McVicar existed, or, stating it conversely, and more nearly in the language of the proposed instruction, it was only necessary for the prosecution to establish that the defendant believed that she had been legally married to McVicar and that the marriage had not been annulled.

To certain physicians called as expert witnesses the prosecution addressed the preliminary question whether they had heard the testimony of certain other witnesses. Upon answering in the affirmative they were then asked the following question: "Now, doctor, assuming each and all of the facts and circumstances testified to by these gentlemen I have named as true, what in your opinion was the cause of the death of A. N. McVicar, the deceased person mentioned in this case?" The objection of the defendant to this question was overruled. It should have been sustained. The best way to obtain the opinion of an expert witness upon a matter which is the subject of expert evidence is through the medium of a hypothetical question. Unsatisfactory as that method unquestionably is, it is the least objectionable known to the law. To countenance the practice here adopted would but aggravate existing evils, and destroy whatever value may be attached to such evidence. It assumes that every fact which the witness has heard is in his mind, while some may have been forgotten. It allows the expert to assume that unstated evidence upon which he bases his opinion has been proved to his satisfaction, while, to the minds of the jurors, it may not have been proved at all. It permits the expert to base his opinion upon some undeclared fact, or set of facts, to which he may give great weight, yet which in the minds of the jurors may be entitled to little or no consideration whatever. It makes it impossible for the jury ever to determine upon precisely what facts the expert has based his opinion, and thus makes it forever impossible for them to say what weight should be accorded to that opinion. And in this view it matters not whether the evidence in the case be actually conflicting or not. The vice still remains, if it be said that the evidence is unconflicting, since it is for the jurors alone to say what weight shall be given to this, or that, or the other evidence tending to establish a given fact. And where the evidence is unconflicting, the jurors may hold that the evidence offered is insufficient to prove some particular fact. So it is said in People v. Akin, 66 Mich. 476, 33 N. W. 828, 11 Am. St. Rep. 512: "An expert can never be safely permitted to state that he has heard or read the testimony of a witness or witnesses, and then base his opinion upon such testimony, without stating the particular points of the evidence, the facts upon which he rests his conclusion. There is no reputable authority for any such method of examining an expert witness." In People v. McElvaine, 121 N. Y. 250, 24 N. E. 465, 18 Am. St. Rep. 820, it is said: "We think it is not competent in any case to predicate a hypothetical question to an expert upon all of the evidence in the case, whether he has heard it all or not, upon the assumption that he then recollects it, for it would then be impossible for the jury to determine the facts upon which the witness based his opinion, and whether such facts were proved or not."

In thus pointing out what we conceive to be the best method for obtaining the expert opinion of a witness, we would not be understood as saying that every departure from that method involves error, necessitating the reversal of a case. Cases may arise where the facts upon which the opinion is sought are simple, salient, and few. If it be made to appear that the expert has heard the testimony by which those facts have been presented, it would not necessarily be held error that he was asked to state his opinion upon those facts, without a restatement of them. Howland v. Oakland, etc., Ry. Co., 115 Cal. 487, 47 Pac. 255. But the danger in a departure from the approved procedure is that, in the generality of cases, the facts themselves are in question, and disputes are numerous and complicated, and, under these circumstances, injury may be worked to a litigant by an adverse expert opinion so adduced.

We have thus discussed all of the matters which we deem necessary in contemplation of the new trial, which must be ordered; and, for the foregoing reasons, the judgment and order are reversed, and the cause is remanded for a new trial.

We concur: LORIGAN, J.; MELVIN, J.

BEATTY, C. J. I concur. There can be no doubt that the trial judge erred in disallowing the challenge to the panel of talesmen returned upon the open venire, and it cannot be held that the failure of the defendant to exercise all her peremptory challenges was a waiver of her exception, or a conclusive proof that the error was without prejudice, unless we were willing, which I am not, to lay down a rule of practice entirely new in this state, and supported by very meager authority elsewhere, and that in a capital case involving the life of a woman. Such a rule, moreover, is wholly unnecessary, since the existing statute affords ample means for preventing the trouble which has arisen in this case. This open venire was issued, as it is in all such cases, under section 227 of the Code of Civil Procedure, which reads as follows: "When there are not competent jurors enough present to form a panel the court may direct the sheriff, or an elisor chosen by the court, to summon a sufficient number of persons having the qualifications of jurors to complete the panel, from the body of the county, or city and county, and not from the bystanders; and the sheriff or elisor shall summon the number so ordered accordingly and return the names to the court." The language of this section clearly implies that the judge must, in making the order, determine whether the service of the venire shall be made by the sheriff or by (the coroner) or an elisor. He must, in other words, provide in advance for its service by a competent officer, and the only way to do this is to examine the sheriff and his deputies, and the coroner, if necessary, to see that the writ is not issued to a person disqualified to act as a juror in the case. This may always be done in the presence of the defendant and his counsel in a criminal case; and I have no doubt that their waiver at that time of any objection to the sheriff or coroner, or the person named as elisor, by refusing or failing to challenge his competency when given the opportunity, would justify a denial of their challenge after the return of the venire. For it is not true, as contended by counsel, that the statute gives the parties an absolute right to challenge the panel at any time before a juror is sworn. It is true it cannot be taken after a juror is sworn; but it does not follow that it may not be waived, in a case like the present, by the refusal of the opportunity to object, when it is offered at the time when, according to the plain intent of the statute (Code Civ. Proc. § 227, supra), it is the duty of the court to determine whether the sheriff (or coroner) is competent to act, and, if not, to appoint a competent person as elisor.

On rehearing.

PER CURIAM. The petition for rehearing is denied. In the petition two matters are pressed upon the attention of the court which merit consideration.

1. It is argued, with much apparent earnestness, that because defendant had not exhausted all of her peremptory challenges at the time of her acceptance of the last juror, and the impanelment of the jury, she should not be listened to in the appellate court, where she urges the error of the trial judge in overruling her challenge to the panel because of the bias of the sheriff. No one versed in the law can question, or we think does seriously question, the grave error that was committed in overruling defendant's challenge to the panel, and in proceeding with the selection of the jury from such venire. But it is said that, as the authorities are abundant, and the rule well settled, to the effect that this court will not review the alleged improper ruling of the trial court upon a challenge interposed to an individual juror, if it shall be made to appear that the jury was completed without the exhaustion by the defendant of all peremptory challenges, so the same rule should be applied to a case such as this, where the challenge is to the whole panel; and, if it shall be made to appear, as here it does, that a jury was taken while defendant still had unused peremptory challenges in reserve, it should be held, as matter of law, that the error of the trial court is conclusively presumed to have been without injury to the defendant. Or, wording it differently, we are asked to say to defendant's counsel: "If you had arbitrarily exhausted your peremptory challenges, we would then, for the admittedly erroneous ruling of the trial court in denying your challenge to the panel, have granted your client a new trial. But because you did not thus exhaust your peremptory challenges, we will not consider your objection, and your client must go hang." Quite obviously the sole result which could ensue from this would be the execution of this woman, under a new ruling upon a question of law. And this ruling would serve only to hang the woman, since in every subsequent case, enlightened by the extraordinary view thus expressed, defendants would exhaust their peremptory challenges, and so bring the matter before this court under circumstances which, as has been said, it is conceded would cause a reversal of the case. But the reason why this court refuses so to rule does not rest alone, nor even largely, upon the fact, grave though it be, that the ruling would be the death warrant of a woman who, if her lawyers could have seen into the workings of the mind of the appellate court, would easily and assuredly have prevented this result by exercising their peremptory challenges—the reason of this court's refusal is based upon the fact that there is no true, substantial similarity between the two classes of cases, and that therefore the application of the rule touching the challenge of an individual juror to the case of a challenge to a panel would be, not only without reason in law, but against the reason of the law. For where a venire has been regularly served by the proper officer, in contemplation of law a panel composed of qualified, dispassionate, fair-minded men is brought into court. If upon examination it shall prove that some one of those men is biased, the taint affects him alone. He may be disposed of by a peremptory challenge. The next juror or jurors called to the box are still presumed to be qualified men, legally selected. Therefore, if a defendant, while still having peremptory challenges in reserve, shall allow the jury to be completed, and then on appeal complain that the court refused to excuse John Roe upon his challenge for bias, the complete answer is that the defendant had it in his power to have relieved himself of the obnoxious juror, and refused to do so, and that he shall not therefore be heard to complain of an injury, the evil effects of which he was easily able to have avoided by the exercise of the power of peremptory challenge conferred upon him by law.

But how is it when a just challenge has been interposed to the array, to the whole panel, because of the interest or bias of the party summoning them? There is then before the court, not the case of a single juror who may be proved to be disqualified, while his fellows stand qualified, but every man so summoned is obnoxious to the law, and is in law a disqualified juror. The question is not then whether an individual juror has successfully passed an examination for actual bias upon voir dire, for if the summoning officer has been astute enough and wicked enough, he has procured evil-minded men who can, and will, do just this thing. But whether he does or does not, the law looks with abhorrence upon the possibility of this being done, and will not subject a defendant to the compulsion of selecting his jurors from men so summoned. In the one case the taint attaches to the individual juror only; in the other, it attaches to the whole panel and procedure, and the legal vice is affixed to every juror summoned. What avail, then, for a defendant to exhaust his peremptory challenges, knowing, as he must, that he will still be compelled to select his jurymen from men who have been called in against him without warrant of law, and who, for aught that he can tell, may prove secretly more hostile than those who are then in the box? In the case of the challenge to the individual juror the defendant is called upon to excuse him because of the assurance that the next man is qualified. In the case at bar each and every succeeding man is equally disqualified, and had this defendant exhausted her nine peremptory challenges, she would still have been called upon to complete her jury from men all summoned with like illegality, and who might have been more obnoxious than were those whom, under the compulsion of the court's erroneous ruling, she felt obliged to accept. Here, then, is the broad distinction in the two classes of cases, and here also is the reason why the law will not permit the inquiry to go further than a determination as to whether or not the panel was legally chosen. For, if it was illegally chosen, and the defendant compelled, with or without the exhaustion of her peremptory challenges, to select a jury from such a panel, by no conceivable circumstances can such a defendant be said to have been accorded his constitutional right to a fair trial under the laws of his land.

The industry of the state's attorney has resulted in the discovery of but one case which even seemingly bears out his contention. If it fully bore out his contention, it would suffice to say that it stands alone against the great weight of contrary adjudication. But it does not so stand. In the case to which we have referred the sheriff had been set aside as disqualified, notwithstanding which order he summoned the jury. The Supreme Court of Colorado declared that defendant's challenge to the panel should have been sustained for this, unless there had been a waiver of the error, and proceeded briefly to point out the circumstances which, in its view, constituted a waiver. As one of the facts and circumstances, it stated that the defendant did not exhaust his peremptory challenges. But the waiver was not founded upon this circumstance, but upon other facts set forth, to the effect that defendant's counsel expressly stated that the jurors included in the panel were not prejudiced, or illegally drawn or summoned, in any other respect than for the reasons specified. Says the Supreme Court: "As defendant's counsel admits, not only the personal qualifications of the jurors, but that as jurors in all respects they are unobjectionable, it would be idle to quash the panel when no possible injury could result to the defendant from selecting a jury therefrom." Boykin v. People, 22 Colo. 496, 45 Pac. 419. We are not concerned with the soundness of the Colorado court's ruling to the effect that the facts which it presents did constitute a waiver. The one matter which it is desired to point out is that the waiver which the court found did not rest upon a failure of the defendant to exhaust his challenges. None of the cases cited by the Colorado court has any bearing upon the question, and the case itself contains no discussion of the proposition here presented.

2. In the concurring opinion of the Chief Justice, which is hereby adopted, it is pointed out that it is the duty of the trial court to determine whether the summoning officer is qualified or not before ordering the special venire to issue to him. Objection is made that the court is helpless in this regard, and has not the power to proceed in the manner indicated. It is said that only when the sheriff and coroner are parties, or when either is a party in a proceeding against the other, or when either of these officers is a party, and there is a vacancy in the office of the other, can the court proceed of its own motion, but that in every other case it can proceed only upon a challenge for disqualification supported by affidavit. This restriction thus sought to be imposed upon the general powers of a court of record narrows those powers to the point of absurdity. It would mean that, if the judge actually knew that the sheriff was disqualified by consanguinity or interest, he would be compelled to remain silent, issue to him a venire, which he knew was to be illegally served, and await the action of somebody before he was able to correct the error. No such shackles as these embarrass a judge in the performance of this duty. It is true that the power of a judge to appoint an elisor is not unlimited and unqualified, but it is equally true that it is his duty to do so in a proper case, and that case may as well be made upon the judge's own initiative as upon that of a party litigant. It is competent and proper for him, with the parties before the court, to interrogate the summoning officer, sheriff, or coroner, to call upon the prosecution or defense so to do, to the end that he may learn at the outset whether that officer is qualified, and if he be not, then to avoid the unnecessary delay and expense which would be imposed upon the state, and upon litigants, by placing the venire in disqualified hands.

ANGELLOTTI, J. I dissent from that portion of the foregoing opinion which is numbered "1," and also dissent from the order denying a rehearing.

Assuming that the challenge to the panel was well based, I believe that, under the circumstances shown by the record, the objection should be held to have been waived. It appears that five members of the special panel were selected to complete the jury, seven jurors having been selected from the previous panel, properly drawn and summoned. To my mind appellant's objection practically amounts to no more than that these five jurors so selected from the special panel should not have been allowed to act, for the sole reason that they were not properly selected and brought into court. It affirmatively appears, however, that after the challenge to the panel was disallowed, the defendant participated in the examination of the individual jurors composing the same, passed without objection or challenge, each of the five jurors ultimately taken from said panel to complete the jury, and allowed such jurors to be sworn to try the case, without exercising the right of peremptory challenge as to any of them, although she then had nine unused peremptory challenges. Under these circumstances, I believe that she should be held to have waived her objections so far as these five jurors were concerned. To my mind the principle applicable is that stated in People v. Durrant, 116 Cal. 196, 197, 48 Pac. 75.

I concur: SLOSS, J.

SHAW, J. I agree that the trial court may forestall a challenge to a special venire of jurors, for bias of the summoning officer, by examining them in the presence of the defendant and his attorney, at the time of ordering the special venire, and allowing the defendant to participate in such examination. In that case I doubt not the defendant would be deemed to have waived a challenge for any cause covered by such examination, unless he then filed an affidavit alleging disqualification. I also agree that in many cases it would be a useless formality to require a defendant to exhaust his peremptory challenges, in a vain effort to rid himself of jurors whom he really considered objectionable because of the bias of the officer who summoned them. But I think in the present case, the circumstances show that the proceeding caused no prejudice to any substantial right of the defendant, and a practical admission of this fact by the defendant. The only substantial right involved was the right to a trial by a fair, unbiased, disinterested jury of qualified citizens, selected according to the forms of law by persons without bias toward her. This the record shows she actually had. The fact that the possession of an opinion by the sheriff, who did not summon the jury, works a technical disqualification of the deputies who did perform that service, is not, as I believe, such an important departure from the forms of law as to require a reversal of the case, in the total absence of any claim that it did in fact in any wise affect the character of the jurors selected. For these reasons, and because I considered the other errors alleged to be equally unsubstantial, I did not concur in the original judgment of reversal herein.

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10 Cal. App. 477

HUBBARD v. LEE et al. (Civ. 549.)

(Court of Appeal, First District, California. April 29, 1909.)

1. Appeal and Error (§ 1097*)—Law of the Case.

The decision of the court on appeal is the law of the case on a subsequent trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358–4368; Dec. Dig. § 1097.*]

2. Mechanics' Liens (§ 132*)—Performance of Additional Work—Estoppel.

Where additional work is performed or material furnished pursuant to the demand of the owner of the building based on the theory that the contract for its erection has not been fully performed, the owner is estopped from asserting that the contract was completed before the additional work was performed or materials furnished, though such was the fact.

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 132.*]

3. Mechanics' Liens (§ 132*)—Performance of Additional Work—Estoppel.

Where the owner of a building took the position that it was not completed and consistently maintained until a designated date, that it was not completed, and repeatedly stated to the contractor and the architect that the building was not completed, and that more work must be done before the building would be accepted, and the architect, as agent in supervising the construction of the building, repeatedly made the same statements to a materialman, who relied thereon, the owner was estopped from asserting that the building had been completed prior to such designated date, though, in fact, it had been completed.

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 132.*]

Appeal from Superior Court, Santa Clara County; John E. Richards, Judge.

Action by T. B. Hubbard against C. H. Lee, administrator of Eugene A. Lee, deceased, and others. From a judgment for defendants, and from an order refusing to amend the conclusions of law and to vacate the judgment as entered, plaintiff appeals. Reversed, with directions.

See 6 Cal. App. 602, 92 Pac. 744.

A. H. Jarman and Will M. Beggs, for appellant. Beasly & Fry and J. S. McGinnis, for respondents.

HALL, J. This action was brought by plaintiff, as assignee of Hubbard & Carmichael Bros., materialmen, to foreclose a lien in the sum of $1,894.90 for materials used in constructing certain buildings upon the property of defendants' intestate, Eugene A. Lee, who was one of the original defendants in the action, but has died since the action was brought. The contractors, Hastings & Son, are also defendants, but made no defense other than to file a formal answer. Plaintiff also sought a personal judgment against Lee for the sum of $1,894.90, basing this claim upon a notice given Lee on June 26, 1906, that plaintiff's assignors had furnished the contractors certain materials used in constructing the buildings. This notice intercepted $526.35 in the hands of Lee, for which the court gave plaintiff judgment against C. H. Lee as such administrator, but refused to give judgment for any lien. Plaintiff insists that on the findings made by the court he is entitled to a lien against the property of Lee for the amount sued for. He accordingly in due time made a motion under section 663, Code Civ. Proc., to amend and correct the conclusions of law and to vacate the judgment as entered, and that a judgment awarding him a lien for the amount of his claim and foreclosing the same be entered. His motion was denied, and this appeal is from such order and judgment.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The contract under which the buildings were built was never filed in the recorder's office, and no notice of the completion of the buildings was ever filed in said office. The claim of lien was filed on the 23d day of July, 1906. The court found that the buildings were actually completed on December 1, 1905. The court, however, found certain other facts, which appellant contends have the effect to estop defendant from asserting that the buildings were completed prior to May 9, 1906. Whether or not the facts found work such estoppel is the only question presented by this appeal; for, if the claim of lien was filed in time, it is not contended that plaintiff should not have judgment enforcing his claim of lien for the full amount sued for. The case was before this court on a former appeal, when the judgment was reversed because of error committed by the trial court in refusing to admit evidence as to statements made by the owner Lee and his architect to plaintiff's assignors between the months of September, 1905, and May, 1906, to the effect that the Lee houses were not completed. It was there held that such testimony "was competent for the purpose of proving or tending to prove the fact as to when the buildings were completed, and also for the purpose of proving that defendant Lee was estopped from claiming that the lien was not filed in time." The discussion in the opinion as to the admissibility of said evidence was mostly in regard to its effect as an estoppel. It was there said: "In the present case the owner not only failed to file any notice as to when the building was completed, but now claims that his statements to the lien claimant, that the building had not been completed, were immaterial, and the court held that the plaintiff 'had no right to rely upon the statements of the owner.' If the claimant could find no notice of record, if he could not rely upon the statements of the owner, and if he could not rely upon the statements of the architect, his right to file a notice of lien, and thus save his rights, was a mere hazard. If he had filed it before the building was completed, it would have been too early. If he waited beyond the statutory time, it was too late. If the owner by his own declaration intentionally led plaintiff to believe that the buildings were not completed, and plaintiff acted upon such belief, and by reason of such declaration, as to the completion of the buildings, he cannot now be permitted to falsify such declaration." Hubbard v. Lee, 6 Cal. App. 602, 92 Pac. 744. What was there decided has become the law of this case. Hoadley v. City and County of San Francisco, 70 Cal. 324, 12 Pac. 125; Benson v. Bunting, 141 Cal. 464, 75 Pac. 59; Franz v. Mendonca, 146 Cal. 643, 80 Pac. 1078. It thus only remains for us to see whether or not the findings of fact bring the case within the rule of estoppel thus laid down.

A portion of the contract between the owners and contractors is set out in the findings, from which it appears that the work and materials were to be done and furnished under the direction and supervision, and subject to the approval, of the architect employed by the owner. After finding that plaintiff's assignors did furnish the material to the contractors between April 28, 1905, and May 4, 1906, to be used in, and that the same actually were used in, the erection and construction of the buildings, the court found: "That practically all of said building materials were furnished by said firm of Hubbard & Carmichael Bros. prior to November 1, 1905, with the exception of certain minor mill work furnished on May 4, 1906, for the purpose of remedying certain trivial imperfections in said buildings. * * * That said buildings were erected on said property heretofore described according to the terms of said contract between Eugene A. Lee and the said defendants A. W. Hastings & Son, and were ready for occupancy and were actually occupied by the defendant Lee and his tenants on or prior to the 1st day of November, 1905. That upon the occupancy of said buildings the work of their construction ceased for a period of 30 days, and that said period of 30 days expired on December 1, 1905, on which day said buildings were actually completed. That said A. W. Hastings & Son, as said contractors, performed labor upon and used materials in the construction of said buildings on the 8th and 9th days of May, 1906, but that the said labor performed and materials furnished were to remedy certain trivial imperfections therein. That certain trivial work was done on the 17th day of May, 1906, in perfecting and painting certain window screens. That said Eugene A. Lee continued to occupy one of said houses as his residence, and resided therein at all times after said completion until the time of the commencement of this action. That between October 1, 1905, and April 11, 1906, the said A. W. Hastings as such contractor, and said Wesley W. Hastings as such architect, separately and repeatedly and during each month between said dates stated to the firm of Hubbard & Carmichael Bros. that said buildings were not completed, that the owner had not accepted the job, and that there was more work to be done before it was completed, and that there were two payments still due. That said firm of Hubbard & Carmichael Bros. relied upon the truth of the statements made to them by said A. W. Hastings and said Wesley W. Hastings, and did not further investigate the matter, either by visiting the premises or inquiring of the owner in regard to the completion of said buildings, except as hereinafter set forth. That during all of said period of time, to wit, between the 1st day of October, 1905, and the 11th day of April, 1906, the said Eugene A. Lee repeatedly stated during each month to his contractors, A. W. Hastings & Son, and to his architect, Wesley W. Hastings, that the buildings were not completed, that there was more work to be done, and that said work must be done by said contractors before he as the owner would accept the same That on April 6, 1906, the said Wesley W. Hastings left the city of San Jose, and, immediately upon learning of said fact, plaintiff, as one of the partners of the firm of Hubbard & Carmichael Bros., and A. L. Hubbard, an employé of said partnership, went to the home of said defendant Eugene A. Lee, and there interviewed him in reference to the completion of said buildings. That said Eugene A. Lee then and there stated to said T. B. Hubbard, in the presence of A. L. Hubbard, that the said buildings were not completed, that he had not accepted them, and that certain work must still be done by said contractors before said buildings were completed. That on or about May 1, 1906, said Eugene A. Lee stated to Will M. Beggs, the attorney of, and while acting for, the firm of Hubbard & Carmichael Bros. that the job was not completed. That immediately thereafter said T. B. Hubbard caused said contractors to complete said buildings to the satisfaction of said defendant Eugene A. Lee. That a carpenter, an employé of said contractors, under the personal supervision of said defendant Eugene A. Lee, performed such additional work on said buildings as he directed, which work consisted in remedying said trivial imperfections to the satisfaction of said owner on the 8th and 9th days of May, 1906, with the exception of the painting of certain screens, which was done on the 17th day of May, 1906."

We think the facts thus found by the court bring the case within the rule of estoppel laid down by this court on the former appeal. While it is true that the court found that the buildings were actually completed, save for some trivial imperfections, on the 1st day of December, 1905, it is perfectly clear from the findings that the owner took the position that they were not completed. Notwithstanding the trivial imperfections, he might have recorded a notice of the completion of the buildings, which would have set at rest any controversy on this point. Instead of so doing, he consistently maintained until some time in May, 1906, that the buildings were not completed. According to the findings, he repeatedly during each month from October 1, 1905, to April 11, 1906, stated both to his contractor and his architect that the buildings were not completed, and that more work must be done by his said contractors before he would accept the same. His authorized architect and agent in the supervising of the construction of said buildings repeatedly each month during the same period made the same statements to plaintiff's assignors. They relied on these statements—as we have before decided they had a right to do—until they learned that the architect had left the city, when they made inquiries of the owner, Lee, when he stated that the buildings were not completed, that he had not accepted them, and that certain work must still be done by said contractors before said buildings were completed. Thereafter Hubbard & Carmichael Bros. furnished certain mill work to the contractors for the purpose of remedying the imperfections in the buildings, and said contractors used said materials in remedying said imperfections on the 8th and 9th days of May, 1906, as required and directed by the owner.

These facts estop the owner from claiming that the buildings were completed prior to May, 1906, under the rule laid down upon the first appeal of this case, and which fully accords with the established law on this subject. The rule is thus laid down in 20 Am. & Eng. Ency. of Law, 399: "If additional work is performed or materials furnished in compliance with a demand made by the owner * * * based upon the theory that the contract for labor or material had not been fully performed, the owner is estopped to assert that the contract was completed before such additional work was performed or materials furnished, though such was clearly the fact." See, also, 27 Cyc. 147, 148; Stidger v. McPhee, 15 Colo. App. 252, 62 Pac. 332; McIntyre v. Trautner, 63 Cal. 429; Minneapolis Trust Co. v. Gt. Northern Ry. Co., 74 Minn. 30, 76 N. W. 953; Minneapolis Trust Co. v. Gt. Northern Ry. Co., 81 Minn. 28, 83 N. W. 463; Nichols v. Culver, 51 Conn. 177; Hubbard v. Brown, 8 Allen (Mass.) 590; Turner v. Wentworth, 119 Mass. 459; Farnham v. Richardson, 91 Me. 559, 40 Atl. 553; Cole v. Uhl, 46 Conn. 296. The facts found bring this case squarely within the rule above quoted.

The judgment and order are reversed, and the trial court directed to enter judgment upon the findings of fact in accordance with the views herein expressed.

We concur: COOPER, P. J.; KERRIGAN, J.

10 Cal. App. 501

WINCHESTER v. PAYNE. (Civ. 517.)

(Court of Appeal, Second District, California. May 1, 1909.)

1. EJECTMENT (§ 86*)—BURDEN OF PROOF—OWNERSHIP.

Where, in ejectment, defendant denied plaintiff's ownership or right of possession, plaintiff must show that deeds which he offered in evidence embraced the land claimed if that did not clearly appear from the description therein.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 86.*]

2. BOUNDARIES (§ 20*)—HIGHWAYS.

Where the only monuments called for in plaintiff's deed were two streets, the description will be construed to mean the lines of the streets as they were actually laid out, in absence of evidence showing a different intention.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 123–130; Dec. Dig. § 20.*]

3. EVIDENCE (§ 157*)—BEST EVIDENCE.

Where the ownership of property depended on the location of certain streets named as monuments in the deed, in absence of evidence as to the official location of the street B, the best evidence the case afforded was admissible to establish their location.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 157.*]

4. EJECTMENT (§ 94*)—ACTION—SUFFICIENCY OF EVIDENCE.

In ejectment for property bounded by certain streets, where plaintiff did not locate the property with reference to the official map referred to in the deed or the survey made therefrom, evidence *held* to sustain the finding of the trial court that plaintiff had not located the property so as to show that the description in the deed included the tract in controversy.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 94.*]

Appeal from Superior Court, Santa Barbara County; Felix W. Ewing, Judge.

Action by Sarah A. Winchester against Orren D. Payne. From a judgment for defendant and an order denying a motion for new trial, plaintiff appeals. Affirmed.

W. S. Day and Day & Day, for appellant.
Henley C. Booth, for respondent.

TAGGART, J. Action in ejectment. Judgment for defendant, and plaintiff appeals from judgment and from an order denying her motion for a new trial.

The complaint alleges ownership and possession by plaintiff of a strip of land fronting on Montecito street eight feet and six inches, and extending at the same width 175 feet into the east quarter of block 273 of the city of Santa Barbara, along the southwesterly line of said quarter, and that the defendant on August 1, 1906, ousted her from the possession thereof. The answer is, in effect, a general denial.

Plaintiff showed no connection with the paramount source of title, but the record contains this recital: "It is agreed by the parties hereto, plaintiff and defendant, that the basis of title is contained in a deed from Isaac J. Sparks to Ramona Trussel, which deed conveys to the grantee named therein a tract of land known on the official map of the city of Santa Barbara as Square 273, and bounded by Rancheria, Castillo, Gutierrez, and Montecito streets." This deed is dated September 1, 1858, and was recorded September 3, 1858, in the records of Santa Barbara county. Plaintiff also introduced in evidence three other deeds of mesne conveyance through and by which the title of said Ramona Trussel to the easterly quarter of said block was on the 10th day of October, 1885, vested in plaintiff. The particular descriptions in these and each of said deeds were the same, and are in the words and figures following: "Commencing at a point in city block two hundred and seventy-three (273) at the intersection of Montecito and Castillo streets, and running thence in a southwesterly line along the line of Montecito street 225 feet; thence at right angles into said block 225 feet; thence at right angles 225 feet to Castillo street; thence along the line of Castillo street 225 feet to the place of beginning." Plaintiff's respective predecessors in title, taking successively under each of said deeds, went into possession of and occupied continuously since the year 1878 a lot of land of the dimensions above given, which did not include the strip in question, but adjoined it immediately to the northeast; and neither they nor plaintiff have ever been in the actual occupancy of this strip. No objection was made to the introduction of these deeds on the ground that the description therein did not include the premises in dispute when they were admitted in evidence; admitted they made a prima facie showing that plaintiff held the title and was entitled to the possession of the premises therein described. But, as the ownership, possession, right of possession of plaintiff, and the ouster of plaintiff by defendant were denied by the answer, it was necessary for the plaintiff to show, after these deeds were introduced, that the description in them embraced the premises in controversy, if this did not clearly appear from such description. Walbridge v. Ellsworth, 44 Cal. 353.

The stipulation as to the common source of title by consent locates the disputed strip of land in square 273, as shown "on the official map of the city of Santa Barbara," and this "square" is by the same instrument shown to be bounded by Rancheria, Castillo, Gutierrez, and Montecito streets. No attempt, however, was made to locate the lines of the property by this map, or to determine the location of the intersection of Montecito and Castillo streets, the initial point of the description in plaintiff's deed, by this map or the monuments of the survey which it is presumed to represent. The only monuments called for in the deed to plaintiff are the two streets last named. In the absence of any evidence to establish a different intention, the description in the deed must be construed to mean the lines of these streets as they were actually laid out; in other words, according to their true location. Orena v. Newlove, 153 Cal. 136, 140, 94 Pac. 628. Appellant contends that she has done this by showing that it appears from a survey of a portion of the block made by the city engineer in March, 1906, that the frontage of the block on Montecito street is 450.44 feet, and that after deducting the disputed strip which was first inclosed by defendant in March, 1906, there remains but 217.2 feet between it and the east corner of the block at the intersection of Montecito and Castillo streets, and that, as the eight-foot strip is necessary to complete the 225 feet frontage to which she shows title, her right of possession is established. This survey so relied upon was based upon monuments placed in the streets to indicate their location by one George F. Wright, who made a survey or resurvey of the streets of the city in 1889. The purpose or intent of or authority for the survey is not shown. The only matter in the record which can be construed as giving it any authoritative value is that the lines of the streets as laid out in accordance therewith are now recognized as official lines by the city and acted upon by it. Respondent, on the other hand, relies upon a showing that prior to the year 1903 the fence on the Castillo-street side of the plaintiff's property was located about eight feet northeasterly from where it now stands, and that the rest of the fence along the Trussel block, on that street, and the fence along block No. 292, the next block to the southeast of block 273, were at least as early as 1882, and said other fences ever since have been, and still are, on a line with each other, and located about eight feet northeasterly from the line of plaintiff's fence; that, when the fences were so located, Castillo street was open for travel its full width between the fences on either side thereof; and that the street so fenced was traveled as early as the year 1882. He contends that on the authority of Orena v. City of Santa Barbara, 91 Cal. 621, 28 Pac. 268, and Oglesby v. City of S. B., 119 Cal 114, 51 Pac. 181, he has thus established the line of Castillo street so that plaintiff has her full 225 feet frontage on Montecito street without the eight-foot strip in question.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

In the absence of proper evidence essential to the correct official location of either the block or the streets surrounding it, the trial court was justified in accepting the best evidence the case afforded, or, if it afforded none, in applying the presumption which the law provides where there is a failure to present satisfactory evidence. In sustaining his conclusions, it is not necessary that we assume that the learned judge who tried the case construed the opinions in the two cases above cited as supporting the view of respondent that fences are original evidence of the street lines. We do not regard those cases as so holding. In both of them the respective parties to the litigation properly sought to locate the lines of an "official" survey to support title the paramount source of which rested thereon for purposes of description. The difficulty of locating the original monuments of the official survey recognized by both parties to each of said actions led to the consideration of two methods of determining where the lines of the streets of that official survey ran. In the Orena Case the trial court adopted the theory that measurement from the initial point of the original survey, the location of which was known, was the proper method of locating a disputed point, following the ordinance of the city declaring this to be a rule of evidence in all such cases; but it was shown by recognized monuments of the original survey in the immediate vicinity of the property in litigation that the original survey was inaccurate, and the Supreme Court in reversing the judgment in that case declared that in determining the location of the line of the street in question the initial point would not necessarily be of greater or less importance than those monuments found in the vicinity, and that measurements on the street in question would be of more value than those made elsewhere; that, in the absence of original measurements, it would be important to ascertain the boundaries of the streets as actually opened and used, and, if such location had been generally acquiesced in by the public, by lot owners, and by the municipality, in the absence of more certain evidence, it would be conclusive of the location of the lines of the official survey. Incidentally it was also determined that the ordinance attempting to legislate upon the matter of what should be received as evidence was void. In the Oglesby Case evidence as to the true location of the monuments of the Haley survey (which was the official survey of said city and stated in the opinion in that case to have been made in 1851) was lacking, and the testimony as to the location of the older improvements, such as fences, etc., was conflicting, and the trial court based its judgment of the location of the lines of the Haley survey of Laguna street upon those fences and improvements which were located approximately where the lines of the street were ascertained to be by a measurement from the initial point. In neither of these cases was it determined that a fence was original evidence of the location of a street. As said by the opinion of the Supreme Court in affirming the judgment in the Oglesby Case: "Here we have some evidence as to the true location of the lines based upon the Haley survey. The evidence is conflicting to be sure, but, being so, we cannot say which is right or which is wrong"—and so the finding of the trial court was not disturbed.

Respondent, however, has not presented the evidence of the location of the fences upon the theory that it was locating the line of the Haley survey, for, as he properly says, in his brief, "there is not a syllable of testimony in this case to show what the official survey of the city of Santa Barbara was at any time referred to in the oral or documentary evidence, or what it is now." In other words, the court was left to determine the location of a street from evidence of the city engineer and his assistant that the city now (in 1906) recognizes a certain line as the southwesterly line of Castillo street, and the testimony of a witness that prior to 1903, from at least as early as 1882, the fence inclosing plaintiff's property line stood eight feet farther to the east and was then in line with fences on either side which were in effect the same line prolonged. In the absence of any attempt of the appellant to locate her property with relation to the official map called for in her chain of title, or the survey from which that map was made, or by any other evidence showing, or tending to show, the true location on the ground of the streets with reference to which it was located, we are of opinion that the judgment of the trial court should be affirmed on the ground that plaintiff's evidence failed to locate her property on the ground so as to enable the trial court to determine from the description in her deed whether or not it covered the strip in dispute. If the trial court regarded the meager evidence given as entitled to consideration, it created a conflict as to the location of the streets. The city apparently did not, in 1906, recognize the fences along the sides of the street as showing street lines, while the property owners, including plaintiff and her predecessors in title, had done so from 1882 to 1903, and the other property owners continued to recognize the fences as the lines of the street to the time of trial. The recognition of a certain line by the city in 1906 does not necessarily establish that this was the "official" line of a street in 1878 where there is evidence tending to show that about that time the street as traveled was otherwise located. The finding of the trial court, if considered as based upon the facts mentioned, determined which evidence was of the greater value, and its conclusion in this regard will not be disturbed.

Judgment and order affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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10 Cal. App. 426

HOUGHTON CO. v. KENNEDY. (Civ. 535.)

(Court of Appeal, First District, California. April 23, 1909. Rehearing Denied by Supreme Court June 22, 1909.)

1. SALES (§ 68*)—CONSTRUCTION.

By a written instrument defendant assigned to plaintiff all right, title, etc., in and to "all the following described personal property and appurtenances to real estate, to wit: All of the fences and buildings of every description," etc., situated on certain described lands, including any "such property situated on the town site of R. or in the vicinity thereof." *Held* that the instrument covered a barn situated within 300 feet of the town site.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 184; Dec. Dig. § 68.*]

2. EVIDENCE (§ 441*)—PAROL EVIDENCE AFFECTING WRITINGS—MERGER OF NEGOTIATIONS IN WRITTEN CONTRACT.

Under the express provisions of Civ. Code § 1625, the execution of a contract in writing supersedes all oral negotiations concerning its matter which preceded its execution.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2030–2047; Dec. Dig. § 441.*]

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by the Houghton Company (a corporation) against J. W. Kennedy. From the judgment, and from an order denying a new trial, plaintiff appeals. Reversed.

Frank H. Short and F. E. Cook, for appellant. J. P. Berhard and Francis C. Huebner, for respondent.

HALL, J. Plaintiff brought this action to restrain defendant from removing a barn from the land of plaintiff. Defendant, besides answering, filed a cross-complaint in claim and delivery for the said barn, and obtained judgment for the possession thereof, or the value thereof, in the sum of $1,000. Upon the hearing of plaintiff's motion for a new trial the court ordered that, unless defendant should consent to a reduction in the amount of the judgment for the value of the barn to the sum of $750, a new trial should be granted. Defendant so consented, and the motion was thereupon denied. Plaintiff in due time appealed from this order as well as from the judgment.

The barn in question was originally built by defendant upon land belonging to one J. F. Houghton, the grantor of plaintiff; but, though built upon the land of Houghton, it is conceded by appellant, as we understand him, that it belonged to defendant, and might be by him removed, unless defendant, by a certain written instrument executed by himself and wife on or about the 19th day of April, 1905, assigned and transferred said barn to plaintiff. In a special verdict the jury found, in effect, that defendant had not assigned or transferred said barn to plaintiff, and the court adopted said verdict as a part of its findings. Defendant was a tenant of plaintiff, and had become much indebted to it. On the 19th day of April, 1905, plaintiff and defendant effected a settlement of their respective claims, evidenced by four writings, three of which bear date April 18, 1905, but all were delivered on April 19, 1905. One of these writings was executed by defendant and his wife, two by plaintiff, and the third by defendant. By the first of these writings defendant and his wife "assigned and transferred and delivered unto the Houghton Company, a corporation, all of their right, title, estate, claim or interest in or to all of the following described personal property and appurtenances to real estate, to wit: All of the fences and buildings of every description, and all engines, pumps, appurtenances and pipe lines, scales, watering troughs and other property and appurtenances of like character and description, all situated upon or connected with the lands and property described in a certain lease between J. F. Houghton and J. W. Kennedy, dated October 1, 1901, and the lands and property described in a certain trust deed from said J. W. Kennedy and wife to H. B. Houghton and H. F. Gordon, trustees for J. F. Houghton, dated the 15th day of December, 1898, and recorded in volume 220 of Deeds, page 430 et seq., Fresno County Records, together with and including all of the connections and appurtenances used in connection with said property situated upon said lands, or in the vicinity thereof, including any such property situated upon or extending through or under the town site of Rolinda, or through or under the streets, roads or highways thereon, or in the vicinity thereof." It is upon this writing that plaintiff depends, as showing a transfer of the barn in question from defendant to plaintiff. The barn is not situated upon the lands described in the lease or deed of trust referred to in the assignment. Neither is it situated upon the town site of Rolinda, but it is situated in the vicinity of such town site, upon land that Kennedy had been permitted to use by Houghton, the undisputed evidence being that the barn is situated about 300 feet from block 8 of said town site. It is this undisputed fact that is relied on as bringing the barn within the terms of the assignment; appellant's interpretation of the words of the assignment being that it is a direct conveyance of all buildings situated upon certain described property, or situate upon the town site of Rolinda, or in the vicinity thereof. A careful examination of the instrument has convinced us that this interpretation is correct.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

In the first part of the assignment is an enumeration of certain kinds of property assigned, described as situated upon, or connected with certain described lands. Next follows language intended to carry the connections and appurtenances of said enumerated property, whether such connections be upon said lands or in the vicinity thereof. The barn does not come within any of this language, however, for the evidence is that it was neither upon the lands described, nor physically connected with it, or used in connection with any improvements thereon. It is the concluding language of the assignment that covers the barn, to wit, "including any such property situated upon or extending through or under the town site of Rolinda, or through or under the streets, roads or highways thereon, or in the vicinity thereof." The words "any such property" refer to such property as had before been enumerated, which includes "buildings of every description," and the entire clause brings within the operating words of the assignment buildings of every description situated upon the town site of Rolinda or in the vicinity thereof. We are unable to fairly read the words of the assignment in any other sense.

Respondent invokes the rule that, where there is a conflict of evidence, this court will not interfere with the verdict of the jury or the findings of the court. But there is no conflict as to the words of the assignment, nor as to the location of the barn. Kennedy did testify that, at some time prior to the settlement between him and plaintiff, he had asked Houghton to take the barn, and allow the value thereof to Kennedy on a settlement, and that Houghton refused, but no settlement was agreed upon at this time; and, when the settlement was finally effected, the contract was reduced to writing, by the terms of which the barn was assigned by defendant to plaintiff. The preceding negotiations testified to by Kennedy were clearly superseded by the written contract. Civ. Code, § 1625. The record does not present a case of a conflict of evidence, but simply a case for the interpretation of a written contract.

The judgment and order should be reversed, and it is so ordered.

We concur: COOPER, P. J.; KERRIGAN, J.

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10 Cal. App. 430

LONG v. NEWMAN et al. (Civ. 590.)

(Court of Appeal, Third District, California. April 23, 1909. Rehearing Denied by Supreme Court June 22, 1909.)

1. BUILDING AND LOAN ASSOCIATIONS (§ 39*) — MORTGAGES — FORECLOSURE — NOTICE OF AMOUNT DUE.

The by-laws of a building and loan association provided that the whole premium on loans shall be divided into a certain number of installments, payable monthly. A note, made by plaintiff on his procuring a loan, provided that the principal and interest, together with the whole premium, should become payable at the company's option if any installment was not paid when due; plaintiff waiving notice of the exercise of such option. The instrument assigning plaintiff's shares of stock as security for the note, as required by the by-laws, contained a like provision, and made the by-laws a part thereof. Civ. Code, § 639, makes the whole loan due at the option of the board of directors when any member is six months in arrears in the payment of interest or premium. *Held* that, where plaintiff was in default for more than six months, defendant was entitled to declare the whole loan due, and sell the property, without notifying plaintiff of the exact amount due, and plaintiff's willingness to pay the interest and principal due would not prevent defendant from exercising the right to sell the property on default, in absence of a showing of fraud or mistake in allowing credits, and a tender by plaintiff of the full amount due, specifying it.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Building and Loan Associations, Dec. Dig. § 39.*]

2. EVIDENCE (§ 65*)—PRESUMPTIONS—KNOWLEDGE OF LAW.

One is presumed to know the law defining his obligations under a contract which he executes.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 85; Dec. Dig. § 65.*]

3. APPEAL AND ERROR (§ 954*)—REVIEW—DISCRETION OF TRIAL COURT—DISSOLUTION OF INJUNCTION.

An order dissolving a temporary injunction is within the trial court's discretion, and will not be disturbed on appeal, in absence of a clear abuse thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3818; Dec. Dig. § 954.*]

4. INJUNCTION (§ 163*) — TEMPORARY RESTRAINING ORDER—DISSOLUTION.

Where both the statute and the contract clearly authorized a loan association to declare a loan due and payable in case of nonpayment of premiums, etc., for a certain time, and there was no valid excuse for a member's failure to comply therewith, a temporary injunction, restraining the foreclosure of the trust deed as authorized on default, was properly dissolved, and it would have been an abuse of discretion not to dissolve it.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 163.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Suit by Mary J. Long against Simon Newman and others to enjoin the sale of property upon foreclosure of a trust deed, and for other relief. From an order dissolving a temporary injunction, plaintiff appeals. Affirmed.

Dudley Kinsell, for appellant. Naphtaly & Freidenrich, for respondents.

HART, J. The defendant Pacific Loan Association is a building and loan corporation, organized and existing under and by virtue of the laws of this state. On the 30th of April, 1901, the plaintiff, having borrowed from said defendant the sum of $4,200, on the general plan of building and loan concerns, executed and delivered to said defendant her promissory note in said amount, payable 10 years after date, with interest at the rate of 7 per cent. per annum. For the purpose in part of securing the payment of said loan, the plaintiff executed a deed of trust to a certain lot or piece of real property situated in the city of San Francisco to the defendants Simon Newman and Henry Sinsheimer as trustees, with full power to sell said premises at public auction to satisfy the loan secured from said Pacific Loan Association, in the event of default by the plaintiff in any of the payments required by her contract with said association.

It is alleged in the complaint that the defendants, claiming that the plaintiff had failed to make the payments required of her under her contract, had taken steps to sell said premises "on the 12th day of March, 1908." It is alleged that the plaintiff "has caused to be fully paid and discharged all of the interest due upon said promissory note, but the said defendant Pacific Loan Association has disputed such payments, and has claimed a larger sum and amount to be due than is actually due under the terms of said instrument," etc.; that the plaintiff has at all times been, and is now, ready, able, and willing to pay all interest, charges, and penalties of "every kind and character justly due from her to said corporation defendant, under the terms of said promissory note, or in any manner whatsoever due from her to said corporation defendant, but the said corporation defendant has at all times refused to accept, and still refuses to accept, the payment of any other sum or amount than the full amount wrongfully and unjustly claimed by it as aforesaid." It is alleged that the defendants Newman and Sinsheimer, threaten to sell the said premises; that said property is of the value of $9,000, and that "a sale, or purported sale, thereof, as threatened by said defendants, will cause great and irreparable injury to the plaintiff, and will cast a cloud upon her title to the premises aforesaid, and that such injury will be of a character for which pecuniary damages will not afford adequate compensation." The prayer is that the defendant corporation be required to account "to this court for all moneys paid by, and credits due to, said plaintiff upon said promissory note," so that the amount, if any, due from plaintiff to the corporation may be adjudged by the court; that a provisional injunction or temporary restraining order be made, enjoining and restraining the defendants or their agents from publishing the said premises as for sale, and from selling the same, etc. The complaint is verified, and upon the filing thereof the court below caused to be issued a temporary injunction as prayed for therein. On the 3d day of April, 1908, upon motion of the defendants previously noticed, said motion having been made on the pleadings (complaint and the affirmative matter set up in the answer) and an affidavit of Emil Gunzburger, secretary of the corporation defendant, the court made an order dissolving the temporary injunction. It is from said order that this appeal is taken.

The only points made by the appellant on this appeal are those involved in the contention that the amount claimed to be due is unliquidated and disputed, and that, under the terms of the trust deed, she was entitled, at the hands of the corporation, to specific notice of the exact amount due it from her before the right to sell the property covered by said deed accrued to said corporation; or, to put the proposition as it is stated in his brief by counsel for the appellant: "That a specific demand for the precise sum due was absolutely necessary as a condition precedent to the publication of notice of, or proceedings by the trustees for, the sale of the property; that before a sale could be lawfully attempted the plaintiff was entitled to have a statement of the amount due, and an account of the items, including the character of the fines and penalties claimed, and also a statement and accounting of the dividends, and accumulations of the stock, to be added as a credit to the payments by her"—that the corporation having failed to so apprise plaintiff of and demand from her the precise balance due it from her, she was entitled to the continuance of the preliminary injunction until the amount due was determined by the court, and an opportunity presented to her for a redemption of her property. Hence it is claimed, the court erred in its order dissolving the preliminary injunction.

The facts as alleged in the answer, and as disclosed by the affidavit of the secretary of the corporation, do not, in our opinion, support the contention of the appellant.

By the provisions of section 1, of art. 15, of the by-laws of the defendant corporation, the same being set forth in full in the answer, there are two plans upon which said corporation makes loans—one known as the "gross premium plan," and the other as the "installment premium plan." By the former plan the amount of the premium is deducted from the amount of the loan when made, while under the last-mentioned or "installment premium plan" the whole amount of the premium is divided into 120 equal installments, "one of which shall be paid by the borrower monthly, on the first Wednesday of each month, until the whole amount of premium is paid, or the loan has been satisfied." Section 2 of said article of the by-laws provides that "each stockholder, for each share of stock he may hold, shall be entitled to a loan of two hundred dollars from the funds of the association by assigning for each two hundred dollars, or fraction thereof, so loaned, one share of the stock of the association as collateral security, together with a mortgage on real estate," etc. On the 30th day of April, 1901, the plaintiff and her husband borrowed from the association the sum of $4,200 on the installment premium plan, the amount of the premium being divided into 120 equal monthly installments of $10.50. The plaintiff and her husband executed and delivered to the corporation their promissory note for the amount of the loan, payable 10 years after date, with interest at 7 per cent., payable monthly, and further promised to pay the monthly premium of $10.50. As security for the payment of the note the plaintiff and her husband pledged to the association the 21 shares of capital stock in the association held by plaintiff, and as further security for the payment of said note they executed and delivered to the corporation the deed of trust to which we have hitherto referred, and covering the property, to restrain the sale of which by the corporation is the object of this proceeding. It will thus be seen that the plaintiff, under the terms of the loan, obligated herself to make the following monthly payments to the association: $24.50 for interest, $10.50 for premium, and $21 for dues, aggregating a monthly payment of $56.00.

The note provides, among other things, that "in case said monthly interest, or any part thereof, or any of said installments of premium aforesaid, or any part thereof, is not paid as it comes due and payable, then the whole of said principal sum, and the interest due thereon together with the whole of said premium, shall be and become forthwith, due and payable, at the option of the holder hereof, and notice of the exercise of such option is hereby waived." A covenant of similar tenor and import to the foregoing is contained in an instrument executed by the plaintiff and her husband assigning to the association her shares of stock therein as security for the payment of said note.

From the affidavit of Gunzburger it appears that plaintiff, for two or three years after securing the loan, made payments regularly, but after that time "the payments became irregular, and were made after long intervals"; that "during all the time since April 30, 1901, plaintiff had a passbook, which was issued to her by said defendant corporation, wherein was entered each payment as made by plaintiff," and that in all said transactions plaintiff was represented by her son, Percy V. Long, Esq.; that "during the entire year of 1906 no payment whatever was made by plaintiff to defendant corporation on account of interest or premium, as specified in said promissory note, or on account of dues, except the sum of $112, paid by her through Percy V. Long, on the 26th day of November, 1906"; that "since said last-named day no payment whatever has been made by plaintiff, either on account of interest or premium or dues." On the 10th of May, 1907, said Gunzburger, as secretary of said association, addressed a letter to the plaintiff, informing her that her "account is beyond the time allowed by the by-laws many months and the Building and Loan Commissioners have issued instructions to collect or foreclose all such accounts," and requesting her to pay up and satisfy her delinquencies immediately.

On October 23, 1907, one C. C. Hamilton, representing plaintiff, wrote to Gunzburger, stating that "about two months ago, the statement of the Pacific Loan Association against Mary J. Long was forwarded to me for investigation," and declaring that he (Hamilton) was unable to understand the statement and certain specified items therein contained, and requesting Gunzburger to send him information "concerning the nature of this instrument [referring to the deed of trust] that will enable me to understand the condition of the indebtedness mentioned." To this letter Gunzburger replied, under date of October 25, 1907, explaining minutely the nature of the contract between the plaintiff and the corporation, and stating that, if Mr. Hamilton would call at the office of the association, he would be given all the information relative to the transaction he might desire. To this last letter it does not appear that there was any reply, either by Hamilton or the plaintiff. Gunzburger, in a letter under date of December 10, 1907, informed the plaintiff that at the next meeting of the board of trustees of the association it would adopt a resolution authorizing the trustees to proceed to act under the power vested in them by the deed of trust, and sell the property described in said deed, said letter, moreover, containing the following: "If you wish to avoid expenses, call at once and either pay or arrange about giving a deed without costs."

Later a sale of the property under the trust deed was ordered, notice whereof having been published for three successive weeks, and the time specified for such sale being the 5th day of March, 1908. "On the day prior to said last-named date," proceeds the affidavit of Gunzburger, "Mr. C. C. Hamilton, representing the plaintiff, requested that such sale be postponed for one week. Thereupon said sale was postponed until the 12th day of March, 1908. Plaintiff's said representative was informed of said postponement, and notice of said postponement of said sale was duly published." Gunzburger further deposes that he has had some experience in dealing in real estate in the city of San Francisco; that he is familiar with the property covered by the trust deed, and with the value thereof; "that said property is assessed on the last assessment roll at the sum of $3,540, and the market value of said property, in the opinion of deponent, does not exceed the sum of $6,000."

The foregoing statement represents, substantially, the facts upon which the court below founded the order complained of on this appeal.

Section 639 of the Civil Code contains, among others, the following provisions: "* * * Whenever a borrowing member shall be six months in arrears in the payment of his dues, or interest, or premium, the whole loan shall become due at the option of the board of directors; and they may proceed to enforce collection upon the securities held by the association. The withdrawal value, at the time of the commencement of the action, of all shares pledged as collateral security for the loan, shall be applied to the payment of the loan, and said shares, from that time, shall be deemed surrendered to the association." The Legislature of 1907 (St. 1907, p. 927, c. 502, § 1) amended this part of said section so that now, when a borrowing member is in arrears three months, the whole loan shall become due at the option of the board of directors, etc. It is thus to be observed that the statute itself, where the contract does not itself fix the time, practically fixes the time at which the whole loan shall become due, in the case of a borrowing member who is in arrears for a period of six months in the payment of either his dues, or interest, or premium, by investing the directors of the association with the discretion of so declaring and thereupon proceeding to enforce collection of the whole amount upon the securities held by the association.

The several instruments executed by the plaintiff and her husband, and which constitute the written evidence of the terms of her contract with the association, plainly provide for the payments required to be made, and the penalty for, or the consequences of, default in any of such payments in accordance with the requirements of the statute. The plaintiff is presumed to know the law from which is derived the vitality of the contract into which she entered, and presumably read and became thoroughly familiar with the full import and scope of the terms of said contract before making herself a party to it. She must therefore have known and fully understood that in her agreement she emphasized the provisions of the law in conferring upon the board of directors the discretionary power of declaring, and conclusively determining, that the whole loan shall become due (that is, payable) in the event that she was in default for a period of six months in any of the payments which she promised and thus obligated herself to make. Moreover, she had a passbook, in which were inserted all credits to which she became entitled by reason of the payments made by her. Besides, she was a member of the association, and as such must be deemed to have some knowledge of its by-laws, and particularly is this true since the collateral agreement by which she pledged her 21 shares of stock in the association as partial security for the repayment of the loan makes the by-laws a part of its terms.

The complaint itself declares that the association rendered an account to the plaintiff, showing that the principal and interest on the promissory note amounted to the sum of $8,056.81; that the plaintiff was entitled to a credit thereon of $2,058.00, leaving a balance due of $5,998.81. It is true that the complaint alleges that the plaintiff "claims" that the large balance so claimed is "in consequence of penalties incurred by plaintiff, the kind, character, and amount of which are unknown to plaintiff," and declares that the same do not exist, yet there is no allegation charging fraud or mistake against the association in its claim as to the balance due as exhibited by the statement so rendered; nor is there any evidence in the record that said statement was incorrect, or that the plaintiff was not thus fully apprised of the precise state of her account with the association. If the account, in the opinion of the plaintiff, was erroneous for any reason; if it contained incorrect items of charges against her; if, in short, she were without sufficient information as to the status of the account to enable her to offer the exact amount due the corporation, and thus satisfy all delinquencies—she could have experienced no difficulty in securing full knowledge of the same at the association's office, to which, according to the undisputed facts, she had been repeatedly and importunately invited for that purpose, and to which, as a member, she had a right to go at any time without invitation, and make full investigation into her affairs with the association. This she did not do, and if now she must suffer to some extent by reason of the sale of her property, her own inexcusable remissness is alone responsible for it.

But, it is absolutely clear that she was in arrears in her payments, beyond the time after which the law provides that the directors may, in their discretion, order the property to be sold, and that she knew she was so in default, and the board of directors, having in the exercise of their option declared the whole loan to be due, in ordering the property to be sold, and taking the steps necessary to sell the same, were clearly within their rights under the law and the contract, whether plaintiff had previously been notified of the precise amount due or not; for, as to a borrowing member, the law does not prescribe any notice in the case of arrearages in any payments he is required to make. Civ. Code, § 639, supra. Nor do we find any such requirement in any of the several instruments constituting the contract between the association and the plaintiff. In other words, under the terms of her contract, as well as under the provisions of the law, the plaintiff had by her delinquencies forfeited her rights under said contract, if the directors of the corporation so determined, and the trustees thereupon authorized to proceed with a sale of the property for the satisfaction of the loan.

The contention of the appellant to the effect that the allegation in the complaint that plaintiff is ready, able, and willing, "and now offers, to pay all of such interest and penalties as may be found to be justly due from her to the corporation defendant by this court, and in addition thereto to pay the sum of $4,200, the principal of said promissory note," operates to prevent the sale of the property cannot be maintained under the averments of the complaint. The appellant does not offer a specific amount, and, besides, there having been default in the required payments for a period of six months, the law gives the association the right, without any qualification, to sell the property under the terms of the trust deed, if the directors after delinquencies covering that period elect to exercise that right. Of course, we do not mean to be understood as saying that, had plaintiff alleged in her complaint that there were erroneous debits against her in the account, and that such overcharges were due either to mistake or fraud on the part of the association, and had offered to pay the full amount, specifying the same, minus such erroneous charges, she would not have been entitled to an adjustment of the account by the court and an order restraining the sale of the property pending such determination. But, as we have seen, there is no charge of mistake or of fraud, and her complaint does not point out specifically the alleged overcharges, but in a general way only states that the interest charged exceeds the "interest justly due," and that "the said corporation defendant is not entitled to any of the penalties by it claimed," etc.

We have examined the cases of Porter v. Jennings, 89 Cal. 445, 26 Pac. 965, and Bullard v. Kempf, 119 Cal. 13, 50 Pac. 780, cited by counsel for appellant. These cases have no application to the facts as disclosed by this record.

It is the settled rule in California that an order granting or dissolving an injunction is a matter of discretion with the lower court, and that such discretion will not be interfered with by a reviewing court, unless it clearly appears that it has been abused. In the case at bar the facts are such, in our opinion, as would justify an appellate court in holding it to be an abuse of discretion if the court below had refused to dissolve the injunction pendente lite. The law by which the contract into which plaintiff entered is expressly authorized is unambiguous, the terms of said contract are themselves clear and plain, and there is no valid reason disclosed excusing plaintiff's failure to comply therewith, or, having so failed, to prevent the association from securing its due by a foreclosure upon the securities pledged for the repayment of the money loaned. It is not shown, as before stated, that the association has in any wise violated the law, or done any other wrong which would justify a court of equity in interposing in plaintiff's behalf.

The order appealed from is, for the foregoing reasons, affirmed.

We concur: **CHIPMAN, P. J.; BURNETT, J.**

10 Cal. App. 460

PEOPLE v. WEIR. (Cr. 165.)

(Court of Appeal, First District, California. April 28, 1909. Rehearing Denied May 26, 1909; Denied by Supreme Court June 24, 1909.)

Assault and Battery (§ 74*)—Indictment—Requisites—Designation of Instrument.

An indictment under Pen. Code, § 245, punishing one who commits an assault upon another with a deadly weapon, etc., which alleged that accused assaulted another "with a certain deadly weapon, to wit, a large shovel," was not objectionable as not showing that the instrument described was in fact a deadly weapon, as it would have been sufficient to merely allege that the offense was committed with a deadly weapon without further describing the instrument; the only effect of the description being to confine the proof to the character of the instrument described.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 120; Dec. Dig. § 74.*]

Appeal from Superior Court, Fresno County; George E. Church, Judge.

W. J. Weir was convicted of assault with a deadly weapon, and, from the judgment and an order denying a motion in arrest, he appeals. Affirmed.

E. A. Williams, for appellant. Attorney General Webb, for the People.

KERRIGAN, J. The information in this case charged the defendant with the crime of "an assault with a deadly weapon, to wit, a large shovel." He was tried and convicted of the offense charged, and thereafter judgment was pronounced that defendant pay a fine of $500, with the alternative of imprisonment in the county jail of Fresno county. This is an appeal from the judgment and from an order denying defendant's motion in arrest of judgment.

The information was filed under section 245 of the Penal Code, which reads as follows: "Every person who commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable," etc. The charging portion of the information alleges the assault to have been made upon the person of G. Brocks by the defendant with a "certain deadly weapon, to wit, a large shovel." Defendant contends that the information does not state facts sufficient to constitute a public offense, in this: that the words "a large shovel" are too indefinite to show that the instrument described was in fact a deadly weapon. The authority relied upon is the case of People v. Perales, 141 Cal. 581, 75 Pac. 170. But that case is radically dissimilar from this, as will be patent when it is noted that in that case the information did not attempt to charge an assault with a deadly weapon, but "an assault by means likely to produce great bodily injury"; and the Supreme Court there held that the language of the section "or by means or force likely to produce great bodily injury" is a general and comprehensive term, designed to embrace many means or forces which, aside from a deadly weapon or instrument, may be used in making an assault, and that, therefore, an offense under this part of section 245 cannot be charged in the language of the section, but the particular things and acts which constitute the offense must be alleged. In the case at bar the offense is stated to have been committed with a "deadly weapon," and, as the term "deadly weapon" has a well-recognized meaning, it was sufficient to use that term in the indictment without further description of the particular instrument employed. The cases in this state so hold.

In People v. Savercool, 81 Cal. 650, 22 Pac. 856, the defendant was charged with "an assault with a deadly weapon, to wit, a revolver"; and there it was said: "Examining the information, we find that it follows the language of that section. This is all that is necessary. The ultimate or issuable facts which the statute declares to constitute the offense are to be pleaded substantially in the language of the law, while probative facts, such as the intent with which an assault is made, and the 'present ability' to do it, must be proved, but need not be alleged in the information or indictment"—citing cases. "It being charged that the assault was made with a 'deadly weapon,' as the statute prescribes, it was unnecessary to have described it further as 'to wit, a revolver,' as was done. The kind of weapon was a matter of proof only." In People v. Congleton, 44 Cal. 92, it is said that an indictment for an assault with a deadly weapon with intent to do bodily injury to another may in general terms aver the assault to have been made "with a deadly weapon"; that in so doing it would but follow the language of the statute by which the offense itself is defined. In People v. Perales, supra, the Supreme Court say: "The term 'deadly weapon' has a precise, well-recognized meaning, and the nature of such weapon as being one likely to produce great bodily harm is well understood. It is expressly declared by the statute a specific means, the use of which in making an assault shall constitute an offense, and therefore, under the general rule, an assault with it may be pleaded in the language of the statute." It thus clearly appears that the information is sufficient and proper in form. The only effect of the words "a large shovel" in the information was to confine the prosecution to proof that the assault was made with the instrument described, and not with some other. People v. Savercool, supra; People v. Carson (Cal.) 99 Pac. 970.

The defendant upon his conviction was fined $500, with the alternative of 250 days in the county jail. This alternative did not exceed the terms for which the defendant might have been imprisoned for the offense of which he had been convicted, and therefore the judgment is not subject to the objection urged against it by defendant. Pen. Code, §§ 245, 1205.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The judgment and order appealed from are affirmed.

We concur: COOPER, P. J.; HALL, J.

10 Cal. App. 440

HOLDT et al. v. HAZARD et al. (Civ. 609.)

(Court of Appeal, Second District, California. April 23, 1909.)

1. MINES AND MINERALS (§ 97*) — MINING PARTNERSHIP—EXISTENCE OF RELATION.

Where parties expressly agreed that they would hold and work certain mining claims for their joint use and benefit, and did some work on the premises, a partnership existed between them.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 222; Dec. Dig. § 97.]*

2. MINES AND MINERALS (§ 12*) — MINING CLAIMS — QUALIFICATION OF LOCATOR — ALIENAGE.

The question of qualification of the locator of a mining claim so far as the validity thereof is affected by his alienage cannot be raised in actions between private persons wherein the United States is not made a party.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 12.*]

3. MINES AND MINERALS (§ 29*) — PUBLIC MINERAL LANDS — LOCATION OF CLAIMS — NECESSITY OF ACTUAL POSSESSION.

Where persons make a valid location of mineral claims on the public domain in accordance with Rev. St. U. S. § 2324 (U. S. Comp. St. 1901, p. 1427) relating to such locations, their right of possession will continue until they have, in fact, abandoned it or forfeited it by failure to do the requisite amount of work within the prescribed time, and they need not keep an actual possession of the claims.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 29.*]

4. MINES AND MINERALS (§ 20*) — PUBLIC MINERAL LANDS — LOCATION OF CLAIMS — SUFFICIENT MARKING OF BOUNDARIES.

Where notices were posted upon each mineral claim located on public domain, designating the place of posting as the starting point, which notices contained calls and distances to certain stakes at the four corners of each claim, the area of which was 600 feet by 1,500 feet, and the stakes thus called for were set and in some cases stones piled around them, there was a sufficient marking of the claims.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 40–44; Dec. Dig. § 20.*]

5. MINES AND MINERALS (§ 38*)—ACTIONS—JUDGMENT—DESCRIPTION OF PROPERTY.

A judgment in an action to determine the right of possession to mineral claims on public lands as between two contesting locators, which described the claims in accordance with the notices posted thereon, which constituted a part of the markings of the claims, and contained other data so that the claims could be identified with reasonable certainty, sufficiently described them.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 38.*]

Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by Iver M. Holdt and others against R. D. Hazard and others. From a judgment for plaintiffs and an order denying a new trial, defendants appeal. Affirmed.

Day & Day, for appellants. Carpenter & Gibbons and R. V. Bouldin, for respondents.

SHAW, J. This is an action to recover possession of three certain mining claims from which it is alleged plaintiffs were ousted by defendants. Judgment went for plaintiffs, from which, and an order denying their motion for a new trial, defendants prosecute this appeal.

The complaint alleges that on November 16, 1906, and at the time of instituting the suit, plaintiffs, who were partners for the purpose of working the same, were the owners, in possession of, and entitled to the possession of three certain mining claims situated in section 33, township 28 south, range 11 east, Mt. Diablo meridian, San Luis Obispo county, each of which claims was 600 feet in width by 1,500 feet in length, bounded and marked by certain stakes and monuments thereon, which said claims were known as "Crown Copper and Silver Claim," "Black Horse Copper and Silver Claim," and "Saddlerock Silver and Copper Claim"; that while plaintiffs were such owners, so possessed, and entitled to the possession thereof, defendants did on November 16, 1906, wrongfully and unlawfully enter thereupon and did oust and eject plaintiffs, and since said date have unlawfully withheld possession thereof. The answer is a general denial.

The findings attacked by appellants upon specifications of insufficiency of evidence to support the same are, in effect, that each of said plaintiffs was a citizen of the United States; that they agreed to hold and work said claims as joint owners and partners therein; that at the time of making said locations plaintiffs discovered ore in place in ledges upon each of said claims, which ore so found justified plaintiffs in believing that the claims contained mineral in paying quantities; that at the time plaintiffs made their locations the lands were unoccupied and part of the public domain; that on September 2, 1906, plaintiffs, in accordance with the provisions of chapter 6, tit. 32, Rev. St. U. S. (U. S. Comp. St. 1901, pp. 1422–1442), posted a notice upon each of said claims, particularly describing the same and the boundaries thereof, together with the names of the locators; that on September 3 and 4, 1906, plaintiffs, by stakes and monuments, marked the boundaries of each of said claims so "that a person unfamiliar with said lands could readily have found all of said stakes and said mounds and could thereby have determined the boundaries of said claims with reasonable certainty." The court also found that on October 12, 1906, defendants ousted plaintiffs from the possession of said claims and posted notices of location upon the Black Horse claim, designating it as the "Andicondi" claim, located by defendant Hobson, and posted a notice of location upon the Crown claim, designating it as the "San Ramon" claim, with defendant Hazard as the locator thereof; that ever since said date said defendants have retained possession of said lands; that as to the Saddlerock claim, located in the name of Rebecca Holdt, defendants in open court disclaimed any claim or right to possession thereof. The evidence without conflict fully supports the finding as to the discovery of ore. Indeed, appellants conceded in open court that the mines contained ledges of mineral, but they denied plaintiffs' discovery. Book v. Justice Min. Co. (C. C.) 58 Fed. 106; Muldrick v. Brown, 37 Or. 185, 61 Pac. 428. The evidence touching the question of a partnership between the plaintiffs, as found by the court, tends to prove an express agreement between the parties that they should hold and work the claims for their joint use and benefit. This, together with evidence of the fact that some work was done upon the property, is sufficient to support the finding.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The finding to the effect that each of said plaintiffs was a citizen of the United States is not supported by the evidence. That question, however, was not in issue, and, so far as it concerned the rights of the parties to this action, it was wholly immaterial whether plaintiffs were citizens or aliens. Their citizenship is a matter which concerns the government of the United States only. Notwithstanding the fact that the contrary has been held in some jurisdictions, it is now well settled by the decisions of the courts of the United States that the question of qualification of the locator of a mining claim, so far as the validity thereof is affected by his alienage, is one which cannot be raised or determined in actions between private individuals wherein the United States is not made a party. Billings v. Smelting Co., 51 Fed. 338, 2 C. C. A. 252; Manuel v. Wulff, 152 U. S. 507, 14 Sup. Ct. 651, 38 L. Ed. 532; McKinley Creek Min. Co. v. Alaska Min. Co., 183 U. S. 563, 22 Sup. Ct. 84, 46 L. Ed. 331; Snyder on Mines, § 267; Costigan on Mining Law, § 47; Tornanses v. Melsing et al., 109 Fed. 710, 47 C. C. A. 596.

The question involved here is the right of possession between two contesting locators, and it may be conceded, as contended by appellants, that at the time defendants entered upon and took possession of the claims plaintiffs were not in the actual possession thereof. Such being the case, plaintiffs' rights must rest upon the finding of the court to the effect that at the time of defendants' entry plaintiffs had made a valid location of the claims, in accordance with the provisions of section 2324, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1427), and, in the absence of any supplementary local regulation, nothing further was required. "After a valid location has been made the locator need not keep an actual possession of the claim. His right of possession will continue until he has in fact abandoned it, or has forfeited it by failure to do the requisite amount of work within the prescribed time." Harris v. Kellogg, 117 Cal. 488, 49 Pac. 708; Belk v. Meagher, 104 U. S. 279, 26 L. Ed. 735. This finding, however, is attacked upon the ground that the evidence is insufficient to sustain it.

The evidence clearly tends to show the posting of notices upon each claim designating therein the place of posting as being the starting point, which notices contained calls and distances to certain stakes at the four corners of each claim, the area of which was 600 feet by 1,500 feet. It also clearly tends to show that the stakes thus called for in the notices were set, and, in some cases, stones piled around them. Appellants concede that, "taking all this evidence together, the court might find that plaintiffs did or did not set stakes, and the finding would not be likely to be disturbed, but it seems impossible to find therefrom that the lines were so marked that they could be easily traced." In Southern Cross, etc., Min. Co. v. Europa Min. Co., 15 Nev. 383, it was held that "stakes and stone monuments set at each corner of the claim and at the center of each of the end lines is a sufficient marking of the boundaries" under the most stringent construction of the act of Congress; and in Gleeson v. Martin White Min. Co., 13 Nev. 442, it was held that setting stakes at the four corners constituted a sufficient marking. To the same effect, see Oregon King Min. Co. v. Brown, 119 Fed. 48, 55 C. C. A. 626; North Noonday Min. Co. v. Orient Min. Co. (C. C.) 1 Fed. 522; Howeth v. Sullenger, 113 Cal. 547, 45 Pac. 841; Green v. Gavin (Cal. App.) 101 Pac. 931. Under these authorities, we think the evidence ample to sustain the finding that plaintiffs had made valid locations of the claims, and, in the absence of any showing of abandonment or forfeiture thereof, they were entitled to possession of the same.

There is no merit in the contention that the judgment is void for uncertainty in describing the property. It describes the claims in accordance with the notices posted, which constitute a part of the markings of the claims (Willeford v. Bell [Cal.] 49 Pac. 6), which, taken with other data contained therein, is sufficient to enable one to identify the property with reasonable certainty.

We find no error in the record, and the judgment and order appealed from are affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

10 Cal. App. 522

PEOPLE v. COURTRIGHT. (Cr. 118.)

(Court of Appeal, Second District, California. May 5, 1909. Rehearing Denied by Supreme Court July 1, 1909.)

CRIMINAL LAW (§ 369*)—EVIDENCE OF OTHER OFFENSES—ADMISSIBILITY.

Where, on a trial for robbery, the prosecutor showed that, on discovering that his house had been entered during his absence, he made a search thereof, and found accused in a room, and that accused at the point of a revolver compelled prosecutor to deliver his money and other valuables, the evidence of the manner in which an entrance into the house had been effected was admissible, as detailing the surrounding circumstances connected with the crime, though it proved another crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822–824; Dec. Dig. § 369.*]

Appeal from Superior Court, Los Angeles County; W. H. Jamison, Judge.

Harry Courtright was convicted of robbery, and he appeals. Affirmed.

Edward Judson Brown, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

ALLEN, P. J. The defendant was convicted of robbery, and appeals from the judgment of conviction, and from an order denying a new trial.

The insufficiency of the record is such that no review can be had of the action of the court in denying the motion to set aside the information, on the ground that before the filing thereof the defendant had not been legally committed by a magistrate. People v. Lonnen, 139 Cal. 634, 73 Pac. 586; People v. Williams (Cal.) 97 Pac. 634.

Upon the trial of the cause the prosecuting witness testified that he was living alone in his bungalow at Redondo, and left his home about half past 6 in the evening, and did not return before 10 the same evening; that upon his return he discovered that his house had been entered during his absence, and trunks and drawers had been opened and the contents disarranged; that he discovered the odor of tobacco smoke in the house; that an examination of one of the drawers showed that a revolver, kept by him therein, was missing, and that he found lying upon a chair a driftbolt, which was produced in court; that, observing these conditions, he instituted a search through the house, and upon opening the bathroom door found the defendant therein, armed with a revolver in general appearance suggesting the weapon belonging to the witness; that the defendant so armed compelled the witness to deliver up his money, watch, and other valuables; that the house was lighted, and he was able to carefully examine the features of the robber, and positively identified the defendant as such person. Witness, after recounting the events connected with the robbery and the departure of the defendant from the house, further testified that the next morning he examined the windows of the house for the purpose of seeing how entrance was gained thereto, and that he found a dent in the sill of the bathroom which corresponded in size and shape with the iron bolt found in the room. Defendant objected to the introduction of evidence tending to show the manner in which an entrance to the house had been effected, upon the theory that it tended to prove another substantive and distinct crime. This objection was properly overruled. The statement in connection with the manner of entrance into the house was proper, as detailing the surrounding circumstances connected with the crime charged. It being relevant, the fact that it also tended to prove another offense was not a ground of objection to it. People v. Craig, 152 Cal. 46, 91 Pac. 997.

Error is claimed in several other particulars, but they seem to us too trivial for serious discussion or consideration. Nothing appears therefrom which could in any manner prejudice defendant, who seems to have had a fair trial, and to have been very properly convicted under the evidence.

Judgment and order affirmed.

We concur: SHAW, J.; TAGGART, J.

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10 Cal. App. 445

Ex parte DRIGGS. (Cr. 125.)

(Court of Appeal, Second District, California. April 26, 1909.)

HABEAS CORPUS (§ 92*)—PROCEEDINGS—SCOPE OF INQUIRY.

On application for a writ of habeas corpus by one committed by an examining magistrate, the court will not examine the record to determine whether there was testimony warranting the commitment, but to see if there was testimony tending to show the commission of an offense and petitioner's criminal connection therewith, from which a reasonable probability of his guilt might be inferred, warranting the magistrate in acting.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 92.*]

Petition by Gertrude Driggs for a writ of habeas corpus. Writ denied.

C. F. McNutt and Noleman & Smyser, for petitioner. J. D. Fredericks, Dist. Atty., and W. J. Ford, Deputy Dist. Atty., for respondent.

PER CURIAM. The complaint filed before the magistrate was sufficient. The instrument alleged to have been forged was such as might be made the basis of fraud after utterance. People v. Collins (Cal. App.) 99 Pac. 1109, and cases cited. The delivery of the instrument by petitioner to the notary public was a representation of its genuineness and an utterance of the alleged forged instrument in contemplation of law. Such delivery to a public officer cannot be said to be a delivery to a private agent. Homan v. Wayer (Cal. App.) 98 Pac. 80. The record of the instrument, by whomsoever requested, was constructive notice of such record, and the absence of a disavowal thereof might be regarded by the magistrate as evidence tending to show a ratification or adoption of the act. The expert evidence under the circumstances of the case—the death of the principal having intervened—was competent to establish the offense, without preliminary proof of absence of authority to sign the name of the person sought to be charged.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

In applications for writs of this character, we will not enter into an examination of the record with a view of determining whether or not the testimony, in our opinion, warrants the commitment, but rather into an examination of the record to determine whether or not there was testimony from which the examining magistrate was warranted in acting. In other words, is there evidence in the record tending to show the commission of an offense and petitioner's criminal connection therewith, from which may be inferred a reasonable probability of the petitioner's guilt?

Writ denied.

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10 Cal. App. 450

PEOPLE v. HEACOCK. (Cr. 83.)

(Court of Appeal, Third District, California. April 27, 1909. Supplemental Opinion May 4, 1909.)

1. CRIMINAL LAW (§ 470*)—EVIDENCE—SUBJECTS OF EXPERT TESTIMONY.

Where the issue was whether the death of decedent was occasioned, on the one hand, by his falling downstairs, or by his striking his head against a lounge, or, on the other hand, by the criminal act of accused, and the evidence connecting accused with the death was circumstantial, and depended on eliminating, as a possible cause of death, the fact that it was accidental, the question whether the wounds and bruises on the body of decedent, and the hemorrhage discovered, might have been caused by the fall was for the jury, and was not a proper subject of expert testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1059; Dec. Dig. § 470.*]

2. HOMICIDE (§ 223*) — EVIDENCE—PROCEEDINGS AT INQUEST.

Testimony of accused, taken at the examination before the coroner, is properly excluded, when offered by him while a witness for the prosecution was cross-examined, with a view of explaining the condition of accused at the time he gave the testimony, as defendant himself might have taken the stand for that purpose.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 466; Dec. Dig. § 223.*]

3. HOMICIDE (§ 223*) — EVIDENCE—PROCEEDINGS AT INQUEST.

Testimony of accused, taken at the examination before the coroner, is properly excluded, when offered to rebut the testimony of a witness as to statements made by accused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 466; Dec. Dig. § 223.*]

4. HOMICIDE (§ 224*) — EVIDENCE—PROCEEDINGS AT INQUEST.

Testimony of the wife of accused, taken at the examination before the coroner, is properly excluded; she being present at the trial.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 467; Dec. Dig. § 224.*]

5. CRIMINAL LAW (§ 721½*)—IMPROPER ARGUMENT OF PROSECUTING ATTORNEY.

Under Pen. Code, § 1322, providing that neither husband nor wife is a competent witness, except with the consent of both, and section 1323, providing that the refusal of accused to be a witness cannot be used against him on the trial, the district attorney in his argument to the jury should refrain from commenting on the failure of the wife of accused to testify, especially where the wife had been charged with the offense in the complaint filed with the magistrate.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1673; Dec. Dig. § 721½.*]

6. HOLIDAYS (§ 5*)—JUDICIAL PROCEEDINGS.

In view of Const. art. 6, § 5, providing that courts shall be always open, legal holidays excepted, and Code Civ. Proc. § 10, as amended by St. 1907, p. 561, c. 287, making every Saturday from 12 o'clock noon until 12 o'clock midnight a holiday, and sections 134, 135, as amended by St. 1907, pp. 681, 682, c. 358, authorizing courts to be open on holidays for specified purposes, trial courts ought to treat Saturday afternoon as a legal holiday.

[Ed. Note.—For other cases, see Holidays, Cent. Dig. § 2; Dec. Dig. § 5.*

For other definitions, see Words and Phrases, vol. 4, p. 3321.]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Jesse Heacock was convicted of murder in the second degree, and he appeals. Reversed and remanded for a new trial.

See, also, 97 Pac. 77.

L. Gonsalves, Weldon & Held, and J. E. Pemberton, for appellant. W. L. Jenkins, Robert Duncan, Dist. Atty., and U. S. Webb, Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was convicted of murder of the second degree, and was sentenced to imprisonment for the period of 15 years. He appeals from the judgment, and from the order denying his motion for a new trial.

Defendant and his wife were living in a house belonging to deceased, Fred Steinhart, in the town of Caspar, Mendocino county, and deceased occupied a room in the same building. He was a laborer, working in a lumber camp, from which he had returned in the evening on May 4, 1908, the day of his death. So far as disclosed by the evidence, he was last seen alive about the hour of 7 p. m. of that day on his way to his room. He made some small purchases at the store of the Caspar Lumber Company, and from there went to a saloon, where he had one or two drinks of beer, and purchased 15 cents worth to take with him. He was somewhat intoxicated, though not staggeringly drunk. He was not again seen by any witness at the trial until about 9 o'clock, two hours later, when his dead body was found lying on the floor of the sitting room occupied by defendant and his wife, both being present, when the neighbors first became aware of the death of the deceased. A stairway led from this sitting room to the upper story, where there was a room occupied by deceased, and opposite this stairway door a lounge in the sitting room was situated, and about six or seven feet distant therefrom. The door mentioned opened towards the stairs into a narrow space about its width, and the stairway continued from this landing or space nine steps to a landing, and turned a right angle, continuing five steps to the upper floor. The deceased was found lying with his feet in the stairway door sill, and his head about two feet from the lounge. The first witness called as to the appearance of the body was F. H. Sanborn, a practicing physician and surgeon of the place. He testified to having made an examination of wounds he found on the head of deceased, on the night of May 4th, about the hour of half past 10; that he did not strip the body or examine it; that he found a wound on top of the head, and another "right behind the lobe of the left ear," and he also "noticed a discoloration of the left eye"; that he found considerable blood around the body; and that "the face was badly swollen." He also testified that the defendant, who was present, "asked me to look at the corner of the lounge, to notice the hair. * * * He directed me at once to this corner here [pointing], lock of hair right there. He did not call my attention to any blood on the lounge." He further testified: "I did not interfere with the body any more, you know, because I did not want to interfere with the coroner. * * * I do not think there was sufficient loss of blood to cause the death of Steinhart." He was not afterwards called to aid in the autopsy, and saw no more of the body.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

1. The following proceedings were had: "Q. I will ask you whether or not in your opinion the bruises or wounds that you observed upon the head and face of Steinhart were sufficient to cause his death? A. Well, allowing for his age I would say yes; the wounds were sufficient to cause death. Q. I will ask you whether or not in your opinion the wounds and bruises you perceived and found upon the head and face of Steinhart could have been made by a person falling against the head of this lounge? Mr. Pemberton: We object to that on the ground it is calling for the opinion and conclusion of the witness upon matters not the proper subject of expert testimony. The Court: I overrule the objection. Mr. Pemberton: We save an exception. A. I believe not. Q. I will ask you whether or not, in your opinion as a physician and surgeon, the wounds and bruises that you saw upon the face and head of Steinhart, and the hemorrhage that you observed there, might have been caused by a person falling down the stairway indicated upon this diagram here, which has been testified to be six feet in height to the first landing? Mr. Pemberton: We object to that on the ground it calls for a conclusion and opinion of the witness upon a matter not a proper subject of expert opinion, and upon the further ground that it assumes that the man fell down from the landing, or somebody said that he did, for which there is not a particle of proof in the case. The Court: I overrule the objection. Mr. Pemberton: We save an exception. Witness answering: I believe not." He was afterwards asked on cross-examination whether his opinion above given was as a layman or as a physician, and answered: "That is my personal opinion both ways."

It is urged that this was prejudicial error, and with this contention we are constrained to agree. In the case of People v. Westlake, 62 Cal. 303, a medical witness, who had made a post mortem examination of the body of the deceased, was asked this question: "State from the examination you gave the wound, the course of the ball, and the condition of the deceased, whether, if he were moving in a northwesterly direction, or standing facing a northwest direction, he could have received that wound from the pistol shot fired by a person standing north of him and facing south." The Supreme Court said: "Whether the wound of which deceased died could have been inflicted by a pistol shot fired by the defendant from a certain direction was a fact to be found by the jury from the evidence of the circumstances in which the homicide was committed, or to be inferred from the relative position of the parties when the shot was fired. It was not such a matter of science or skill as required the opinion of an expert."

In People v. Smith, 93 Cal. 445, 29 Pac. 64, the defendant was charged with murder, and the defense was that in shooting the deceased the defendant, who was also shot in the encounter, acted in self-defense, and in the determination of this question it became material to ascertain the position in which the defendant was at the time when he was shot. A witness, who was a physician and surgeon, was called by the people, and was asked this question: "Will you state, if you can, from your examination of this man's [the defendant's] arm and your familiarity with gunshot wounds, if you are familiar with them, in what position in your judgment this man's arm was at the time that wound was received?" Over objection the witness was allowed to answer. The Supreme Court said: "The court erred in the admission of this evidence. The subject-matter of the inquiry was not one in relation to which the opinion of an expert can be properly received. The position of the wound being given, and the course taken by the bullet known, the jury was fully as competent to determine the relative positions of the parties to the difficulty as was the witness." In Kauffman v. Maier, 94 Cal. 269, 281, 29 Pac. 481, 484, 18 L. R. A. 124, a machinist, conversant with machinery, was asked certain questions as to the condition of a certain shaft that had caused the injury complained of, and of its effect when brought in contact with clothing, and whether dangerous or not. The Supreme Court held that it was error to admit the testimony. Said the court: "Such questions are to be determined by the jury themselves, either from their own experience in matters of common observation, or from all the evidence in the case, and cannot be asked of witnesses, even if such witnesses are experts in some particular art or science. Sappenfield v. Main St. R. R. Co., 91 Cal. 60, 27 Pac. 590. If the court permits the jury to be influenced by the judgment of such witnesses, it deprives the litigants of their right to have the jury render its verdict upon the facts in the case, and to this extent substitutes the judgment of the expert for what should be the judgment of the jury." In the case of People v. Lemperle, 94 Cal. 45, 29 Pac. 709, a medical witness was permitted to give an opinion as to the distance of the muzzle of the pistol from the wounded man when fired. The court said: "That the ruling was erroneous there can be no doubt. A physician is not, as such, an expert upon such matters. If he found that the flesh was burned or contained unburned powder, he would have known that the pistol must have been near, but this is matter of common observation, and not a matter of special knowledge. The facts being stated, it was for the jury to judge"—citing People v. Westlake, supra; People v. Smith, 93 Cal. 445, 29 Pac. 64.

In the case at bar the vital question at issue was the cause of Steinhart's death—whether by accident, as was claimed by defendant, by his having fallen downstairs, or by striking his head against the lounge in the sitting room, or in some other accidental manner, or whether the cause of his death was by criminal violence administered by some person. The evidence connecting defendant with Steinhart's death was wholly circumstantial, and its strength depended very much upon eliminating, as a probable or possible cause of death, the fact claimed that he was injured by accidentally falling downstairs or by his head coming in contact with the lounge in falling. These were matters for the jury to determine from the facts and circumstances proven, and were not the proper subjects of expert testimony. As was said in Kauffman v. Maier, supra, to permit the jury to be influenced by the judgment of such witnesses would deprive the defendant of his right to have the jury render its verdict upon the facts in the case, and to this extent would substitute the judgment of the expert for what should be the judgment of the jury. Obviously the evidence was prejudicial.

2. Error is claimed because the court refused to allow defendant to introduce the testimony of defendant taken at the examination before the coroner, which was offered while a witness for the prosecution was under cross-examination by defendant's counsel, for the purpose of "explaining the condition defendant was in when he gave it." We see no error in this ruling. The defendant could have taken the witness stand had he desired to make explanation. Defendant offered this testimony several times for the purpose of rebutting testimony of witnesses as to statements made by the defendant. The refusal of the court to admit the testimony was proper.

3. During the cross-examination of the coroner called by the prosecution, defendant offered in evidence the testimony of defendant's wife, taken at the inquest. The court very properly refused its admission. She was present at the trial. Her testimony taken at the inquest was not admissible.

4. During the opening argument of the assistant district attorney, Mr. Jenkins, he addressed the jury, in part, as follows: "If the man had fallen down the stairway as he stated, an accident had befallen him or happened, gentlemen of the jury, is there anything about it he would want to cover up? Is there anything about it he wouldn't want his wife to testify to? Gentlemen of the jury, she is here to-day, why doesn't she give you an explanation of it?" Defendant's counsel objected that the district attorney "has no right to comment upon the failure of the wife to take the stand or anybody else. * * * And we save an exception to the very improper comment made by the assistant district attorney, and ask the court to instruct the jury to disregard that comment, and consider it as never having been made. The wife had the right to stay off the stand, and it is their duty to hold this not in the least against the defendant." Mr. Jenkins: "As to the defendant, I say I have nothing to say, he has the right to stay off the stand. Mr. Pemberton: We save an exception to this. By the Court: Proceed with the argument. Mr. Pemberton: And we save our exception." The court took no other action, and the incident was closed at this point. Section 1323, Pen. Code, provides that the neglect or refusal of the defendant to be a witness "cannot in any manner prejudice him, nor be used against him on the trial of the proceeding"; and we have held it error for the district attorney to comment upon the defendant's failure to testify. People v. Morris, 3 Cal. App. 1, 84 Pac. 463. But the section makes no similar provision as to the failure of the wife of a defendant to testify, though section 1322 does make her incompetent, except by the consent of both husband and wife. The question is a new one so far as we are advised. As the case must go back for a new trial it is perhaps

unnecessary to go further than to advise that the district attorney refrain from such comment hereafter. The reason which underlies the provisions of section 1323 applies with much force to the wife, who is made incompetent to testify for or against her husband in a criminal action, except both consent. The wife may be willing to testify, but the husband may not consent, and to put him in the position of refusing and subjecting his defense to comments for availing himself of a statutory right might be very prejudicial. It was in evidence before the jury that both defendant and his wife were charged with the murder of Steinhart in the complaint filed with the magistrate, which would seem to emphasize the impropriety of commenting upon her failure to testify.

5. It appeared that the evidence closed, and the argument to the jury was completed, in the forenoon of Saturday, July 18, 1908, in time for the court to have instructed the jury before noon. The defendant called attention to the fact that Saturday afternoon was a holiday, and requested the court to instruct the jury and submit the case before the beginning of the holiday. The court denied the request, to which defendant excepted, and thereupon the court adjourned until 2 o'clock p. m., and then instructed the jury and submitted the case to them. After having retired, and while deliberating upon their verdict, the jury requested (but at what time does not appear) that the instructions be sent to the jury room, and the same instructions which had been read to the jury were so sent. The Legislature amended section 10 of the Code of Civil Procedure in 1907 by adding the following: "Every Saturday from twelve o'clock noon until twelve o'clock midnight is a holiday as regards the transaction of business in the public offices of this state, and also in political divisions thereof when laws, ordinances, or charters provide that public offices may be closed on holidays; provided, this shall not be construed to prevent or invalidate the issuance, filing, service, execution or recording of any legal process or written instrument whatever on such Saturday afternoons." St. 1907, p. 561, c. 287. The Constitution provides that the Supreme Court "shall always be open for the transaction of business" (article 6, § 2), but the provision as to superior courts (article 6, § 5) reads: "They shall be always open (legal holidays and nonjudicial days excepted). * * * Injunctions and writs of prohibition may be issued and served on legal holidays and nonjudicial days." Section 134, Code Civ. Proc., provides that: "No court shall be open, nor shall any judicial business be transacted, on Sunday [naming also other holidays] except for the following purposes: (1) To give, upon their request, instructions to a jury when deliberating on their verdict. (2) To receive a verdict or discharge a jury. * * * Provided, that the Supreme Court and the superior courts shall always be open for the transaction of business; and provided further that injunctions and writs of prohibition may be served on any day."

It was held in People v. Town of Loyalton, 147 Cal. 775, 82 Pac. 620, that "all transactions not within the statutory prohibition may be carried on as on any other day," and in People v. Soto, 65 Cal. 621, 4 Pac. 664, it was held that the Legislature may allow or disallow the transaction of all or any class of judicial business on legal holidays, and that section 5, art. 6, of the Constitution, does not in terms prohibit any legal business on holidays. In Heisen v. Smith, 138 Cal. 216, 71 Pac. 180, 94 Am. St. Rep. 70, it was said that "in this state the transaction of 'judicial business' on Sunday or holidays is forbidden (Code Civ. Proc. § 134), but that these terms cannot be extended to the service of process, or other ministerial acts." Reclamation District v. Hamilton, 112 Cal. 603, 44 Pac. 1074, points out, without reconciling the apparent conflict between the provisions of the Constitution and those found in section 134, Code Civ. Proc., supra, the statute declaring that the Supreme and superior courts "shall always be open for the transaction of business" and the Constitution that the superior courts shall always be open (legal holidays and nonjudicial days excepted). Section 1142, Pen. Code, provides: "While the jury are absent, the court may adjourn from time to time, as to other business, but it must nevertheless be open for every purpose connected with the case submitted to the jury until a verdict is rendered or the jury discharged."

There is some force in the suggestion of the Attorney General that the amendment of section 10, Code Civ. Proc., does not refer to court proceedings. Even so, there remains the constitutional provision that superior courts are always open except on holidays, and these courts uniformly refrain from transacting judicial business on such days. See Heisen v. Smith, supra, pp. 218, 219, 71 Pac. 180, 94 Am. St. Rep. 70. The point is not likely to again arise in this case, and we do not decide it.

Some other alleged errors are assigned, but they relate to matters which in all probability will not again occur, and need not be noticed.

The judgment and order are reversed, and the cause remanded for a new trial.

We concur: HART, J.; BURNETT, J.

Supplemental Opinion.

PER CURIAM. Since the foregoing opinion was filed, our attention has been called to an amendment of sections 134 and 135, Code Civ. Proc., which was passed the day after section 10, Code Civ. Proc., was amended, as set forth in the opinion in which section 134 was quoted as it existed prior to 1907. The amendment of sections 134 and 135 will be found in Statutes of 1907, pp. 681, 682, c. 358. Section 134 by that amendment reads: "No court, other than the Supreme Court, must be open for the transaction of judicial business on any of the holidays mentioned in section ten, except for the following purposes: (1) To give upon their request, instructions to jury when deliberating on their verdict; (2) to receive a verdict or discharge a jury; (3) for exercise of the powers of a magistrate in a criminal action, or in a proceeding of a criminal nature. Injunctions and writs of prohibition may be issued and served on any day." Section 135, as amended, reads: "If any day mentioned in the last section happen to be the day appointed for the holding or sitting of a court, or to which it is adjourned, it shall be deemed appointed for or adjourned to the next day." We said in the opinion that it was not necessary to decide the question; nor is it, in view of our decision on other questions. But under the present state of legislation we venture to suggest to trial courts that it would be safer to treat Saturday afternoon as a legal holiday until the question has been determined.

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10 Cal. App. 423

RAUER'S LAW & COLLECTION CO., Inc., v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 640.)

(Court of Appeal, First District, California. April 22, 1909.)

JUSTICES OF THE PEACE (§ 160*)—NOTICE OF APPEAL — SUFFICIENCY—STATUTORY PROVISION.

Under Code Civ. Proc. § 974, providing that notice of appeal from a judgment of a justice's court must state whether the appeal is taken from the whole or part of the judgment, and, if from part, what part, and whether the appeal is taken on questions of law or fact, or both, where the notice recited that the appeal was taken from the whole judgment, the section was substantially complied with, and appellant was entitled to a trial of his case de novo, though it did not appear from the notice whether the appeal was taken on questions of law or fact, or both.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 160.*]

Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Petition by Rauer's Law & Collection Company for writ of prohibition to the Superior Court of the City and County of San Francisco and others. Writ denied.

Macks & Tomsky, for petitioner. Wm. Sea, Jr., for respondents.

KERRIGAN, J. This is an original proceeding for a writ of prohibition to prevent the superior court above named from proceeding with the trial of a certain case. The petition for the writ alleges that the petitioner had excepted to the sufficiency of the sureties on an undertaking on appeal from the justice's court of the city and county of San Francisco within five days after the filing of the undertaking, and that the said sureties, or others in their place, had failed to justify within due time. An order to show cause was issued upon this petition; but it is now stipulated by the parties to the said appeal that the notice of exception to the sufficiency of the sureties was not served within the time prescribed by law, which disposes of the main point made by the petition, inasmuch as the sureties were not called upon to justify in the absence of such notice.

One other point, suggested at the oral argument, remains to be considered. It concerns the sufficiency of the notice of appeal. The notice was in the following terms: "Please take notice that the defendant hereby appeals to the superior court * * * from the judgment made and entered in justice's court * * * in favor of the plaintiff and against the defendant, and from the whole thereof." That part of section 974, Code Civ. Proc., providing what the notice of appeal from a judgment of a justice's court shall contain, reads as follows: "The notice must state whether the appeal is taken from the whole or a part of the judgment, and if from part, what part, and whether the appeal is taken on questions of law or fact, or both." From the notice of appeal it will be observed that it does not appear whether the appeal was taken on questions of law or fact, or both; but, inasmuch as it was taken from the whole of the judgment, we think the section quoted was substantially followed, and that on the notice the appellant is entitled to a trial of his case de novo. Section 624 of the practice act (St. 1851, p. 150, c. 5), as amended by the statute of 1854 (St. 1854, p. 70, c. 54, § 54), in providing what the notice of appeal shall set forth, was precisely the same as section 974 of the Code of Civil Procedure, and the Supreme Court, in passing upon a similar notice to the one here, held it sufficient. The lower court had decided that the notice was defective, and dismissed the appeal, and the Supreme Court said: "It is difficult to perceive on what ground the judgment of the court was based. The amendments to the practice act (St. 1854, p. 66, § 38) provide that, when the appeal is taken on questions of law alone, it shall be heard upon a statement of the case; when the appeal is taken upon questions of fact, or upon both questions of law and fact, the action shall be tried anew in the county court, the party being entitled to a jury if he desires it. The party could readily discover whether the appeal was upon the law merely, or for the purpose of a trial de novo, by looking at the records. The object of the notice is both to apprise the opposite party of the appeal, and as to what the appeal is from. In this case there could be no mistaking it, and there could be nothing more definite than an appeal from 'the whole judgment.'" Price v. Van Caneghan, 5 Cal. 124.

The writ is denied.

We concur: COOPER, P. J.; HALL, J.

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10 Cal. App. 415

SAN DOMINGO GOLD MINING CO. v. GRAND PACIFIC GOLD MINING CO. et al. (Civ. 570.)

(Court of Appeal, Third District, California. April 21, 1909. Rehearing Denied by Supreme Court June 17, 1909.)

1. EXECUTION (§ 321*)—SALE—TITLE OF PURCHASER.

A sheriff's deed to the purchaser at an execution sale relates back to the date of the levy of an attachment in the case, provided the attachment proceedings are regular.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 948; Dec. Dig. § 321.*]

2. EXECUTION (§ 321*)—SALE—TITLE OF PURCHASER.

The court, in a suit to restrain mining on land claimed by plaintiff under a sheriff's deed to the purchasers at an execution sale under a judgment in an action in which an attachment was issued, cannot assume error in the attachment proceedings, and, in the absence of evidence of any defect therein, the sheriff's deed will be deemed to relate back to the date of the attachment.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 948; Dec. Dig. § 321.*]

3. APPEAL AND ERROR (§ 901*)—BURDEN TO PROVE ERROR.

Where the record was silent on the subject, the court could not assume that the facts as stated by appellant making an objection were conceded by respondent, or that any evidence was offered in aid of objection; but the burden was on appellant to show that the objection was supported by the facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3670; Dec. Dig. § 901.*]

4. VENDOR AND PURCHASER (§ 210*)—TITLE OF PURCHASER.

The legal effect of an owner of two-thirds of property, authorizing in writing the owner of the remaining one-third to convey the same, cannot be questioned by a stranger to the title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 428; Dec. Dig. § 210.*]

5. VENDOR AND PURCHASER (§ 231*)—BONA FIDE PURCHASER—NOTICE—DEFECTS—EFFECT.

Any defect in the acknowledgment of a deed in the chain of plaintiff's title is immaterial, where plaintiff at the time it received its deed was ignorant of any outstanding title in another, thereby becoming a bona fide purchaser.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 538; Dec. Dig. § 231.*]

6. EXECUTION (§ 290*)—SALES—OBJECTIONS—RIGHT TO MAKE.

One not in privity with the judgment debtor or interested in the estate cannot profit by any irregularity in an execution sale of the property arising from the fact that the sale was made to an administratrix, and a subsequent purchaser from the administratrix takes a good title, though she might be refused credit in her account for the amount expended.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 827; Dec. Dig. § 290.*]

7. COVENANTS (§ 69*)—PERSONAL COVENANTS—"COVENANT RUNNING WITH THE LAND."

An agreement for the purchase of a mining claim from the patentee, which recites that the patentee may have the exclusive right to work the mine until he is paid the price, and that for further security the purchaser transfers shares in a mining company on the consideration that the patentee will convey the property to the purchaser, and signed by the purchaser alone, is a personal covenant on the part of the purchaser, and is not a covenant running with the land, under Civ. Code, §§ 1460–1462, defining "covenants running with the land."

[Ed. Note.—For other cases, see Covenants, Dec. Dig. § 69.*

For other definitions, see Words and Phrases, vol. 2, pp. 1698–1703.]

8. MINES AND MINERALS (§ 55*)—TITLE ACQUIRED BY PURCHASER.

A patentee of a mining claim contracted for the sale of the claim to a third person, and on the following day he executed a deed absolute in form conveying the claim to a corporation without referring to the contract. A purchaser from the corporation at the time of the purchase had no actual knowledge of any equitable claim of the third person arising out of the contract. *Held*, that the contract and deed were not contemporaneous instruments, because they were not between the same parties, and because there was no connection between the rights accruing to the parties, and the purchaser of the corporation acquired title freed from any equities arising under the contract.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 55.*]

Appeal from Superior Court, Calaveras County; A. I. McSorley, Judge.

Action by the San Domingo Gold Mining Company against the Grand Pacific Gold Mining Company and others. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

A. Everett Ball and J. F. Davis, for appellants. Chickering & Gregory and Snyder & Snyder, for respondent.

BURNETT, J. The action was begun June 22, 1904, for the purpose of enjoining defendants from mining upon or removing ore from two certain placer mining claims, known as the "Bully Boy" and the "Buckeye." The defendants disclaimed any interest in the latter, but asserted title to the former claim, consisting of about 70 acres, and the question in dispute is as to the ownership of this "Bully Boy" claim. Plaintiff relies upon title by mesne conveyances from the patentees and also by prescription.

The deeds received in evidence seem to connect plaintiff with the original source of title. The conveyance, however, from one W. A. Keefer to the Jupiter Gravel Mining & Water Electric Power Company, dated

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

November 21, 1896, must be disregarded, as it is admitted that the said Keefer was adjudged a bankrupt in 1887; but, as pointed out by respondent, this deed is not a necessary link in plaintiff's chain of title, for the corporation known as the "Jupiter Deep Blue Gravel Hydraulic Mining Company" acquired the title on November 4, 1879, and did not purport to convey it to Keefer until June 14, 1884. On April 9, 1883, an attachment was issued in the case of Manuel v. Jupiter Deep Blue Gravel Hydraulic Mining Company and levied upon the property on April 10, 1883. Judgment was rendered in said action in favor of plaintiff on September 8, 1884, and on December 10, 1887, the property was sold under execution to Eliza S. Baker, as administratrix of the estate of Samuel Baker, deceased, and a sheriff's deed therefor given to her on July 6, 1888. Eliza S. Baker, as administratrix, on April 9, 1889, conveyed the property to plaintiff's immediate predecessor in interest, the Jupiter Gravel Mining & Water Company. The record shows that in the matter of the estate of said Samuel Baker, deceased, a decree was entered confirming the sale of all interest of said estate to the said company. It is not disputed that the sheriff's deed related back to the date of the attachment, if the attachment proceedings were regular. "The property is sold under the final process issued on the judgment; but the deed made to the purchaser at the sale, as the last of the series of acts, takes effect from the date of the levy of the attachment, as the first of the series of acts, and perfects the title to the property from the day when it was taken by the officer, for the satisfaction of the judgment." Porter v. Pico, 55 Cal. 174. The record upon its face therefore shows the title to be in respondent; but it is the contention of appellants that a close inspection will reveal certain infirmities that invalidate the apparent title and render indefensible the finding of the trial court "that plaintiff is, and ever since the 28th day of June, 1898, has been, the owner" of said mining claim. We think, however, the contention of appellants is untenable.

In reference to said sheriff's deed to Eliza Baker, it is admitted that it conveyed all interest of the said Hydraulic Mining Company No. 1 which it had September 8, 1884, the date of the judgment; but it is denied that it relates back to the time of the levy of the attachment, for the reason that the undertaking in said attachment proceeding was defective, and that on motion for a dissolution the court so found but allowed the plaintiff to file a new undertaking "nunc pro tunc," thereby going beyond the jurisdiction of the court. But waiving the question whether that consideration could be invoked in this action, since it does not appear that any motion was made in the original action to dissolve the attachment, it is sufficient to say that the record contains no evidence of any defect in said undertaking or of any such order made by the court. We cannot, of course, presume error, and all intendments are in favor of the action of the trial court. All that appears as to the point is the objection of counsel in the following language: "We object, in addition to the objection that it is not rebuttal, that the attachment is void, as there was no proper undertaking on attachment. The court, on defendant's motion to dissolve the attachment, July 5, 1884, allowed a new undertaking filed nunc pro tunc." As the record before us is silent as to the matter, we cannot assume that the facts as stated by appellant were conceded by respondent, or that any evidence was offered in aid of the objection. The burden was upon appellants to show that the objection was supported by the facts, and this they failed to do.

The claim that the deed from Eliza Baker, administratrix, to the Jupiter Gravel Mining & Water Company of September 13, 1888, was void because acknowledged by her as "Eliza S. Baker, widow," is without merit. If any such defect existed, it was cured by another deed of April 9, 1889, executed by the same grantor. In reply to appellants' suggestion that this deed conveyed only the interest of the estate, which was one-third of the property, it is only necessary to allude to the fact that the owner of the other two-thirds in writing authorized the conveyance, and the legal effect of his act could certainly not be questioned by any one who is a stranger to his title; but we deem to be sound and unanswerable this statement by respondent: "The deed would not be void in any event, even if not recorded. Defendants do not claim under Eliza Baker, and, if the predecessor of the plaintiff was a bona fide holder as against the original locators and defendants, the benefit of that bona fide holding would now inure to plaintiff, even if none of the subsequent conveyances had been recorded." It is apparent therefore that any defect in the acknowledgment must be immaterial if, as it sufficiently appears from the evidence, plaintiff at the time it received its deed was ignorant of any outstanding title in appellants.

The position is equally untenable that the conveyance to Eliza Baker was void for the reason that she was the administratrix of an estate, and therefore could not purchase property at execution sale. It would be an anomalous and manifestly inequitable doctrine that any one not in privity with the judgment debtor or interested in the estate could profit by any such irregularity. The fact must be that the proceeding is not void, but simply voidable at the instance of those whom the administrator in his official character represents. A subsequent purchaser takes a good title, although the administrator may be refused credit in his account for the amount expended. In Briggs v. Chicago, K. & W. R. Co., 56 Kan. 526, 43 Pac. 1131, it is held that: "An administrator receiving as assets of the estate of his decedent a promissory note secured by mortgage, and having obtained a judgment on the note and a decree of foreclosure, may bid in the land at the foreclosure sale as administrator in satisfaction of the indebtedness, wholly or in part, and the sheriff's deed will pass the title to him as administrator." To the same effect are Stevenson v. Polk, 71 Iowa, 278, 32 N. W. 340, and Lockman v. Riley, 95 N. Y. 64.

The case of Sedgwick v. Sedgwick, 65 Cal. xx, 4 Pac. 570, cited by appellants, while containing language to the effect that an executor or administrator has no authority to bid in property for the estate, and that such a sale is void, presented an entirely different legal aspect from the case at bar. That action was brought by the judgment debtor against the estate for damages. The only parties who could contest the sale were before the court, and the validity of the purchase was directly involved. The plaintiff as the basis of his action probably insisted that the sale was invalid, and no doubt the defendant urged the same ground for the conclusion that it could not be held for damages. At any rate, from the meager report we have of the case we are satisfied that the decision was right, although the language used must be limited to the peculiar facts therein involved.

The contention in which appellants apparently have the most confidence is, as stated by them: "That by the agreement with Keefer contemporaneous with the deed to the Jupiter Deep Blue Gravel Hydraulic Mining Company, the deed was to become operative only upon the payment of the purchase price of the property which was never paid, and that all persons, including the respondent, had full notice of the rights of appellants and took subject to said rights." The said agreement which it is insisted was contemporaneous with the deed and should be construed with it, as far as material, is in the following language: "This indenture made the 21st day of May, A. D. 1878, by and between W. A. Keefer, party of the first part, and C. Hammerschmidt" and the other patentees—mentioning their names and respective interests in the mine—the parties of the second part, "witnesseth that whereas, the said parties of the second part, who are the owners of the Bully Boy Placer Mine Company's property described as follows: * * * For and in consideration of the sum of one dollar to them paid, and other considerations, to wit, 12,960 shares of the capital stock of the Jupiter Deep Blue Gravel Hydraulic Mining Company, to be held by the parties of the second part, as collateral security until the payment to them by the party of the first part of the sum of $2.50 per share of said capital stock; and it is further agreed between the party of the first part and the parties of the second part that the parties of the second part shall have the exclusive right to drift the gravel and extract the gold from the same and enjoy all the rights and benefits for such labor until such time as their claims under this contract are satisfied. And it is hereby agreed that the parties of the second part shall, as fast as possible to do so, complete their title by United States patent, which has been applied for and deliver the same to the party of the first part. Witness my hand and seal this 21st day of May, 1878. W. A. Keefer." This instrument was acknowledged by said Keefer June 30, 1878, and recorded July 22 following. The deed, however, was in the usual form, dated May 22, 1878, and was executed by the patentees to the said Jupiter Deep Blue Gravel Hydraulic Mining Company, and no reference was made therein to any other instrument or agreement. This deed was recorded June 14, 1878. Parol evidence was admitted "that it was understood in the first place that two of the owners should sign the deed so as to give Keefer a chance to let people understand that he could sell the mine or incorporate—to give him a chance to handle the mine." The two signed, and "then the others came in, and all signed the deed."

It is clear that, in order to overcome the apparent record title of respondent, it must be held, either that the said agreement and deed in legal effect disclose the equitable title to be in the patentees, or that respondent at the time of its purchase of the land had actual or constructive notice of facts sufficient to put it upon inquiry as to the claim of appellants. The said agreement signed only by Keefer is plainly a personal covenant on his part, and not one running with the land. Sections 1460, 1461, and 1462, Civ. Code. This is not seriously contested by appellants, and we shall therefore not discuss it. It is claimed, though, that we have a case for the operation of the doctrine announced in Bryan v. Grosse et al. (Cal.) 99 Pac. 499, and Hunt v. Jones, 149 Cal. 300, 86 Pac. 686, and other decisions to the effect that: "His conscience is bound by the covenant, whether in law it runs with the land or not. The precise form of the nature of the covenant or agreement is quite immaterial. It is not essential that it should run with the land. A personal covenant or agreement will be held valid and binding in equity on a purchaser taking the estate with notice. It is not binding upon him merely because he stands as an assignee of the party who makes the agreement, but because he has taken the estate with notice of a valid agreement concerning it which he cannot equitably refuse to perform."

But respondent does not stand in the relation of assignee to Keefer, who made the agreement, and there is nothing in the record itself that would apprise plaintiff of the claim that the transaction in which said Jupiter Mining Company was concerned amounted to a conditional sale, or anything less than what the deed imports. Keefer enters into an agreement with the patentees that they may have the exclusive right to work the mine until they are paid the purchase price, and for further security he transfers to them certain shares in said mining company upon consideration that they will convey the property to said Keefer. The instrument is somewhat awkwardly drawn; but it was undoubtedly intended to be an agreement for the sale and purchase of the mining property. The record does not show, however, that anything was ever done in pursuance of said agreement. As we have seen, on the next day the patentees execute a deed absolute in form, not to Keefer, but to a corporation to whose interest respondent has succeeded. The instruments are therefore not contemporaneous, not between the same parties, and the record discloses no connection whatever between the rights and obligations accruing to Keefer through said agreement and those of the mining company growing out of said deed. No one looking at the record would have any reason to conclude that the grantors reserved any interest in the property, or that the conveyance was burdened with any condition not expressed in the deed. If the principle contended for by appellants were generally recognized, scarcely any title would be safe from attack. The evidence further shows that the respondent at the time of the purchase had no actual knowledge of any equitable claim of appellants. The contention that the possession of the property by certain of the patentees was constructive notice of their equity cannot prevail here over the finding of the trial court, as there is evidence to the effect that only one of them was on the premises, and he stated that he had no claim to the mine, but was there under a license.

Appellants do not contend for adverse possession, but simply rely upon the alleged defects in respondent's title. The foregoing is therefore decisive of the controversy and renders immaterial—even if assailable—the finding in favor of respondent's prescriptive right.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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10 Cal. App. 494

BOYE et al. v. ANDREWS (KAPPLER, Intervener). (Civ. 526.)

(Court of Appeal, Third District, California. April 30, 1909.)

1. Deeds (§ 58*)—Sufficiency of Delivery.

The owner of land executed a deed thereof, and delivered it to the grantee, after which the deed was returned to the grantor and inclosed in an envelope, which was directed to the county recorder, and this was placed in a larger envelope and directed to the person that the grantor had named in his will as his executor, with directions on the outer envelope to send the inclosure to the recorder on hearing of the death of the grantor, and the executor sent the deed to the recorder as directed. *Held*, that the deed transferred the property to the grantee, and that its validity was not affected by its return to the grantor and his placing it in the hands of his executor.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 130–135; Dec. Dig. § 58.*]

2. Descent and Distribution (§ 69*)—Validity—Effect of Debts of Grantor.

The validity of a transfer of land without consideration a short time before the death of the grantor, as between the grantee and the grantor's heirs and executor, is not affected by the fact that the grantor was in debt, nor that he was living on and in possession of the premises at the time of his death, nor by anything that the grantor did or said after the delivery of the deed, nor by the grantor's physical condition, unless such condition had some relation to his mental condition at the time the deed was executed, nor by the fact that sufficient property did not remain after the conveyance to pay the debts and legacies mentioned in his will made prior to the execution of the deed.

[Ed. Note.—For other cases, see Descent and Distribution, Dec. Dig. § 69.*]

3. Evidence (§ 471*) — Opinion Evidence — Personal Relations.

In an action to quiet title to property transferred by the owner a short time before his death, a question whether the grantee was "in a confidential relation" with the grantor during his sickness was rightly excluded as calling for the conclusion of the witness.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 471.*]

4. Descent and Distribution (§ 90*)—Burden of Proof.

In an action to quiet title, plaintiffs claimed as the heirs of a deceased owner, and alleged that the owner died intestate. *Held*, that the burden of showing intestacy was on plaintiffs.

[Ed. Note.—For other cases, see Descent and Distribution, Dec. Dig. § 90.*]

5. Executors and Administrators (§ 129*)—Title to Land—Action to Recover—Instructions.

In an action to quiet title brought by heirs of a former owner against the owner's grantee, in which the owner's executor intervened, the jury were properly instructed that, to entitle the executor to recover possession, the jury must find that at the time of testator's death he had the right of ownership and possession of the land; that it was subject to testamentary disposition, and had not, in fact, been conveyed to defendant.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 533–536; Dec. Dig. § 129.*]

6. Deeds (§ 194*)—Presumption of Delivery.

A deed is presumed to have been delivered at its date, and, where delivery is presumed or shown, the burden is upon the party disputing that fact to show the contrary.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 574–583, 623; Dec. Dig. § 194.*]

7. Deeds (§ 195*) — Burden of Showing Want of Consideration.

Where a deed is delivered, the burden of showing want of consideration is upon the person contesting it.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 584–586; Dec. Dig. § 195.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

8. Quieting Title (§ 47*)—Instructions—Presumptions as to Ownership.

In an action to quiet title, where the presumption of continuous ownership in a former owner was overcome by the evidence, the court properly refused to instruct that, because ownership was admitted in such former owner on a date specified, it would be presumed, unless proved to the contrary, that such ownership continued until the death of such owner.

[Ed. Note.—For other cases, see Quieting Title, Dec. Dig. § 47.*]

9. Deeds (§ 211*)—Validity—Prima Facie Case.

Evidence in an action to quiet title against the grantee of the deceased owner *held* insufficient to cast the burden on defendant of showing the fairness of the transfer, and that it was free from fraud, artifice, or undue means.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 211.*]

Appeal from Superior Court, Siskiyou County; J. S. Beard, Judge.

Action by Sophie C. F. Boye and another against Charles A. Andrews. Charles Kappler, intervener. Judgment for defendant, and the intervener appeals. Affirmed.

Coburn & Collier, for appellant. C. W. Strother, for respondent. Loewy & Gutch, for plaintiff Sophie Boye.

CHIPMAN, P. J. Action to quiet title to real estate. Charles Kappler, as executor of the last will of plaintiffs' testate, intervened. The issues were tried by a jury, and defendant Andrews had the verdict on which judgment was entered accordingly. Intervener Kappler appeals from the judgment and from the order denying his motion for a new trial. Plaintiffs do not appeal. Kappler, as executor, claimed the property in dispute as belonging to the estate of Boye, deceased, denied Andrews' ownership, and alleged by an amendment filed during the trial that the deed under which Andrews claims title was executed by deceased while suffering from a cancer and under the influence of opiates, and while "his mind was in no fit condition" to transact business, and that the deed was executed through the "duress, menace, fraud, and undue influence of said Andrews" and "was against and without the consent and knowledge of said deceased." It appeared that some time in August, 1904, deceased, who was 70 years of age and had never married, and was then suffering from a cancer, went to San Francisco and was operated upon at a hospital; that defendant, Andrews, and intervener, Kappler, were both there and both were old acquaintances and friends of deceased. On September 1, 1904, while at the hospital and just before going to the operating table, deceased made a will, which was entirely in his own handwriting, by which he devised the property in question to Andrews and also made small bequests, among them one of $500 to intervener Kappler, who was named as executor of the will. The balance, including the property in question, was devised to Andrews. Some time early in September, 1904, deceased returned to his home ranch in Siskiyou county and to the property in question, and there remained until November 23, 1904, when he died. Prior thereto, to wit, on November 3, 1904, he executed a deed of the property in dispute to defendant, Andrews, and the question most seriously urged now by appellant is as to the delivery of this deed at the time of its execution. There was evidence tending to show that on November 3, 1904, deceased sent for Martin Marx, attorney at law and notary public, and stated to him that he desired to convey the land in question to defendant, Andrews, and that he wanted Marx to prepare a deed from deceased to Andrews, explaining to Marx what property he wanted to convey. Marx went to his office, prepared the deed, affixed his seal to the acknowledgment, but did not affix his signature thereto. He returned to the house of deceased, and, in the presence of the nurse of deceased and of Andrews read the deed to deceased and handed it to him, who signed it, whereupon Marx attested it by his signature as notary and handed it to deceased, who then handed it to Andrews. It appeared that, after the deed was delivered to Andrews, Boye expressed a wish that Kappler be given custody of the document, although he did not want him to know its contents, and that he be requested to have it recorded after Boye's death. Marx explained that, as the deed had been delivered to Andrews, Boye's wish could be accomplished without affecting the transfer. Thereupon Marx prepared one envelope in which was placed the deed, and the envelope was sealed and directed to the county recorder. This envelope was then placed in a larger envelope, which was directed to Kappler, and on it were written directions signed by Boye that, upon hearing of the death of Boye, Kappler was to open the package and send the inside envelope to the recorder. The reason assigned by Boye for this was that Kappler was his friend, and had been attending to some of his business, and already had the custody of his will, and he feared he might be offended if he was not intrusted with this document. It appeared that the package was delivered to Kappler, and at Boye's death he opened it and found the sealed envelope directed to the recorder, and the deed was accordingly delivered to the latter and duly recorded. As already stated, both Kappler and Andrews were with Boye at the hospital in San Francisco, and Kappler testified that a few days before Boye returned to his home he made a will and gave it to Kappler, and the latter came home with Boye and his nurse, and it was by this will that Boye devised to Andrews the property now in dispute. We do not deem it necessary to set out the testimony, for it is amply sufficient to sustain-the implied finding of the jury that the deed was executed by Boye and delivered to the grantee, Andrews, and was, in fact, the accomplishment of his wish previously expressed in his will. The evidence was wholly insufficient to warrant a finding that Boye was influenced unduly to make the deed by anything said or done by Andrews or that there was any force, menace, or fraud connected with the transaction, or that Boye was not in the full possession of his mental faculties and fully comprehended what he was doing. Boye was suffering physically from his ailment, but there was no evidence of mental impairment. There was evidence that at times his sufferings had to be relieved by hypodermic injections of opiates, but there was no evidence that at other times he was not entirely competent to transact business and there was evidence that he directed his affairs in considerable detail during the last month of his sickness.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The delivery of the deed to Andrews having been completed and its object effectuated, the subsequent custody by Kappler did not change the effect of the delivery, nor operate as a recall of the deed nor was it so intended. The purpose of placing it in the hands of Kappler to be recorded after the grantor's death was not inconsistent with the delivery shown, nor was it inconsistent with the intention of the grantor, which latter was clearly proven to have been to presently part with the title to the property and convey it to the grantee. The deed was, after its delivery, placed in Kappler's custody for the purpose only of recordation, and not for delivery to Andrews, and Kappler was therefore no more than the agent or bailee of both parties for that purpose only. What Boye's motive was for witholding the knowledge of the conveyance from Kappler is immaterial, for nothing remained to be done to complete the transfer of title to Andrews.

There are numerous assignments of error claimed to have occurred at the trial and in giving or refusing instructions to the jury which will be briefly disposed of. It was immaterial what debts deceased owed if before his death he had conveyed the property to Andrews, and, for like reason, it was immaterial that deceased was living on and in possession of the premises at his death. This latter fact would not prevent his conveying the property. Evidence of what Boye did and said after the delivery of the deed was inadmissible if in disparagement of Andrews' title; so, also, was evidence of his physical condition, unless it had some relation to his mental condition at the time the deed was executed which was not offered to be shown. His physical condition alone furnished no sufficient evidence of mental incapacity. A witness was asked whether or not Andrews was with Boye during his sickness "in a confidential relation." The objection was rightly sustained, as calling for the conclusion of the witness. It was immaterial whether the property remaining after the conveyance to Andrews would be sufficient to pay the debts and legacies mentioned in the will. The will took effect only at the testator's death, and he had a right to dispose of his property by deed before death.

The court instructed the jury that under the issues the plaintiffs must show that at the death of Boye he was the owner of the property in question and died intestate. Plaintiffs claimed that there was no will and alleged that deceased died intestate. Obviously it was upon them to show such to be the fact. It was the uncontradicted evidence that no claims had been presented to the executor, that notice to creditors had been duly published, and the time for presenting claims had elapsed. The court properly instructed the jury that, to entitle the executor to recover possession of the land in question, the jury must find from the evidence that at the time of his death the deceased had the right of ownership and possession of this land, and that it was subject to testamentary disposition, and had not in fact been conveyed to defendant Andrews. It was immaterial under the issues in the case whether there remained sufficient property to pay the debts, expenses of administration, and legacies if deceased had previously to his death conveyed the property in question to Andrews. The court gave an instruction stating the law, should the jury find the facts as to the delivery of the deed and its subsequent custody by Andrews, as we have above briefly given them, and instructing the jury that if they should find that the deed was in fact delivered "absolutely and without any restriction other than that it should be held by Charles Kappler in safe-keeping until the death of said Charles Frederick Boye and then be recorded in the office of the county recorder, then such delivery would have the effect in law to pass the title immediately upon its delivery by the said Charles Frederick Boye to Charles A. Andrews," and that the subsequent possession of the property by Boye "would not have the effect in law to revest or restore the ownership of the property in the grantor, Boye, which had vested in Andrews, if you find that it had so vested." The court also instructed the jury that a deed is presumed to have been delivered at its date, and that, delivery presumed or shown, the burden is then upon the party disputing that fact to show otherwise. We see no error in these instructions. The court also rightly instructed the jury that, if they should find that the deed was in fact executed and delivered, the burden of showing want of consideration was upon plaintiffs and intervener.

The court properly refused to instruct the jury that because it was admitted that on November 3, 1904, deceased was the owner of the property, it is presumed that, unless proved to the contrary, such ownership continued until his death. The previous instructions covered the proposition. The presumption of continuous ownership was met and overcome by the evidence. The evidence was wholly insufficient to cast the burden upon defendant Andrews to show the fairness of the transaction and, that it was free from fraud, artifice, or other undue means. It was not error to refuse to instruct the jury that such burden was upon defendant.

We do not deem it necessary to notice in detail the other instructions asked by defendant and refused by the court. Some of them relate to matters sufficiently covered by instructions given, others are incorrect statements of the law, and others are an invasion of the functions of the jury as the exclusive judges of the facts. The instructions as given fully and correctly stated the law to the jury.

We discover no prejudicial error in the record. The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

10 Cal. App. 471

LEMON v. HUBBARD et al. (Civ. 618.)

(Court of Appeal, Second District, California. April 28, 1909. Rehearing Denied by Supreme Court June 22, 1909.)

1. JUDGMENT (§ 503*)—COLLATERAL ATTACK —JUDGMENTS IMPEACHABLE COLLATERALLY.

If the object of a plaintiff can be ascertained from the allegations of his complaint, and the court has power to grant the relief demanded and jurisdiction of the parties, the judgment is not open to a collateral attack, though the complaint may be bad in substance, and hence where a plaintiff suing on several causes of action to obtain a lien on a threshing outfit for work done thereon, under Civ. Code, § 3061, giving a lien to one performing work in, about, or upon a threshing machine, referred in his complaint to the statute, and in the first cause of action alleged that the work was done in, about, and upon the thresher, but omitted that averment in reciting the other causes of action, and claimed a lien thereon, stating that defendant claimed an interest in the thresher, the complaint sufficiently showed an intention to assert a lien against the thresher on account of the work, under the statute, so that a judgment for the whole sum demanded and directing sale of the thresher to satisfy the lien was not void and open to collateral attack; it affirmatively appearing that the court had jurisdiction of the subject-matter and of defendant.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 943; Dec. Dig. § 503.*]

2. JUDGMENT (§ 503*)—COLLATERAL ATTACK—JUDGMENTS IMPEACHABLE COLLATERALLY.

If the court erred in directing the sale of the thresher in the absence of averments in certain of the causes of action showing that the work had been performed in and upon the machine, or in rendering judgment for the whole amount claimed, and in excess of the amount found due under the first cause of action, such errors could only be corrected upon appeal or upon proper showing by motion under Code Civ. Proc. § 473, giving the court power to relieve a party from a judgment taken against him by mistake, etc.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 943; Dec. Dig. § 503.*]

3. APPEAL AND ERROR (§ 127*)—DECISIONS REVIEWABLE—DEFAULT JUDGMENT.

An appeal lies from a default judgment, and defendant may also move to set it aside.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 885; Dec. Dig. § 127.*]

4. JUDGMENT (§ 363*)—SETTING ASIDE—"PROCEEDING TAKEN AGAINST HIM."

In so far as a judgment for plaintiff is defective and fails to finally adjudicate his rights, it is a proceeding taken against him, within Code Civ. Proc. § 473, giving the court power to relieve a party from a proceeding taken against him through his mistake, etc., and a plaintiff may invoke the aid of the section as well as a defendant.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 705; Dec. Dig. § 363.*]

5. JUDGMENT (§ 337*)—SETTING ASIDE—CONSTRUCTION OF STATUTE.

Code Civ. Proc. § 473, giving the court power to relieve a party from a judgment or other proceeding taken against him through his mistake, etc., should be liberally construed.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 665; Dec. Dig. § 337.*]

6. JUDGMENT (§ 344*)—SETTING ASIDE—DISCRETION OF COURT.

The vacating of a judgment or proceeding for mistake, surprise, etc., lies largely in the discretion of the court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 673; Dec. Dig. § 344.*]

7. LIMITATION OF ACTIONS (§ 127*) — COMMENCEMENT OF ACTION — AMENDMENT OF PLEADING — NEW CAUSE OF ACTION.

Where an action was brought on several causes of action under Civ. Code, § 3061, giving a lien to one performing work in, about, or upon a threshing machine, which lien extends for 10 days after the person ceases the work, but the complaint, as to all but one of the causes of action, failed to allege that the work was done in, about, or upon the threshing machine, an amendment to cure the defect was not a statement of a new cause of action, which would be barred by the 10-day limitation, but simply an allegation of omitted facts.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 545; Dec. Dig. § 127.*]

8. ACTION (§ 1*) — "CAUSE OF ACTION" — "REMEDY."

A "cause of action" is distinguished from the "remedy," which is simply the means by which the obligation or corresponding action is effectuated, and also from the "relief" sought.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 1; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 2, pp. 1015-1019; vol. 8, pp. 7598-7784; vol. 7, pp. 6073-6075.]

9. APPEAL AND ERROR (§ 1033*)—REVIEW—HARMLESS ERROR.

The vacating of a default judgment on plaintiff's motion and permitting him to amend his complaint, if error, was not prejudicial to defendant, since the effect was to re-establish defendant's rights as a litigant and entitle it to have determined any issues it might raise by answer, from which it had been debarred by default, which effect was the same as if defendant had procured a reversal on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4062; Dec. Dig. § 1033.*]

Appeal from Superior Court, Kern County; Paul W. Bennett, Judge.

Action by Frank Lemon against the Holt Manufacturing Company and another. There was judgment for plaintiff, which on his motion was vacated and plaintiff given leave to file an amended complaint, and the defendant named appeals. Affirmed.

Charles G. Lamberson and Frank Lamberson, for appellant. C. L. Flack and Jacobs & Flack, for respondent.

ALLEN, P. J. Appeal by defendant Holt Manufacturing Company from an order after judgment vacating such judgment and giving plaintiff leave to file an amended complaint.

The plaintiff on November 10, 1906, filed his complaint against defendants, in which he sets up as a first cause of action: That between June 1 and November 1, 1906, he had at the instance and request of defendant Hubbard performed work in, about, and upon a certain threshing machine, known as the "Holt Combined Harvester," while engaged in threshing and in the use and possession of Hubbard, all in the counties of Tulare and Kern; that Hubbard agreed to pay for said services $686, which sum was a reasonable compensation for such services, and no part of which has been paid, except the sum of $131.60; and that there remained due, owing, and unpaid from defendant Hubbard to plaintiff for such services the sum of $554.40; that the defendant Holt Manufacturing Company claimed some interest in said harvester, but that the same was subordinate to plaintiff's claim; that plaintiff claims a lien upon said steam harvester for such work and labor by the action commenced within 10 days after cessation of the work. In 13 subsequent causes of action plaintiff sets out the performance of work and labor by various persons at the request of Hubbard and the reasonable value thereof, that cessation from work was had on November 1, 1906, that each of said persons so performing said labor claimed a lien upon the Holt combined harvester, that each and all of said persons performing labor had assigned and transferred their claims for labor and the lien claimed thereunder to plaintiff, and that plaintiff claimed a lien by virtue of the act of March 21, 1905 (St. 1905, p. 618, c. 461), upon said combined steam thresher for all of such work and labor, and in each cause of action it was averred that the Holt Manufacturing Company claimed some interest in said steam thresher, subordinate, however, to the claim of lien of plaintiff. The prayer was for the aggregate amount of all of the claims for work and labor, including that of plaintiff and those assigned to him, for attorney's fees, for the enforcement and foreclosure of the lien of plaintiff as against the steam harvester and its appliances, under the act above mentioned, and that a special execution issue for the sale of said harvester. This complaint was verified, summons issued thereon and served upon defendants, and within due time, no appearance or answer having been filed, default of defendants was regularly entered, and judgment was rendered in favor of plaintiff and against defendant Hubbard for the amount claimed in the complaint; and it was ordered and decreed that plaintiff had a lien on the steam harvester for the aggregate amount of such work and labor, and for certain attorney's fees and costs, and the execution was directed to issue for the sale of said harvester. That thereafter an execution was issued, and the same was levied upon said harvester. That thereupon the appellant paid into the hands of the clerk of the court, for the use of plaintiff, the sum of $580.40, the amount of the first cause of action, and instituted an action in claim and delivery against the sheriff under which he took possession of said threshing machine. Thereupon, on the 21st day of February, 1907, plaintiff moved the court to vacate the judgment theretofore entered in his favor, praying the court that he be permitted to file an amended complaint, setting forth that such judgment was made and entered through mistake, inadvertence, surprise, and excusable neglect of plaintiff, as shown by affidavits set out in the transcript. The court upon the hearing of this motion made its order vacating the original judgment and gave plaintiff leave to file an amended complaint, from which last-mentioned order this appeal is taken.

It will be observed that all of the causes of action, from the second to the fourteenth, inclusive, were incomplete, in that it is not averred that the work or labor was performed in, with, about, or upon the threshing machine. The act of March 21, 1905 (now section 3061, Civ. Code), gives a lien to any one performing work or labor in, about, or upon a threshing machine to the extent of the value of his services, which lien extends for 10 days after such person ceases such work or labor, provided within that time an action is brought to recover the amount of the claim. The original complaint clearly showed the intention of plaintiff to assert a lien against the harvester on account of the work and labor. This is manifest by the reference in the complaint to the thresher and plaintiff's claim of lien thereon, the reference to the section of the law giving a lien for work and labor upon a thresher, and the statement that appellant claimed an interest in such thresher. It cannot be said that no cause of action was attempted to be stated which would entitle plaintiff to relief. "If the object of a plaintiff can be ascertained from the allegations of his complaint, and the court has power to grant the relief demanded, and jurisdiction of the parties, the judgment is not vulnerable to a collateral attack, although the complaint may in fact be bad in substance." Brush v. Smith, 141 Cal. 470, 75 Pac. 55; Crane v. Cummings, 137 Cal. 202, 69 Pac. 984. The true criticism of the complaint is in relation to its incompleteness in not fully developing the facts which entitled plaintiff to the relief demanded. In our opinion the judgment was not void; it affirmatively appearing that the court had jurisdiction of the subject-matter and of the person of defendant, and the relief was such as was demanded in the complaint and specified in the summons. If it were error upon the part of the court to render a judgment directing the sale of the harvester, in the absence of averments in certain causes of action showing that the work which had been performed by Hubbard was in and upon the machine, or in rendering a judgment within the amount claimed in the prayer but in excess of the amount found due by the first cause of action, nevertheless, it was a matter which could be corrected only upon appeal, or upon proper showing by motion, if made within the time limited by section 473 of the Code of Civil Procedure. Mayo v. Ah Loy, 32 Cal. 480, 91 Am. Dec. 595; Blondeau v. Snyder, 95 Cal. 522, 31 Pac. 591; Wood v. Jordan, 125 Cal. 262, 57 Pac. 997. The apparent abandonment by plaintiff of his rights acquired under the levy was no doubt occasioned because he was apprehensive of the result of a direct attack upon his judgment by appeal. While it has generally been held that a default judgment is, in effect, a consent judgment, and that a direct appeal will not lie from a consent judgment, yet in this state, under the decision in Jameson v. Simonds Saw Co., 144 Cal. 3, 77 Pac. 662, it is apparent that the judgment would be open to attack by a direct appeal or by motion to vacate and set it aside. Plaintiff was therefore placed in a position where, through an appeal within the time limited by the statute, his judgment might be reversed. In so far as the judgment was defective and failed to finally adjudicate the rights of plaintiff, it was a proceeding taken against him, and it was permissible for him to invoke the aid afforded by section 473, Code Civ. Proc. Bernheim v. Cerf, 123 Cal. 170, 55 Pac. 759. That a plaintiff as well as a defendant may invoke the relief provided by section 473, Code Civ. Proc., has been frequently decided. That such section should be liberally construed is established. That the granting of such relief is largely within the discretion of the court is unquestioned. The effect of the order vacating the judgment under section 473, Code Civ. Proc., was only affording such relief as could have been obtained through a reversal on account of the error involved in the incompleteness of the complaint. It follows therefore that, while the judgment so rendered was valid and enforceable and not subject to collateral attack, the order vacating the same on account of the error was not improper, having in view the rights of litigants to have their controversies speedily and effectively determined. In making this order, even though no direct attack by defendant had been made, the court was exercising its jurisdiction in a pending proceeding, and in granting such relief the rights of appellant were in no wise prejudiced, provided, of course, that the amendment proposed—which was only to the effect that the work and labor was performed upon the machine—was not in fact stating a new cause of action; for, when the judgment was vacated, either upon plaintiff's motion, as was done here, or by appeal by appellant, the effect was the same. In either case the appellant's rights were reestablished as a litigant through which it was entitled to litigate and have determined any issues which by answer it might raise, from which it had been barred by its default. Under the allegations of the original complaint and the manifest intent thereof, the amendment proposed was not the statement of a new cause of action which would be barred by the 10-day limitation, for appellant was a defendant to the original complaint and served with process before the statute had run in its favor. Jeffers v. Cook, 58 Cal. 150. Against appellant, the action was commenced by the assignee of those who did the work. The amendment did not go to establishing any other cause of action against the parties before the court, but simply to allege omitted facts under which the relief as against the property could be effectively granted. "The 'cause of action' is to be distinguished from the 'remedy'—which is simply the means by which the obligation or the corresponding action is effectuated—and also from the 'relief' sought." Frost v. Witter, 132 Cal. 426, 64 Pac. 705, 84 Am. St. Rep. 53, and cases cited; Frey v. Vignier, 145 Cal. 251, 78 Pac. 733; People's Lumber Co. v. Gillard, 5 Cal. App. 440, 90 Pac. 556.

In our opinion therefore there was no error in granting the relief to plaintiff by the order made, the affidavits disclosing, as they did, such mistakes as would warrant the court in granting the relief, and, were even such error conceded, the same was in no sense prejudicial to appellant.

Order affirmed.

We concur: SHAW, J.; TAGGART, J.

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10 Cal. App. 447

CLAVO v. CLAVO et al. (Civ. 602.)

(Court of Appeal, Third District, California. April 27, 1909.)

1. HUSBAND AND WIFE (§ 247*)—COMMUNITY PROPERTY—STATUTORY PROVISION—CONVEYANCE BY HUSBAND.

Prior to the amendment of Civ. Code, § 172, by Act March 31, 1891 (St. 1891, p. 425, c. 220), providing that a husband cannot make a gift of community property or convey the same without a valuable consideration without the wife's consent in writing, the husband had the power to convey community property without the wife's consent, and the amendment is not retroactive and does not deprive the husband of his vested right to dispose by gift, without the wife's consent, of community property acquired prior to such amendment.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 879; Dec. Dig. § 247.*]

2. HUSBAND AND WIFE (§ 267*)—COMMUNITY PROPERTY—CONVEYANCE IN FRAUD OF WIFE.

The failure of a husband to take title to community property in the name of his wife, in accordance with his promise to her, and his subsequent transfer of the property, do not constitute a fraud upon the wife unless done with a fraudulent intent.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 930; Dec. Dig. § 267.*]

Appeal from Superior Court, Solano County; L. G. Harrier, Judge.

Action by Ann Clavo against John Clavo and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Kierce & Gillogley, for appellant. Bell, York & Bell and Theo. A. Bell, for respondents.

CHIPMAN, P. J. Action to set aside a deed to real property as void. Defendants had judgment, from which plaintiff appeals on the judgment roll.

It was alleged in the complaint and found by the court: That plaintiff and N. Clavo (now deceased) intermarried in January, 1879, and shortly thereafter and prior to 1890 acquired the property in question as community property; that at the time the purchase of said property was made the said N. Clavo agreed that the deed should be made to Ann Clavo, plaintiff, but said deed was not so made, of which fact plaintiff was ignorant by reason of her incapability to read; that on January 17, 1893, the said N. Clavo conveyed said property by deed of gift to the defendants Joseph Clavo and John Clavo, without consideration; that said N. Clavo, by gift deeds disposed of all the real and other property belonging to the community of plaintiff and her said husband (but at what time does not appear), by reason whereof "the rights of plaintiff in her full share of the community property were endangered and dissipated"; and that he thus "deprived himself of the means of supporting his wife, plaintiff herein, and those dependent upon him, and plaintiff was obliged to seek and obtain aid and support from her son by a former marriage." As a conclusion of law the court found that plaintiff has no interest in the property the subject of the action, and that defendants are entitled to judgment. The question here involved arises under section 172 of the Civil Code, which relates to the power of the husband over community property, as amended March 31, 1891 (St. 1891, p. 425, c. 220), by the following provision: "Provided, however, that he (the husband) cannot make a gift of such community property, or convey the same without a valuable consideration, unless the wife, in writing, consent thereto." The property in question was acquired prior to 1891, and the question is: Could the husband convey it by gift after the amendment of 1891 without his wife's consent given in writing?

It is conceded by appellant that the reasoning in Spreckels v. Spreckels, 116 Cal. 339, 48 Pac. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170, sustains the judgment in this case; but it is contended that the facts in the two cases differ, and, furthermore, it is claimed that the question was not necessarily involved in the Spreckels Case, and what was there said on the subject was "pure dictum." An examination of the reported case will show that the parties to the action treated the point decided as involved, and the opinion is devoted almost entirely to its consideration. It was there decided that prior to the amendment of 1891 to section 172 of the Civil Code, forbidding the husband to give away community property without the consent of the wife in writing, the Code vested in the husband all the elements of absolute ownership of the community property, to the exclusion of the wife, whose interest was a mere expectancy, and, as to all the world except the wife, there was, prior to the amendment, no distinction between the community estate and the separate estate of the husband as respects the power of disposition, and the amendment of the Code cannot be construed retroactively so as to deprive the husband of his vested right to dispose by gift of community property which was acquired prior to the amendment, without the written consent of the wife. The opinion is by Mr. Justice Temple, concurred in by Justices Henshaw, Harrison, and McFarland. Chief Justice Beatty concurred in the judgment, as he stated, "but upon a somewhat narrower ground than that taken in the opinion of Mr. Justice Temple." A rehearing was denied, and we cannot doubt but that the result reached on the question was the deliberate and thoroughly well-considered judgment of the court, which it is our duty to follow.

It is also urged that the transactions as pleaded imply fraud of such character as to warrant the annulment of the deed. The deed in question was executed on January 17, 1893, and the action was not brought until November 7, 1905, and the husband was living when it was commenced. There are no allegations of fraud in the complaint, and no finding of fraud was made by the court. The only averment from which appellant infers fraud is that relating to the agreement that the deed to the property was to be in her name; but there is no averment that her husband caused it to be made in his name through any fraudulent intent. His gift conveyance was not fraudulent in itself, and, if claimed to have been so in fact, it should have been pleaded and proved. The averments that he subsequently (when does not appear) conveyed by gift his remaining property presented no issue in this case, and no relief was asked because thereof; but even as to these transactions it is not alleged, nor is it found, that they were consummated with any fraudulent intent.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

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10 Cal. App. 484

RYAN v. OAKLAND GAS, LIGHT & HEAT CO. (Civ. 566.)

(Court of Appeal, First District, California. April 29, 1909. Rehearing Denied May 27, 1909; Denied by Supreme Court June 28, 1909.)

1. MASTER AND SERVANT (§ 256*)—ACTIONS FOR INJURIES—AMENDMENT OF COMPLAINT.

In an action for injuries received by plaintiff by the falling in of the walls of the trench where he was at work, plaintiff alleged that the falling in was due to the nature of the soil, but on the trial it was disclosed by evidence that defendant, about a year prior to the accident, had excavated another trench close to the one in which plaintiff was injured, which had been filled up. *Held*, that it was proper to allow plaintiff to amend his complaint, setting up the digging of such trench as the cause of the weakening of the walls of the trench in which he was injured, as such amendment only states an additional fact, developed during the trial, as to the cause of the falling in of the walls of the trench.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 815; Dec. Dig. § 256.*]

2. MASTER AND SERVANT (§ 217*)—ASSUMPTION OF RISK—KNOWLEDGE OF DEFECT OR DANGER.

Where a servant employed to dig a trench knows the kind of soil, and all the facts and circumstances surrounding the employment, and the danger to which he is exposed, he assumes the risk of the trench caving in upon him, unless the cause of the caving in of the walls is hidden and is unknown to the servant, but is known to the defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 584; Dec. Dig. § 217.*]

3. TRIAL (§ 194*)—INSTRUCTIONS FOR JURY—WEIGHT AND SUFFICIENCY OF EVIDENCE.

Const. art. 6, § 19, forbids judges to charge as to matters of fact, but permits them to state the testimony and declare the law. In an action for injuries to a servant, received by the caving in of the walls of a trench, which were not braced, the court charged that any duty of defendant to brace the side of the trench was partially discharged if it furnished the materials for braces, competent men to put them in, and a competent man to see that it was done. If these persons were guilty of negligence in not bracing the trench, and it caved, the act being one which it was the duty of the employer to perform, the defendant company was responsible. *Held*, that the instruction was erroneous, as taking from the jury, the duty of the defendant to brace the trench, which was one of the issues in the case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 466; Dec. Dig. § 194.*]

4. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—INSTRUCTIONS.

Where contradictory instructions are given, and it cannot be told which one the jury followed, the case will be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219; Dec. Dig. § 1064.*]

5. EVIDENCE (§ 527*)—OPINION EVIDENCE—EFFECT OF DIGGING TRENCH.

In an action against a master for injuries caused by the caving in of the walls of the trench in which plaintiff was at work, evidence of a civil engineer as to the effect of digging a small trench near the one in question as weakening the walls of the trench was admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2334; Dec. Dig. § 527.*]

6. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The admission of expert testimony to prove an undisputed fact of common knowledge is not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4163; Dec. Dig. § 1051.*]

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by Mathew Ryan against the Oakland Gas, Light & Heat Company. Judgment for plaintiff, and defendant appeals. Reversed.

Myrick & Deering, for appellant. Fitzgerald & Abbott, for respondent.

COOPER, P. J. This action was brought to recover damages for personal injuries, alleged to have been sustained by plaintiff by reason of defendant's negligence in allowing the walls of a trench in which plaintiff was working to fall upon him. The jury returned a verdict in favor of the plaintiff, on which judgment was duly entered. The court denied the motion of the defendant for a new trial, and this appeal is from the judgment and order denying said motion.

The court did not err in denying defendant's motion for a nonsuit, as there is evidence sufficient to support the verdict. It would serve no useful purpose to discuss the evidence in detail, and we will not do so, except so far as necessary to the discussion of other questions raised by appellant.

There was no error in allowing the plaintiff to amend the complaint during the progress of the trial. In the original complaint the negligence of defendant was alleged to consist in its failure to brace the walls of the trench where plaintiff was engaged in digging the earth and deepening the trench; it being alleged that the plaintiff did not know of the danger to which he was exposed, and that such danger was well known to the defendant. The language of the original complaint as to the particular facts is as follows: "That the upper stratum of the wall and bank of said trench, which at said time and place fell and caved in on plaintiff, as hereinafter stated, was to plaintiff, and to the common understanding, apparently, visibly and palpably composed of a compact adobe or clay soil about 2 feet thick, on which grass was growing. That the middle and lower portion of said wall and bank was to plaintiff, and to the common understanding, apparently, visibly and palpably of a slightly damp, firm soil, in which were no cracks. That said wall and bank, to plaintiff's eye and mind, and as a matter of common observation, showed no danger of falling or caving in on plaintiff, without being propped, or braced, or secured, and showed no evidence of weakness. That as a matter of fact the said wall or bank was not of a stable or fixed nature, and the soil of which it was composed was not of the firm, solid, and compact character which, from its outward side, plaintiff believed it to be, as aforesaid, but, on the contrary, was composed of loose earth that had been used to fill in said street. Its said outward side was only about 3 feet distant from a brick wall possessed by, and in the use of, defendant, and fronting on said Grove street, and against which brick wall said side of said trench rested. That because of the said character of said soil of said side of said trench, and its said situation, the said bank of said trench, when said trench was excavated to the depth of 5 or 6 feet, as aforesaid, was liable to, as it in fact did, as hereinafter stated, fall away from said brick wall and cave in."

It was disclosed by the evidence during the trial that the defendant, about a year prior to the accident to plaintiff, had had excavated another trench, about 18 inches deep, and about 2 feet wide, between the said brick wall and the trench where plaintiff was working, and had laid therein an iron pipe, after which the said small trench was refilled with earth, so as to leave no visible trace of its having been excavated. It was the theory of the plaintiff, upon such facts being developed, that the small trench that had been excavated and filled with earth about a year prior to the time the plaintiff was injured, as it ran parallel with, and very near to, the trench in which plaintiff was at work, weakened the wall of the trench where plaintiff was at work, and thus caused the wall on the side nearest the old trench to give way and fall in on plaintiff. Plaintiff claimed that he knew nothing about the digging of the old trench until it developed during the trial. In the amended complaint the plaintiff stated said new matter as follows: "That on or about one year prior to the 5th day of July, 1904, the said defendant excavated another trench about 18 inches deep and 2 feet wide between said brick wall and the said trench where said plaintiff was working, parallel therewith for 20 feet or more, and about 2 feet distant therefrom, and laid an iron pipe about 2 inches in diameter in the said trench excavated prior to July 5, 1904, as aforesaid, and then filled in said last-mentioned trench so as to leave no visible trace thereof; that the excavating of the last-mentioned trench and the laying of an iron pipe therein, as aforesaid, weakened the wall of the trench in which plaintiff was working, and made it dangerous to the life, body, and limbs of plaintiff while employed as aforesaid, unless the walls and banks of said last-mentioned trench were properly braced; that plaintiff was never informed by defendant, and was entirely ignorant of the fact, that another trench had been excavated as aforesaid between said brick wall and the trench in which he was working, as herein set forth."

The evidence tended to show a different or additional cause for the caving of the trench in which plaintiff was working other than that specifically set forth in the original complaint. In our opinion, if it was necessary to set up such facts in the complaint, it was not only in the discretion of the court to allow the amendment, but it properly allowed it in furtherance of justice, and with a view to disposing of the case on its merits. The jurors and the witnesses were present, and the trial was in progress, and then and there was the time for the court to liberally exercise its discretion in allowing amendments for the purpose of arriving at the truth. No doubt but that if the amendment had necessitated a continuance or required further evidence on the part of defendant, such continuance would have been granted upon such terms as would have been just and proper; but it does not appear that the defendant was taken by surprise, or that any continuance was asked for. The amendment did not state any new cause of action. The cause of action was based upon defendant's negligence, which it is alleged caused the wall to cave in upon plaintiff. The amendment only stated another and additional fact, developed during the trial, which plaintiff claimed caused, or contributed to, the falling in of the bank of the trench.

The court committed prejudicial error in refusing to give defendant's instruction numbered 19, and in giving it as modified by the court without the consent of defendant. Under the pleadings in the case it was made an issue as to whether or not it was the duty of the defendant to brace the walls of the trench. It is alleged that the wall "fell and caved in on plaintiff, whereby, and because of the said carelessness and negligence of defendant and its said superintendent and vice principal in failing and neglecting to brace and secure said bank and wall to prevent it from falling and caving in * * *" plaintiff was injured. The answer denied that the "place was dangerous to the life, body, or limbs of plaintiff while employed therein, unless the walls and banks of said trench were braced and secured from falling or caving in on plaintiff while standing therein, and denies on information and belief that said danger consisted in the liability that the walls or banks might fall or cave in on plaintiff, while working in the trench in which he was employed, because of the character of the soil." The answer further denied and averred as follows: "Denies that plaintiff was, on the 5th day of July, 1904, when working in said trench, inexperienced as to, or ignorant of, or did not know, the risks and danger to his life, body, and limbs attendant upon said excavation and construction of said trench to the depth and width in said complaint alleged, and to the depth and width in which said trench actually was excavated at the time of said accident, without having the said bank and walls braced and secured; avers that the danger of said walls or banks falling or caving in on plaintiff was as apparent, visible, and palpable to plaintiff, and as open to common observation, as to this defendant, and further avers that it was a risk and peril commonly incident to plaintiff's employment, and a peril which could have been discovered by the use of ordinary care, and in this behalf denies that the said danger was not apparent or visible or palpable to plaintiff, or open to common observation, and denies that it was not a danger or peril commonly incident to plaintiff's employment, or a peril which he could have discovered by the use of ordinary care."

If the plaintiff knew the kind of soil in which the ditch or trench was being excavated, and all the facts and circumstances surrounding the same, and the danger, if any, to which he was exposed, he took upon himself the risk and the peril incident to his employment. Ordinarily a laborer employed to dig a trench 4 or 5 feet deep, where the surface of the earth had not been disturbed on some prior occasion, and where there was no hidden or unknown danger, would do so at his own risk, and could not recover for injuries caused by an unforeseen accident. In this case, however, the plaintiff attempted to show an exception to the general rule by proving that the bank caved by reason of a hidden cause known to the defendant, and unknown to the plaintiff, and that such hidden cause made it incumbent on defendant to brace the banks of the trench so as not to endanger the plaintiff while working therein. It was therefore the pivotal point in the case as to whether the locality of the trench, and its proximity to a danger known to defendant and unknown to the plaintiff, made it incumbent on the defendant, and a part of its duty, to brace the walls of the trench where plaintiff was working. Defendant claimed, and offered evidence to prove, that it furnished materials, implements and competent workmen to brace the trench wherever necessary, and that it did all it could do when it so supplied materials and fellow workmen to keep the place where plaintiff was at work in a safe condition. In accordance with this theory it offered the following instruction, numbered 19, and asked that it be given to the jury, to wit: "A master is not bound to follow the details of the work which he has employed others to do. So far as any duty on the part of the defendant is concerned to brace the side of the trench, the defendant company discharged that duty when it furnished the material to brace, furnished competent men to put in the braces, and a competent man to see that it was done. If these persons were guilty of negligence in not bracing the trench, and it caved, the defendant company cannot be charged with negligence, or held liable for the damages resulting to plaintiff from such caving." The court refused to give said instruction, but modified it so that it read as follows: "A master is not bound to follow the details of the work which he has employed others to do. So far as any duty on the part of the defendant is concerned to brace the side of the trench, the defendant company partially discharged that duty if it furnished the materials to brace, furnished competent men to put in the braces, and a competent man to see that it was done. If these persons were guilty of negligence in not bracing the trench, and it caved, the act being one which it was the duty of the employer to perform, the defendant company is responsible"—and gave it as thus modified.

It is thus seen that the court refused to instruct the jury that the defendant discharged its duty if it furnished the material with which to brace the trench and competent men to put in the braces, but that in such case the defendant had only partially discharged its duty. It also instructed the jury that it was the duty of the defendant to brace the trench. We cannot read the instruction with any other meaning; "the act being one which it was the duty of the employer to perform." In other words, the jurors were told that, if the defendant furnished the material with which to brace the trench, and competent men to see that the bracing was done, and the men did not brace the trench, the defendant failed to perform its duty, and "the defendant company is responsible." Whether the depth of the soil, the hidden causes known only to defendant, and the character of the soil were such facts as to make it the duty of the defendant to brace the trench was a question peculiarly for the determination of the jury. We cannot say that the instruction was not injurious to defendant. It took away from the jury the right to decide as to whether it was the duty of the defendant to brace the trench. It told them that, if the men employed by defendant to brace the trench did not brace it, the defendant was guilty of negligence and responsible.

The court submitted special issues to the jury as to whether or not defendant provided lumber, materials, and implements sufficient in quantity and quality so that the walls of the trench might be braced, and as to whether or not it furnished men, and gave instructions to so brace the trench. It was perfectly useless to submit such issues to the jury when the court informed them that it was the duty of the defendant to brace the trench. It was an admitted fact that the trench was not braced. The jury was thus told that it was the defendant's duty to brace the trench, and, in effect, told that the employés of defendant did not brace it, and that the defendant was responsible.

It is declared in the Constitution of the state (article 6, § 19): "Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." In Weiderkind v. Tuolumne C. W. Co., 65 Cal. 431, 4 Pac. 415, the court below instructed the jury: "If you find from the evidence that the defendant did not have sufficient gates to let out the water, so as to prevent any break that occurred below the top of the dam from being enlarged by the continual flow of the waters through it, then said dam was insufficiently and negligently constructed. It should have had gates sufficient to let all the water out by degrees so as to prevent a flood below by a sudden breakage of the dam." The judgment was reversed, and the court said: "The court might as well have charged them that, if the dam was not of certain dimensions, or constructed of a particular kind of material, it was insufficiently and negligently constructed. The defendant had a right to have the opinion of the jury on those questions."

In City of Santa Ana v. Gildmacher, 133 Cal. 395, 65 Pac. 883, it appeared that the court, in an action to condemn a strip of land for a sewer, instructed the jury to find for the defendant on the question of the necessity for the condemnation; and the instruction was held to be a charge as to a matter of fact, and erroneous. The court said that the question as to the necessity of the condemnation is one of fact, to be determined by the jury in view of all the evidence in the case. See, further, Holloway v. Pasadena, etc., Ry. Co., 130 Cal. 177, 62 Pac. 478; Manning v. App. Cons. G. M. Co., 149 Cal. 35, 84 Pac. 657; Hampton v. Occidental, etc., S. S. Co., 139 Cal. 706, 73 Pac. 579; Kerrigan v. Market St. Ry. Co., 138 Cal. 506, 71 Pac. 621. In the last-mentioned case the court instructed the jury: "In connection with the foregoing instruction I further charge you that stakes or uprights were a necessary part of said flat car as it was used on May 3, 1898; that said stakes were appliances within the rule which requires a master to furnish, with reasonable care, proper and adequate appliances for the purpose of carrying on the proposed work." The court in its opinion, in which it held the instruction to be erroneous, and a charge as to a matter of fact, said: "The court practically told the jury that it was the duty of the defendant to adjust proper stakes or uprights on said car on the day of the accident. Whether or not it was defendant's duty to do so was, in view of certain evidence relied on by the defendant, for the jury to determine from all the evidence in the case."

The instruction is not only erroneous in the respect pointed out, but it is contradictory of another instruction, numbered 24, in which the court stated to the jury as follows: "Thus you are instructed that, if you find that the plaintiff was injured by reason of the falling of the side of the trench because it was not braced or shored up, yet if you also find that the defendant did furnish materials to brace the banks of the trench so that it could not fall, and also a carpenter to aid in putting in such bracing, and that the plaintiff and said carpenter were engaged in the same general employment, then I instruct you that the neglect to brace the banks was the neglect of fellow servants of the plaintiff, and that he cannot recover damages herein, but that your verdict must be for the defendant." In this instruction the jurors were told that the neglect to brace the banks by fellow servants was not the neglect of defendant, and that in such case the verdict must be for the defendant; while in instruction numbered 19, hereinbefore quoted, the jurors were told that for negligence of the men "in not bracing the trench, the act being one which it was the duty of the employer to perform, the defendant company is responsible." Where instructions are inconsistent and contradictory, and it is impossible to tell which instruction was followed by the jury in reaching their verdict, the case will be reversed. Sappenfield v. Main St., etc., R. R. Co., 91 Cal. 48, 27 Pac. 590; People v. Westlake, 124 Cal. 452, 57 Pac. 465; Lemasters v. S. P. Co., 131 Cal. 105, 63 Pac. 128; Quint v. Dimond, 147 Cal. 707, 82 Pac. 310.

The court did not err in admitting the evidence of the civil engineer Brier as to the effect of the old and small trench, and the pipe laid therein, upon weakening the walls of the trench in which plaintiff was working. While it would probably appear to most practical men that the effect of such small ditch and the pipe being laid therein would be to weaken the walls of the ditch in which plaintiff was working, yet we are not prepared to say that such fact would be a matter of common knowledge to the extent that the testimony of an expert would not be admissible. Fraternal Construction Co. v. Jackson (Ky.) 89 S. W. 265; Quigley v. H. W. Johnson Mfg. Co., 26 App. Div. 434, 50 N. Y. Supp. 98; Callan v. Bull, 113 Cal. 593, 45 Pac. 1017. If it be conceded that the matter was one of common knowledge, it was not prejudicial error in this case to admit the evidence. The evidence of an expert as to an undisputed fact of common knowledge could not injure any one.

We do not deem it necessary to discuss any other point. The judgment and order are reversed.

We concur: HALL, J.; KERRIGAN, J.

155 Cal. 599

WORTH v. WORTH. (L. A. No. 2,277.)

(Supreme Court of California. June 9, 1909.)

1. Limitation of Actions (§ 148*) — Acknowledgment of Indebtedness.

There is a sufficient acknowledgment in writing of the indebtedness to take it out of the operation of the statute, where an attorney, having full charge of the matter for the mortgagee to the knowledge of the mortgagor, wrote the mortgagor in regard to renewing or paying the note, in view of the fact that it would soon outlaw; and the mortgagor replied that he thought an agreement to extend the old mortgage would be enough, but would make a new one if necessary, and that nothing ever outlawed with him.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 597–603; Dec. Dig. § 148.*]

2. Liens (§ 16*)—Loss—Lapse of Time.

A lien is not extinguished by lapse of time, so long as the principal obligation is kept alive.

[Ed. Note.—For other cases, see Liens, Cent. Dig. § 14; Dec. Dig. § 16.*]

3. Appeal and Error (§ 193*)—Objection Not Made Below.

Objection that the amended complaint contained an additional cause of action cannot be made for the first time on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1226–1240; Dec. Dig. § 193.*]

4. Appeal and Error (§ 1039*)—Harmless Error—Pleadings.

Insertion of a second cause of action in the complaint was harmless; the relief being based solely on the first cause.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1039.*]

5. Appeal and Error (§ 750*)—Sufficiency of Evidence—Specifications—Necessity.

The question of sufficiency of the evidence to warrant certain findings cannot be considered on appeal; the record showing no specification of any particular wherein the evidence was insufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3079; Dec. Dig. § 750.*]

6. Appeal and Error (§ 750*)—Assignment of Error—Scope.

The facts on which is based the objection that the court erred in allowing counsel fees in a mortgage foreclosure suit, and that otherwise the judgment was excessive, being shown on the face of the findings, the point is available on a claim that the findings do not sustain the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3074–3083; Dec. Dig. § 750.*]

7. Mortgages (§ 581*)—Foreclosure—Counsel Fees.

A mortgage, though containing no provision for counsel fees, being given to secure a note, secures the counsel fees provided in the note in case of suit to enforce it.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1669–1679; Dec. Dig. § 581.*]

8. Mortgages (§ 581*)—Foreclosure—Counsel Fees.

The mortgage containing no provision for counsel fees, none other than provided in the note can be allowed on foreclosure.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1669–1679; Dec. Dig. § 581.*]

9. Appeal and Error (§ 238*)—Review—Objections Waived.

Objection that the findings do not support the judgment is not waived by failure to proceed in the lower court by motion, under Code Civ. Proc. §§ 663, 663½, to have a proper judgment entered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1348–1352; Dec. Dig. § 238.*]

Department 1. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Minnie Worth against C. Worth. Judgment for plaintiff. Defendant appeals. Modified and affirmed.

F. E. Davis and J. W. Cochran, for appellant. E. A. Meserve, for appellee.

ANGELLOTTI, J. This is an appeal by defendant from a judgment and order denying his motion for a new trial, in an action brought by plaintiff to foreclose the lien of a mortgage given by defendant to plaintiff, to secure the payment of a promissory note dated February 15, 1899, for $2,500, bearing interest at the rate of 8 per cent. per annum, and payable March 1, 1902.

1. It appears from the amended complaint that this action was not commenced until shortly after the expiration of four years from the maturity of the note. A demurrer was interposed to the amended complaint, based on the ground that it appears on the face thereof that said action is barred by section 337 of the Code of Civil Procedure, which prescribes four years as the period within which an action must be brought on a written contract. The amended complaint, however, contained allegations which, in our opinion, made it good as against this demurrer. In addition to other acknowledgments alleged, it was alleged as follows: On January 30, 1906 (several weeks before the expiration of the four-year period), Mr. Meserve, the attorney for the plaintiff, who, to defendant's knowledge, had full charge of this matter for plaintiff, wrote to defendant, as follows: "January 30, 1906. C. Worth, Esq.—Dear Sir: Mrs. Minnie Worth has called my attention again to the fact that your note to her for $2,500.00, dated Feb. 15, 1899, due March 1, 1902, will outlaw during the month of February next, and has asked me to take the matter up with you looking to its renewal or payment. Will you please give the matter your immediate attention, and oblige, Yours very truly, Edwin A. Meserve." To this, defendant immediately responded as follows: "Los Angeles, Cal., 2—2, 1906. Edwin A. Meserve, City—Dear Sir: In response to the mortgage referred to in yours of recent date. I see no necessity of making a new mortgage. An agreement extending the old mortgage will have the same effect, won't it; however if you must have a new mortgage will make it. Nothing ever

outlaws with me. Truly yours, C. Worth." It was further alleged that plaintiff would have commenced her action prior to March 1, 1906, but for said statement and offer to renew, upon which she relied. Counsel for defendant have not pointed out why this was not a sufficient acknowledgment in writing of the indebtedness to take the case out of the operation of the statute of limitations, and we can conceive of no reason why it did not have such effect. See Foster v. Bowles, 138 Cal. 346, 351, 71 Pac. 494, 649, and cases there cited. A lien is not extinguished by lapse of time, so long as the principal obligation is kept alive. See Weinberger v. Weidman, 134 Cal. 600, 66 Pac. 869. The demurrer was properly overruled.

2. Some complaint is made on this appeal that the amended complaint contained a second cause of action based on the note alone, and without any allegation as to the mortgage. No objection by way of demurrer or otherwise was made to this joinder, and the relief granted by the judgment was based wholly on the allegations contained in the first count. We cannot see that any objection on this ground is now available to defendant, or that he could have been prejudiced in the slightest degree by the insertion of this cause of action.

3. It is urged in the briefs that the evidence was not sufficient to warrant certain of the findings of fact, but a sufficient answer to this claim is that the record on appeal fails to show any specification of any particular wherein the evidence was insufficient. This is not a case of alleged insufficient specifications, but a case of no attempt at specification at all. We are therefore precluded from considering the question suggested.

4. It is claimed that counsel fees were not secured under the terms of the mortgage, and that the court, therefore, erred in making the amount allowed plaintiff therefor, $175, a lien on the mortgaged premises, and payable out of the proceeds of the foreclosure sale. The facts upon which this objection is based are shown on the face of the findings, and the point is available to defendant on a claim that the findings do not sustain the judgment. But there is no force in the objection on its merits. The language of the mortgage as to counsel fees is practically the same as that contained in the mortgage in Klokke v. Escailer, 124 Cal. 297, 56 Pac. 1113, where it was held that the counsel fees were not secured by the mortgage. But this case differs from that, in that the note here itself contains a provision for "7% on principal, as attorney's fees in such suit" in the event that suit is commenced to enforce payment of the note. The mortgage was given to secure "said note," which included the contract to pay the attorney fee provided for therein. The attorney fee was therefore secured by the mortgage. The case in this respect is the same as County Bank v. Goldtree, 129 Cal. 160, 163, 61 Pac. 785, and Peachy v. Witter, 131 Cal. 316, 319, 63 Pac. 468. The amount allowed was, however, excessive. The trial court was not warranted in allowing more on this account than was stipulated for in the note. The findings show that there was due on the principal only $2,220, so that the utmost the trial court could properly allow was $155.40. The amount allowed should be decreased by $19.60. We do not understand that a party waives his objection that the findings do not support the judgment by a failure to proceed in the lower court by motion, under sections 663 and 663½, to have a proper judgment entered.

5. In another respect, shown by the findings, is the judgment excessive. It is specifically found that defendant has paid $1,740 on account of said note, $1,460 thereof being interest thereon to May 15, 1906, and $280 thereof being on account of the principal. While it is further said that this leaves $2,320 due on the principal, it is manifest that this conclusion cannot be true, and that the balance due for principal was only $2,220. It thus appears indisputably from the figures found by the trial court that the amount due at the date of the findings and decree, July 29, 1907, on account of principal and interest, was $2,434.06, instead of $2,586.07, the amount adjudged, a difference in favor of defendant of $152.01. This objection we think is also available to defendant, as an objection that the findings do not support the judgment.

There is no other point requiring notice.

It is ordered that the judgment be, and the same is hereby, modified by inserting the amount "$2,434.06" in lieu of the amount "$2,586.07" wherever the same occurs therein, and also by inserting the amount "$155.40" in lieu of the amount "$175.00" wherever the same occurs therein; and, as so modified, the judgment is affirmed.

The order denying the motion for a new trial is affirmed.

We concur; SLOSS, J.; SHAW, J.

(155 Cal. 604)

PEOPLE ex rel. SCHOLLER v. CITY OF LONG BEACH. (L. A. 2,239.)

(Supreme Court of California. June 9, 1909.)

1. Municipal Corporations (§ 34*)—Annexation of Territory—Election.

Under the statute relative to the annexation of territory to cities, and providing that the question shall be submitted to the qualified electors residing in the territory to be annexed, and that the election shall be held in conformity with the general election laws, a temporary resident of the territory, not a resident in the sense that would qualify him to vote at a general election, was not qualified to vote on the question of annexation.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 34.*]

2. Quo Warranto (§ 29*)—Laches.

August 16, 1905, an election was held under St. 1889, p. 358, c. 247, for the purpose of annexing certain territory to the city of B., and the vote in favor of annexation was certified to the Secretary of State August 22d. Proceedings to annex part of the same territory to the city of P. were pending when the B. proceeding was begun. An election for the annexation to P. was held September 5th, and the result in favor of annexation was certified September 7th. Another proceeding for the annexation of still another part of the same territory to P. was afterwards had, whereby the same was certified as annexed November 30, 1906. From the beginning the legality of the annexation to B. was in dispute, and March 30, 1907, quo warranto proceedings were commenced to determine the validity of the annexation to B. *Held*, that the state was not estopped by delay and recognition to question by quo warranto the validity of the annexation.

[Ed. Note.—For other cases, see Quo Warranto, Dec. Dig. § 29.*]

3. Municipal Corporations (§ 33*)—Annexation of Territory.

Deering's Gen. Laws, p. 638, § 2 (St. 1889, p. 371, c. 251), providing for the organization of cities under which the city of B. was organized, provide that the county board of supervisors shall establish the boundaries which shall remain until by action authorized by law for the annexation of additional territory the boundaries shall be changed. St. 1889, p. 358, c. 247, provides a scheme for annexation of territory, and declares that the boundaries of any city may be altered and new territory annexed by proceedings to be had as provided for in the statute. Const. art. 11, § 6, declares that cities shall not be created by special laws, but that the Legislature by general laws shall provide for the organization of cities, and that all special charters shall be subject to and controlled by general laws. The city of B. attempted to annex territory, but the proceedings were legally ineffectual to accomplish the result, and thereafter the city adopted a charter prepared by a board of freeholders as provided in Const. art. 11, § 8. *Held*, that the fact that such charter described the boundaries of the city of B. as including the territory which the city had sought to annex did not accomplish an annexation.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 33.*]

Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Quo warranto by the People by U. S. Webb, Attorney General, on the relation of T. E. Scholler, to determine the right of the city of Long Beach to exercise corporate jurisdiction over Terminal Island. From a judgment for the People, and from an order denying a new trial, respondent appeals. Affirmed.

Stephen G. Long (Ralph C. Harrison, of counsel), for appellant. U. S. Webb, Atty. Gen., Henry Stieglitz, and J. W. McKinley, for respondent.

SHAW, J. This is an action in quo warranto to determine the right of the defendant, as a municipal corporation, to exercise corporate jurisdiction and control over certain adjacent territory comprising a seaside summer resort now usually known as Terminal Island. A proceeding was had under the act of March 19, 1889 (St. 1889, p. 358, c. 247), for the purpose of annexing this territory to the city of Long Beach. An election to determine such annexation was held on August 16, 1905. In the territory proposed to be annexed the election officers made return that 73 votes were cast in favor of the annexation and 72 votes against it. The vote in the original city being favorable, a record of the result was made and certified to the Secretary of State and filed by him on August 22, 1905, and ever since that date the said city has claimed the right to exercise municipal control over the said territory, upon the theory that it had been duly annexed to the city by said proceeding. The same proceeding was under consideration by this court in Haskell v. Long Beach, 153 Cal. 543, 96 Pac. 92, a suit by a private person. In that case certain alleged informalities and defects in the ballots cast at the annexation election were held to be lawful and the attempt to annul the proceedings in that action failed. In the case at bar the complaint alleged that 17 persons who voted in favor of annexation at the election in the territory to be annexed were not at that time residents of said territory, hence not entitled to vote; that a majority of the legal votes cast in said territory was against the annexation; and that, therefore, the proceeding was void. This question was not presented in the Haskell Case. The court below found that two of these persons, Patterson and Blankenhorn, were not at the time residents of the territory and were not lawful voters at said election; that they voted thereat in favor of annexation; and that without these votes there was not a majority for the annexation. Upon this ground judgment was given declaring that the territory was not a part of the city of Long Beach. Appeals are taken both from the judgment and from an order denying defendant's motion for a new trial. A bill of exceptions presents the evidence on the subject.

The evidence shows that for some years prior to 1905 these two persons had been residents and householders without the territory, each living with his family in a house owned by himself, Mr. Patterson in Los Angeles, and Mr. Blankenhorn in Pasadena, and that it had been customary for each of them to live with his family at Terminal Island for several months in the summer season, usually the months of July, August, and September, each returning to his home at the end of the outing. Patterson owned the house which he occupied at Terminal Island. Blankenhorn rented and occupied a furnished house while there. This custom they followed in 1905, going to the seaside with their respective families about the 1st of July and returning the latter part of September. Neither of them testified that at the time he was there in 1905 he had any intention to make Terminal Island his home, or to reside there permanently, and there were many circumstances in evidence indicating the absence of such intention. Without further recital of the evidence, it is sufficient to say that, while each of them doubtless honestly believed that he had a legal right to vote at the annexation election, the evidence was sufficient as to each to support a finding that he had not such legal residence and was not entitled to vote. The statute requires that the proposition of annexation shall be submitted "to the electors residing in the territory proposed" to be annexed, at a special election held for that purpose; that "the qualified electors residing in said territory so proposed to be annexed shall be entitled to vote upon such proposition"; and that "the holding and conducting of such election shall be in conformity, as far as may be, with the general laws of this state concerning elections." Under these provisions, no one would be lawfully entitled to vote at such election, unless he was at the time a permanent resident of the territory, a resident in the sense that he would be a qualified elector therein at a general election if, prior thereto, his residence therein had continued for the required time. See Huston v. Anderson, 145 Cal. 328, 78 Pac. 626. It is not necessary here to inquire with respect to one who had taken up his permanent residence there whether such residence must have continued for any specified period prior to the election in order to entitle him to vote. Patterson and Blankenhorn were not residents of the territory at all in the sense above stated. They were mere temporary summer residents without intent to remain, and were not voters at that place. The contention of the appellant that the statute was intended to permit any person to vote at such election who happened at the time to be bodily present there with such family as he had, regardless of his intent to remain there and make it his home or domicile, cannot be sustained. Huston v. Anderson, supra. If one who went there with his family to remain for a period of three months, and then return to his former residence, were to be considered a qualified elector, the line could not be drawn at any specific period, and every summer visitor who was a citizen of the state on the date of the election could vote, regardless of the time he came or of his intention to remain. The statute uses the phrase "electors residing in the territory" with reference to an election to be held therein to determine a political question—that is, the boundaries of a political subdivision of the state—and it cannot reasonably be understood to mean or refer to any other than a legal residence therein, as distinguished from an actual, but transitory, residence or sojourn. Huston v. Anderson, supra. The court below was right in holding these votes illegal and that in consequence thereof the annexation proceedings were void.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

This action was not begun until March 30, 1907. The court finds that during the interval of 19 months that elapsed after the culmination of the annexation proceedings and before the action was begun the city of Long Beach was exercising municipal control over the annexed territory, and collecting municipal taxes on property situated therein. The defendant contends that it is to be presumed, also, that the annexation was in that interval acquiesced in and recognized by the public authorities of the state as a part of Long Beach, and upon these facts it is asserted that the state, by this delay, acquiescence, and recognition, is estopped to question the validity of the annexation, or has by its laches lost its right to do so. In support of this proposition, counsel cite State v. Des Moines, 96 Iowa, 521, 65 N. W. 818, 31 L. R. A. 186, 59 Am. St. Rep. 381; State v. Leatherman, 38 Ark. 81; Jameson v. People, 16 Ill. 257, 63 Am. Dec. 304; People v. Maynard, 15 Mich. 470. No valid public recognition of the validity of the annexation has been shown, except that of the city of Long Beach itself. On the other hand, it appears that proceedings to annex a part of the same territory to the city of San Pedro were pending when the Long Beach proceeding was begun; that an election for the annexation to San Pedro was held on September 5, 1905, and the result in favor of annexation certified to the Secretary of State on September 7, 1905, by which that territory became annexed to San Pedro, if the Long Beach proceeding was invalid; that another proceeding for the annexation of still another part of the same territory to San Pedro was afterwards had whereby the same was certified as annexed thereto on November 30, 1906; and that the legality of the annexation to Long Beach has been in dispute from the beginning, as shown by the case of Haskell v. Long Beach, supra, which was begun immediately after the Long Beach annexation election in August, 1905. Under these circumstances, we do not think the state is precluded from inquiry into the validity of the proceeding. There has been no such acquiescence or recognition as appeared in the cases cited by appellant on this point, and no such lapse of time as would be necessary to sustain the defense of laches. The freeholder's charter, as will be shown, was wholly ineffective as to this territory. It appears that thereafter, on February 5, 1907, the people of Long Beach, at an election held for that purpose, adopted a city charter for the city of Long Beach, prepared by a board of freeholders as provided in section 8, art. 11, Const., and that this charter was duly approved by a majority of the members of the Legislature on February 26, 1907 (St. 1907, pp. 1176–1240, c. 15). This charter described the boundaries of the city, and included, as part of the city, the territory attempted to be annexed thereto by the proceeding which we have declared to be void. It is claimed that this charter so adopted has the force and effect of a law fixing the city boundaries, and that it makes the territory in question a part of the city of Long Beach, notwithstanding the invalidity of the previous annexation.

The constitutional provisions for the adoption of special city charters are designed and adapted to give the people of any existing city an opportunity to frame their own laws to control their municipal affairs and government, according to their own desires and notions. No provision whatever is made for considering the wish or voice of any persons outside the city with regard to such charters, or in relation to the addition of territory to such city by the extension of the boundary lines in the described corporate limits in such proposed charters. On the contrary, it is specifically declared that "a city," manifestly referring to any city already organized, "may frame a charter for its own government," the special charter to be prepared by a board of freeholders selected by the voters residing within the city, the freeholders must all have resided within the city for the five years preceding their selection, and the charter, when thus prepared, must be submitted to the qualified electors of such city for ratification before approval by the Legislature. The people of any outside territory have no opportunity to express their wishes. Thereupon, the section declares, the charter shall become the organic law of such city. All this clearly implies that the special charter is to apply only to territory already erected into a municipality, and it negatives the idea that the provisions of such special charters were intended to delegate to a city the power to enlarge its limits when enacting a new charter, or amending an old one. The erection of territory into a city and the change of the boundaries thereof are matters within the general political power of the people, and there can be no doubt that the people, by their Constitution, could delegate to any city the power to annex and bring within its municipal jurisdiction any adjacent territory without consulting the inhabitants of that territory. But we should not declare that a grant of such arbitrary power was intended to be made in any Constitution, unless we should find it expressed in unequivocal language not capable of any other reasonable interpretation. Our Constitution does not contain any language purporting to delegate such powers to cities. The provision concerning freeholders' charters may be given full effect without including a delegation of power to a city to annex territory. The obvious meaning is that such charters are to apply to cities as they exist, and this we hold to be the correct construction.

Section 6 of the same article of the Constitution declares that cities shall not be created by special laws, but that the Legislature by general laws shall provide for the incorporation and organization of cities, and, further, that all special charters of any cities "shall be subject to and controlled by general laws," except in municipal affairs. Under this latter provision, it is now settled that such special charters are paramount in all matters exclusively of municipal concern, but that in all other affairs, all affairs of state policy and government, the general laws control. Upon this principle it is held that the annexation of territory to a city is not a municipal affair within the meaning of section 6, but is a matter pertaining to the state at large and within its general powers and functions, and hence that the general law upon that subject controls. People v. Oakland, 123 Cal. 604, 56 Pac. 445. In that case it was claimed that the annexation of territory was a municipal affair, and that the provisions of the charter, so far as they related to that subject, were paramount. The court said that the annexation of territory was "a thing that could not be accomplished through any provision of the charter of the city of Oakland, or otherwise than under the statutory authority given by said act," and that, "as the Legislature alone has the power to authorize such annexation, it must have the power to prescribe the terms, conditions, and mode of annexation."

The decision in People v. Oakland, 92 Cal. 611, 28 Pac. 807, holding that territory could be excluded from a city by a change in the boundaries thereof in a new freeholders' charter omitting some of its territory, referred to a charter adopted in 1888. This was prior to the passage of the act of 1889 (St. 1889, p. 356, c. 246), providing for the exclusion of territory from cities, and at a time when there was no general law in force authorizing such exclusion. Whether or not it could be accomplished by a freeholders' charter when there was a general law covering the subject is a question not settled by that decision. It may be observed, however, that the question of exclusion is one which affects a part of the existing city, and of which the inhabitants of the territory to be excluded would have notice and upon which they would have an opportunity to vote and to exercise their influence. In these respects it is to be distinguished from the question of the addition of outside territory. But the decision relates solely to the exclusion of territory, and it is not authority for the proposition that territory could be annexed by a freeholders' charter, even in the absence of a general law upon that subject.

The provisions of the general law are inconsistent with the theory that such annexation can be accomplished by a freeholders' charter. Section 2 of the general law providing for the organization of cities, under which Long Beach was incorporated, declares that, in the proceeding to incorporate a city, the county board of supervisors shall establish and define its boundaries, and that "the boundaries so established by the board of supervisors shall be the boundaries of such municipal corporation until by action, authorized by law for the annexation of additional territory to, or the taking of territory from, said municipal corporation, such boundaries shall be changed." Deering's Gen. Laws, p. 638, § 2; St. 1889, p. 371, c. 251. The act of 1889 (St. 1889, p. 358, c. 247) provides a complete scheme for the annexation of territory, and declares that "the boundaries of any incorporated town or city, whether heretofore or hereafter formed, incorporated, reincorporated, organized or reorganized, may be altered, and new territory annexed thereto, incorporated and included therein, and made a part thereof, by proceedings to be had and taken as in this act provided." It was this act which was held to provide the exclusive method for the annexation of territory to cities in People v. Oakland, 123 Cal. 604, 56 Pac. 445.

Our conclusion is that the part of the freeholders' charter of Long Beach, purporting to include within the limits of that city territory not previously a part thereof, was ineffective and void, and that it did not make such territory a part of that city.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

Cal. App. 463

CARY v. BLODGETT et al. (Civ. 532.)

(Court of Appeal, Third District, California. April 28, 1909. Rehearing Denied by Supreme Court June 22, 1909.)

1. MUNICIPAL CORPORATIONS (§ 58*)—POWERS.

A municipal corporation can exercise only the powers granted in express words, those necessarily or fairly implied in or incident to the powers expressly granted, and those essential to the declared objects and purposes of the corporation, not simply convenient but indispensable, and the rule of strict construction of corporate powers is not applicable to the ordinary clauses in the incorporating acts of municipalities, though it is applicable to grants of powers which are out of the usual range or which may result in public burdens.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 145; Dec. Dig. § 58.*]

2. MUNICIPAL CORPORATIONS (§§ 271, 272*)—POWERS—WATER AND LIGHT.

General Municipal Incorporation Act (Gen. Laws 1906, p. 898), § 862, empowering cities of the sixth class to acquire, construct, and maintain waterworks and works for light for the inhabitants thereof, authorizes a city of the sixth class to construct and maintain a plant to supply its inhabitants with water and light for their private use as well as for public purposes.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 726, 727; Dec. Dig. §§ 271, 272.*]

3. STATUTES (§ 93*)—SPECIAL LEGISLATION—"MUNICIPAL AFFAIR."

General Municipal Incorporation Act (Gen. Laws 1906, p. 898), § 862, empowering cities of the sixth class to acquire and maintain waterworks and works for light, relates to matters constituting a "municipal affair," and it is not invalid as special legislation because the power conferred is confined to cities of the sixth class.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 102; Dec. Dig. § 93.*

For other definitions, see Words and Phrases, vol. 5, p. 4619; vol. 8, p. 7726.]

4. MUNICIPAL CORPORATIONS (§ 296*)—PUBLIC IMPROVEMENTS—ESTIMATES OF COST—SUFFICIENCY.

The estimate of the cost of a combined plant for supplying the inhabitants of a city with water and light is sufficient, where the estimate shows the cost of the completed plant, though it does not separate the cost of the plant for supplying water from that for supplying light, though the law contemplates that separate estimates shall be made for each separate improvement or structure.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 296.*]

5. MUNICIPAL CORPORATIONS (§ 918*)—BONDS FOR PUBLIC IMPROVEMENTS—ELECTIONS.

Under General Incorporation Act (Gen. Laws 1906, p. 898), § 862, authorizing cities of the sixth class to acquire waterworks and works for light, and St. 1901, p. 27, c. 32, authorizing a city to incur an indebtedness for the cost of a municipal improvement by submitting the question to the voters, a proposition for the issuance of bonds for the construction of a combined plant to supply water and light to the inhabitants of a city of the sixth class may be submitted as a single proposition, the duty of determining the necessity for the expenditure and the propriety of submitting it to the electors, together with the phraseology in which it shall be submitted, being cast on the municipal authorities subject to a reasonable regard for the privilege of the electors to be informed as to the purposes and cost of the proposed improvement.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 918.*]

Appeal from Superior Court, San Joaquin County; Nutter, Smith and Norton, Judges, in Bank.

Action by Edward C. Cary against J. M. Blodgett and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Arthur L. Levinsky, for appellant. Edward I. Jones, for respondents.

BURNETT, J. The action was brought against the trustees, clerk, and treasurer of the city of Lodi, a municipality of the sixth class, to enjoin and restrain them from selling or disposing of certain bonds to the amount of $76,000 which had been voted by the electors at a special election called for that purpose for a combined plant for supplying said city of Lodi and its inhabitants with water and electric light. The decision was in favor of defendants, and the appeal is from the judgment on the judgment roll.

For the general authority to incur the indebtedness and to issue the bonds respondents rely upon the act of the Legislature of

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

1901, entitled "An act authorizing the incurring of indebtedness by cities, towns and municipal corporations for municipal improvements, and regulating the acquisition, construction or completion thereof." The portion of said act sufficient for the purpose of the discussion is as follows:

"Section 1. Any city, town or municipal corporation incorporated under the laws of this state may as hereinafter provided incur indebtedness to pay the cost of any municipal improvement requiring an expenditure greater than the amount allowed for such improvement by the annual tax levy.

"Sec. 2. Whenever the legislative branch of any city, town or municipal corporation shall by resolution passed by vote of two-thirds of all its members and approved by the executive of said municipality, determine that the public interest or necessity demands the acquisition, construction or completion of any municipal improvement, including bridges, water works, water rights, sewers, light or power works or plants, buildings for municipal uses, school houses, fire apparatus and street work or other works, property or structure necessary or convenient to carry out the objects, purposes and powers of the municipality, the cost of which will be too great to be paid out of the ordinary annual income and revenue of the municipality, * * * it may call a special election and submit to the qualified voters of said city, town or municipal corporation the proposition of incurring a debt for the purpose set forth in said resolution, and no question other than the incurring of the indebtedness for said purpose shall be submitted; provided that propositions of incurring indebtedness for more than one object or purpose may be submitted at the same election. The ordinance calling such special election shall recite the objects and purposes for which the indebtedness is proposed to be incurred, the estimated cost of the proposed public improvement," etc. St. 1901, p. 27, c. 32.

The specific grant of power as to cities of the sixth class, involved in the present controversy, is contained in section 862 of the general municipal incorporation act (Gen. Laws 1906, p. 898), which provides that "the board of trustees of said city shall have power: * * * (3) To contract for supplying the city or town with water for municipal purposes, or to acquire, construct, repair and manage pumps, acqueducts, reservoirs or other works necessary or proper for supplying water for the use of such city or the inhabitants or for irrigating purposes therein. * * * (13) To acquire, own, construct, maintain and operate street railways, telephone and telegraph lines, gas and other works for light and heat; public libraries, museums, gymnasiums, parks and baths."

No question is raised by appellant as to the regularity of the proceedings culminating in the vote authorizing the issuance of the bonds, except in regard to the estimate of the cost of the improvement hereinafter to be noticed, but he claims the judgment should be reversed for the following reasons: "First, the city of Lodi has no right or authority in law to sell to its inhabitants electric light; second, the bonds voted were illegal and invalid by reason of the fact that no separate estimates were given to the city of Lodi by any engineer prior to the election at which said bonds were voted, showing the estimated cost for a plant for supplying the city of Lodi and its inhabitants with water, or a separate estimate for supplying electric light; third, the bonds are invalid because there was an estimate only for a combined plan for supplying water and electric light; fourth, the said bonds are illegal and invalid for the reason that the electors were not given an opportunity to vote separately upon the proposition for supplying the city of Lodi and its inhabitants with water, and upon the proposition of supplying them with electric light."

1. The general rule as to the power and authority of municipalities has been stated by Judge Dillon and approved by the courts, as follows: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: (1) Those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; and (3) those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable." 1 Dillon on Mun. Corp., § 89. He further says (section 91) that: "The rule of strict construction of corporate powers is not so directly applicable to the ordinary clauses in the charter or incorporating acts of municipalities as it is to the charters of private corporations; but it is equally applicable to grants of powers to municipalities and public bodies which are out of the usual range, or which may result in public burdens, or which in their exercise touch the right to liberty or property, or as it may be compendiously expressed, any common-law right of the citizen or inhabitant." In this principle announced by Judge Dillon appellant claims to find justification for his first contention. It seems clear, though, to us that in the grant of power to cities of the sixth class, if not explicitly expressed, it is at least necessarily implied, that the municipality shall have the authority to furnish the inhabitants for private use as well as the general public with electric light. In the grant there is no specification as to the purposes for which the light is to be furnished, and therefore we think no purpose for which such works are usually designed and operated was excluded from the contemplation of the Legislature in the enactment of the statute. Indeed, it would be a strained and unnatural construction of the language used to hold that the works were to be devoted simply to corporate uses. When the city is expressly authorized "to

acquire, own, construct, maintain and operate * * * gas and other works for light and heat," the incidents of such ownership and right of operation necessarily follow. Appellant's view derogates from the ordinary meaning of the terms used and writes into the statute a restriction of the use, which we have no right to assume was in the mind of the Legislature. If the same grant were made to an individual, no one, of course, would contend for such a limitation; but it is sought here because of the idea that it is hardly within the legitimate functions of a municipality to furnish light to its inhabitants. But the modern decisions recognize this as a public use and not outside of the usual range and scope of municipal authority. In Jacksonville Electric Light Company v. City of Jacksonville, 36 Fla. 229, 18 South. 677, 30 L. R. A. 540, 51 Am. St. Rep. 24, it is held that: "A charter conferring upon a city council power to provide for lighting the city by gas or other illuminating material, or in any other manner, authorizes the erection and maintenance, at public expense, of an electric plant of sufficient power to light, not only the streets and public places in the city, but also to supply in connection therewith, electric lights for the inhabitants of the city in their private houses." A large number of cases is therein cited in support of the court's conclusion, among them being Thompson-Houston Electric Light Co. v. City of Newton (C. C.) 42 Fed. 723; Linn v. Chambersburg Borough, 160 Pa. 511, 28 Atl. 842, 25 L. R. A. 217; Opinion of the Justices, 150 Mass. 593, 24 N. E. 1084, 8 L. R. A. 487; Crawfordsville v. Braden, 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268, 30 Am. St. Rep. 214.

In the Thompson-Houston Electric Light Co. Case, supra, Mr. Justice Shiras said: "It has been the uniform rule that a city in erecting gasworks or waterworks is not limited to furnishing gas or water for use only upon the streets and other public places of the city, but may furnish the same for private use." The case of Hyatt v. Williams, 148 Cal. 585, 84 Pac. 41, cited by appellant, is not opposed to the foregoing view. The particular clauses o' the Stockton charter therein construed are as follows: "The council shall have power to pass ordinances: * * * (5) To provide for and regulate * * * lighting and watering of the streets, avenues and public places. * * * (17) To provide for * * * such lights * * * as are necessary for the convenient transaction of public business." It is clear that the power was expressly limited to the purposes therein enumerated. By the specification of the particular purposes, in accordance with a familiar rule of construction, other purposes were excluded. It was very properly said by the court that "the terms of the express grant of the power to provide light for the public purposes named do not indicate any intention to give the distinct and larger power to establish a plant for furnishing light for private use to all the inhabitants of the city who may desire it, and no such intention can be imputed to the framers of the charter from the language there employed." And it is also held that the power to construct works for the express purpose of supplying light to the inhabitants is not incidental to or included in the power to construct such works to supply light for public streets and public buildings. The difference in that case and this is between the grant of a power for special and expressly enumerated purposes and the grant for all usual and necessary purposes.

The suggestion of appellant that the attempted grant is unconstitutional because it is special legislation, in that it is confined to cities of the sixth class, is answered by the Supreme Court in the case of Ex parte Jackson, 143 Cal. 564, 77 Pac. 457, wherein it is said: "As to such matters—i. e., matters coming within the proper scope of a municipal charter, or, in other words, municipal affairs—there is a distinction recognized by the Constitution between the various classes of municipal corporations, which justifies the varying legislation. So long as the legislation as to such matters contained in such a charter operates alike upon all municipal corporations coming within the class for which the charter exists, it is under our constitutional provisions a 'general law' fully authorized by section 6 of article 11 of the Constitution." The ordinance under review there was one requiring a license tax for carrying on the business of a livery and feed stable adopted in pursuance of the provision of the general municipal corporation act granting such power to cities of the sixth class. It was held to be immaterial whether there was or not any similar provision in the charter of other cities. It is not disputed that the matter before us is a "municipal affair," and therefore the provision in question is not open to the imputation of special legislation.

2. The contention that separate estimates of the cost of a plant for supplying water and of one for suplying light are required is entirely without merit. The law, indeed, contemplates that separate estimates shall be made for each separate improvement or structure; but it does not require the impracticable attempt to determine and declare what part of the cost shall be appropriated to each purpose in case of the construction of one plant or mechanism capable of supplying various needs of the community. The construction for which appellant contends would lead to the absurd result that, however advantageous on the ground of economy or efficiency might be the course pursued in the present instance, the plan must be rejected for the reason that the trustees did not adopt the more expensive and probably less feasible scheme of separate plants to furnish water and

electric light. The proposal, being for a definite sum for a single definite plant, satisfies the requirement of any reasonable interpretation of the law. In State ex rel. Chillicothe v. Wilder, 200 Mo. 97, 98 S. W. 465, the Supreme Court of Missouri aptly said: "As for the second ground for refusing to register the bonds, to wit, that it contained two propositions, one for a waterworks plant and the other for an electric light plant, so that the voters were compelled to vote for the whole proposition, and could not vote for one against the other, we think that a reading of the ordinance and the notice of election indicates that the bonds were to be issued for one plant only, to wit, 'a waterworks and electric light plant,' and that the ordinance and the notice of election in this case do not violate the rule announced by this court in State ex rel. Bethany v. Allen, 186 Mo. 673, 85 S. W. 531. We think it was the clearly expressed purpose in this case to erect one plant, on one site, to be conducted by one management and in this manner save the expense of another plant. * * * We know of no reason, and none is suggested, why one plant, at least so far as the power and machinery are concerned, could not be made available and we think such was the intention and purpose of the council in passing this ordinance, and that the objection of the auditor to the bonds on this ground cannot be sustained. Upon a new submission of the proposition, however, it should be for a combined waterworks and electric light plant." It may be said that the submission here was substantially in the language so recommended by the Missouri court. In harmony with the foregoing, the Supreme Court of this state, in the City of Oakland v. Thompson, 151 Cal. 572, 91 Pac. 387, held that: "Where the scheme of the city had in contemplation the acquisition of several distinct parcels of land widely separated for park purposes, the object to be accomplished was single in its purpose, and under the act of 1901 the municipal authorities had discretion to submit at the special election held under the act the question of the acquisition of all such lands as a single proposition to be voted on." In People v. Counts, 89 Cal. 15, 26 Pac. 612, it was held that: "The specification of a purpose to construct two wagon roads with the bonds to be issued is not objectionable as being expressive of more than one object or purpose." The cases cited from this state by appellant are easily distinguishable from the foregoing, and, if there is a decision anywhere condemning such a proposal as the one before us, it should not be followed.

3. What has already been said applies to the third and fourth considerations submitted by appellant. Holding as we do that the proposal presented by the trustees was within the power granted by the statute and the Constitution, it follows that the elector cannot complain because he was not afforded the opportunity to vote for one proposition and against the other. As suggested by the learned counsel for respondents: "The fact is that the elector can scarcely ever vote upon that precise proposition which, of all the possible and authorized propositions, he prefers. He may favor the specified purpose, but not the specified amount of the proposed debt, or vice versa; yet he must vote, if at all, upon a proposition which combines both purpose and amount." The duty of determining the necessity for the expenditure and the propriety of submitting it to the electors and the particular phraseology in which it shall be expressed is cast upon the trustees subject to a reasonable and practicable regard for the right and privilege of the electors to be informed as to the purposes and cost of the proposed improvement that they may exercise at the polls an intelligent and discriminating judgment as to their own interests and the public welfare.

We see no reason to disturb the judgment of the lower court, and it is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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10 Cal. App. 572

KAUFFMAN, DAVIDSON & CO. v. W. F. SHAW & CO. (Civ. 594.)

(Court of Appeal, First District, California. May 10, 1909.)

1. Compromise and Settlement (§ 20*)—Performance of Agreement.

Where plaintiff agreed to accept from defendant a certain sum in satisfaction of a note, together with interest thereon from a certain date to be paid within a specified time, payment of such sum without payment of the interest did not constitute sufficient performance of the agreement, and plaintiff was entitled to recover the whole amount due on the note, less the payment.

[Ed. Note.—For other cases, see Compromise and Settlement, Dec. Dig. § 20.*]

2. Compromise and Settlement (§ 20*) — Breach of Agreement—Rights of Parties.

The agreement having provided that the amount paid was to be deemed a payment on account in case the agreement was not fully performed, it was not necessary for plaintiff to return any portion of the sum so paid.

[Ed. Note.—For other cases, see Compromise and Settlement, Dec. Dig. § 20.*]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Kauffman, Davidson & Co. against W. F. Shaw & Co. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Marcus Rosenthal, for appellant. Edwin L. Forster and Robert R. Moody, for respondent.

COOPER, P. J. This action was brought to recover the sum of $1,006.85 upon a promissory note dated June 13, 1906, less the sum of $503.42, which it is alleged was paid thereon on the 18th day of September, 1906. The case was tried before the court, and findings filed, upon which judgment was entered for the defendant.

The defendant in its answer claimed that it had been released from the payment of the full amount of said promissory note by virtue of an agreement of compromise, under the terms of which it was to pay the plaintiff the sum of $503.42 in full payment of said promissory note, and that said compromise agreement had been fully performed on its part. The court found in relation to the said compromise agreement as follows: "That on the ——— day of August, 1906, at the city and county of San Francisco, state of California, by its certain writing, the plaintiff agreed with the defendant to accept the sum of $503.42, with interest thereon from June 13, 1906, at the rate of 6 per cent. per annum, in full payment of principal and interest mentioned in said promissory note above set out and mentioned in the complaint herein, provided and on the express condition precedent that such payment be made within 90 days from and after the date of the execution of said agreement, and by said agreement it was further provided that said agreement was strictly upon the condition precedent that all and singular the terms, provisions and conditions thereof be fully performed, and, in the event of the failure in the performance of any of said provisions, terms, and conditions, then the plaintiff should be and thereby was released from any obligation thereunder and from any obligation to accept less than the full amount of its claim in settlement thereof, and that time was in all respects of the essence of said agreement, and that if at the expiration of said period of 90 days the said sum of $503.42, with said interest thereon, should not have been paid, then said agreement should be and become null and void, and the plaintiff should be released from all obligation to accept said sum in settlement of its claim, and that such payment of said last-named sum and interest should be deemed merely a payment on account by the said defendant to the said plaintiff, and, further, that in the event of the violation of said agreement in any respect by the said defendant, or in the event of the failure in the performance by defendant of any of the terms or conditions in said agreement set forth, plaintiff should at its option be released from said agreement and from its conditional obligation to accept said sum and interest in settlement of its claim. That said agreement has never been set aside by agreement between the parties hereto or by any order or judgment of any court. That said defendant did on or about the 18th day of September, 1906, pay to said plaintiff the sum of $503.42, and that the plaintiff did immediately thereupon demand of said defendant the payment of said interest thereon, and said defendant did thereupon promise to and with the plaintiff to pay the same on the next day, but that neither said interest nor any part thereof has been paid, and that the plaintiff did thereupon, to wit, on or about the 15th day of November, 1906, and after the expiration of said period of 90 days, demand of and from the defendant the payment of the remainder of the principal and interest of said promissory note, but that no part of the principal or interest of said promissory note has been paid, save and except the said sum of $503.42. That said sum of $503.42 or any part thereof has never been tendered to or returned to defendant by plaintiff or by any person on behalf of plaintiff." It appears from the above findings that under the express agreement of the parties time was of the essence of the contract, and that the parties agreed that, unless the full amount was paid as provided for in the said composition agreement, then the said agreement should be void, and any payment that had been made thereunder should be deemed merely a payment by the defendant to plaintiff on account of the said promissory note. The court finds—and it is so stated in the agreement—that interest at the rate of 6 per cent. from June 13, 1906, was to be paid upon said $503.42. It further appears that the interest was not paid, and that the defendant promised, at the request of plaintiff, to pay it the next day, but did not do so. It further appears that on the 15th day of November, after the expiration of the period of 90 days, the plaintiff again demanded payment of the balance due on said promissory note, with interest, but the defendant neglected and refused to pay the same. It is elementary that the defendant, in order to have availed himself of the composition agreement, and of the payment of the amount justly due to the plaintiff, must have complied strictly with the terms of the contract under which it was agreed that it should be released from a part of its indebtedness. Under the composition agreement, if the $503.42 and the interest thereon had been paid within the times provided for in the agreement, then the defendant would have been released; but the amount was not paid, and it is no answer to the proposition that only the interest remained unpaid. The court cannot stop to speculate in regard to the amount—whether only a few dollars or half the composition agreement or three-fourths of it should release the defendant. It could only be released by paying the amount in the manner and at the time and according to the agreement by which plaintiff agreed that it should be released.

Nor was it necessary for the plaintiff to return any portion of the $503.42 paid to it. That was by the express agreement of the parties to be deemed a payment on account in case the composition agreement was not fully kept and performed. It is not for the court to make contracts for the parties; nor to allow the defendant to be relieved because it came very near complying with its contract. The contract was not performed, and the judgment should have been for the plaintiff for the amount due upon the promissory note, less the payment, to be credited as of the date when it was made.

The judgment is reversed, with directions to the trial court to enter judgment upon the findings in favor of plaintiff in accordance with the views herein expressed.

We concur: KERRIGAN, J; HALL, J.

10 Cal. App. 515

McDONALD v. HOFFMAN. (Civ. 578.)

(Court of Appeal, First District, California. May 5, 1909.)

1. MASTER AND SERVANT (§ 116*)—LIABILITY FOR INJURIES TO SERVANT—"APPLIANCE"—SCAFFOLDS.

The scaffold, erected by carpenters for their work upon a building, is not an "appliance" within the rule making it the duty of the master to furnish servants safe appliances with which to work, as the master's duty is performed when he has employed competent men and furnished them with proper tools and lumber and materials with which to erect the scaffold.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 207; Dec. Dig. § 116.*

For other definitions, see Words and Phrases, vol. 1, p. 455.]

2. MASTER AND SERVANT (§ 189*)—"FELLOW SERVANTS"—FOREMEN.

A foreman in charge of the construction of a building is a "fellow servant" of the carpenters employed on the building, in the construction of a scaffold under his direction, to be used in their work on the building, as the master's responsibility in case of an accident is not fixed by the grade of service, but the character of the act, and the act to furnish a safe scaffold was not a part of the master's duty.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 427–448; Dec. Dig. § 189.*

For other definitions, see Words and Phrases, vol. 3, pp. 2716–2730; vol. 8, p. 7662.]

Appeal from Superior Court, City and County of San Francisco; F. H. Kerrigan, Judge.

Action by A. D. McDonald against Victor Hoffman. A judgment of nonsuit was entered for defendant, and plaintiff appeals from an order denying a new trial. Affirmed.

C. L. Dam and Charles S. Burnell, for appellant. Myrick, Deering & Gibbons, for respondent.

COOPER, P. J. This action was brought to recover damages for injuries received by plaintiff, caused by the falling of a scaffold, while he was in the employ of the defendant as a carpenter engaged in building a warehouse on Sansome street, in the city and county of San Francisco. At the close of the testimony offered by plaintiff the court granted the motion of the defendant for a nonsuit, and judgment was accordingly entered. Plaintiff made a motion for a new trial, which was denied, and this appeal is from the order so made. The sole question here is as to whether or not the court erred in granting the nonsuit.

The facts as shown by the pleadings and evidence are briefly as follows: The plaintiff at the time of the injury was in the employment of the defendant as a carpenter in the construction of a building and warehouse. He was one of a number of carpenters employed by the same defendant in constructing the same building. The defendant was the contractor, and one Owens, also a carpenter, was the foreman under whom plaintiff was working. The plaintiff, the foreman Owens, and all the carpenters were engaged in the same general work in and about the erection and construction of the building. It became necessary in the course of construction to place or construct trusses to support the roof of the one-story portion of the building. In order to do this a cord or tiebeam was lifted into position, one end on the outer brick wall, the other end on the girder in the center of the building. This tiebeam was so lifted into place by three or four carpenters. While this work was in progress Owens called to several of the carpenters, including plaintiff, to bring their tools and erect a platform or scaffold upon which to work. There were plenty of planks on hand with which to build the scaffold, and which were used in building scaffolds in connection with the building, and the platform was built by laying these planks from the tiebeam to the nearest truss that had already been placed. Plaintiff was one of the carpenters who built the scaffold. The defendant furnished materials sufficient in quantity and quality with which to build the scaffold, and it is not claimed that any of the carpenters employed with plaintiff in the same general employment were incompetent, or that the defendant was guilty of negligence in employing them. It is alleged that Owens was incompetent and unfit to act as foreman, and that defendant employed him knowing him to be so incompetent and unfit for the work in which he was engaged, but plaintiff did not attempt to prove that Owens was incompetent. It is alleged "that on the said 17th day of April, 1903, it became and was the duty of plaintiff, in the course of his employment by defendant as such carpenter, to go upon the scaffold as aforesaid, and, while engaged in the performance of his duties as such carpenter and such employé of the defendant as aforesaid, plaintiff went and was upon said scaffold; and while engaged thereon in his said employment the said scaffold, by reason of its said inherent weakness and said imperfect, defective, and dangerous character thereof, broke and gave way and fell down, without any negligence or fault of plaintiff existing or contributing thereto, by reason whereof plaintiff was cast and thrown from said scaffold. * * *" It is claimed by the appellant that the scaffold was an appliance, and thus is within the rule that it is the duty of the master to furnish to his employés and servants safe appliances with which to work.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

We do not think that this scaffold was an appliance within the meaning of the law, but a place on which to stand while working, and a place built by the men who were working. It was the duty of defendant to furnish his men with proper tools, lumber, and materials with which to erect proper scaffolds or platforms to be used in the construction of the building. When he had done this he had done all that any reasonably prudent person would be required to do under like circumstances. It was then the duty of the employés to construct the scaffold in a workmanlike manner, so that it would be a reasonably safe place upon which to work. They were carpenters; they knew where scaffolds had to be used, and the purposes for which they were to be used. They built the scaffold, and if it was not built of such strength as to answer the purposes for which it was built, they have only themselves to blame for the unhappy accident. An employer is not required, where he furnishes a nail, or bolt, or rope, or planks with which to build a scaffold, to stand over each man to see that the nail is properly driven to the proper depth, the bolt properly secured, the rope properly adjusted or tied, or the planks properly placed on substantial supports. He sufficiently performs his duty when he employs competent men, and furnishes suitable and proper nails, bolts, ropes, and lumber, as the case may be, with which to erect the place upon which to work, or for the putting together of the materials in the building.

It is claimed that Owens was a vice principal, and not a fellow servant, and that the defendant is to be treated as if he himself erected the scaffold. This question has been settled to the contrary by the Supreme Court of this state in many cases. In Noyes v. Wood, 102 Cal. 392, 36 Pac. 766, the rule is thus stated by Judge Temple: "Plaintiff testified that Wayne was foreman and in charge of the work for defendants, and as such put up the scaffold and ladder which fell with plaintiff. It is therefore claimed that the negligence of Wayne was the negligence of his principals—the defendants. Upon this theory the case was tried and was argued here by appellant. Of course, under repeated decisions of this court, the grade of work of employés is an immaterial circumstance. Defendants would not have been liable to the plaintiff for the negligence of Wayne even if he had had entire charge and control of the work, with full power to hire and discharge the men. Davis v. S. P. Co., 98 Cal. 19, 32 Pac. 708, 35 Am. St. Rep. 133; Congrave v. S. P. Co., 88 Cal. 360, 26 Pac. 175; Burns v. Sennett, 99 Cal. 363, 33 Pac. 916; Stevens v. San Francisco, etc., R. Co., 100 Cal. 554, 34 Pac. 706. He was still but a fellow servant with plaintiff; and as his competency is not questioned defendants are not liable for his negligence." Among the later cases are Donovan v. Ferris, 128 Cal. 54, 60 Pac. 519, 79 Am. St. Rep. 25; Leishman v. Union Iron Works, 148 Cal. 274, 83 Pac. 30, 3 L. R. A. (N. S.) 500, 113 Am. St. Rep. 243; Callan v. Bull, 113 Cal. 600, 45 Pac. 1017. It is settled in this state that it is not the grade of service which fixes the master's responsibility in case of accident; it is the character of the act. The act of furnishing a safe scaffold in this case is not one which it was the duty of the defendant to perform. Owens was not therefore a vice principal, but a fellow servant; and the fact that he was foreman made him none the less a fellow servant.

The order is affirmed.

We concur: KERRIGAN, J.; HALL, J.

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10 Cal. App. 507

Ex parte AVDALAS. (Cr. 97.)

(Court of Appeal, Third District, California. May 4, 1909.)

1. INNKEEPERS (§ 16*)—FRAUD OF BOARDER—SUFFICIENCY OF ACCUSATION.

A complaint, charging that accused did willfully and unlawfully defraud one T., keeper of a boarding house, by leaving and going away from the said boarding house without first paying his bill, with deliberate intent to defraud the said T. out of the amount due thereon, etc., did not state an offense under Pen. Code, § 537, making it a misdemeanor for any person to obtain any food or accommodation at a boarding house, without paying therefor, with intent to defraud the proprietor or manager thereof.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. § 48; Dec. Dig. § 16.*]

2. HABEAS CORPUS (§ 30*)—GROUNDS—WANT OF JURISDICTION—INSUFFICIENCY OF COMPLAINT.

The complaint clearly discloses an attempt at charging an offense under the section, though so defectively drawn as to be bad on demurrer, and hence habeas corpus would not lie, as the writ cannot be made to subserve the office of a demurrer; its sole purpose being to test the question of jurisdiction in the class of cases to which it is applicable.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 25; Dec. Dig. § 30.*]

3. CRIMINAL LAW (§ 304*)—JUDICIAL NOTICE—PROVISIONS OF STATUTE.

The court may take judicial notice of the provisions of a statute.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 701; Dec. Dig. § 304.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. INDICTMENT AND INFORMATION (§ 110*)—SUFFICIENCY OF ACCUSATION — STATUTORY OFFENSES—FOLLOWING LANGUAGE OF STATUTE.

The general rule that, in charging a crime, if the allegations are substantially in the language of the statute it is sufficient does not mean that the language of the statute must be literally followed, and in some cases a literal following of the language of the statute, without other averments, would not be sufficient, but the true rule in proceedings before justices is, as expressly declared by Pen. Code, § 1426, that the offense must be set forth with such particulars of time, place, person, and property as to enable accused to understand distinctly the character of the offense complained of, and to answer the complaint.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 290; Dec. Dig. § 110.*]

5. WORDS AND PHRASES—"KEEPER."

Webster defines a "keeper" as one who has the care, custody, or superintendence of anything, or one who has or holds possession of anything.

[For other definitions, see Words and Phrases, vol. 4, pp. 3923-3926.]

6. HABEAS CORPUS (§ 30*)—GROUNDS—WANT OF JURISDICTION—INSUFFICIENCY OF COMPLAINT—"KEEPER."

The word "keeper" having a broader meaning than either the word "proprietor" or "manager," as used in Pen. Code, § 537, making it a misdemeanor for a person to obtain food or accommodation at a boarding house without paying therefor, with intent to defraud the proprietor or manager thereof, inasmuch as it may include either or both, the use of the word "keeper," instead of "proprietor" or "manager," in charging an offense under the section sufficiently indicated that the person alleged to have been defrauded was either proprietor or manager, or both, of the boarding house referred to, at least for the purposes of a habeas corpus proceeding.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 25; Dec. Dig. § 30.*]

Application of George Avdalas for a writ of habeas corpus. Alternative writ discharged, and petitioner remanded.

Tuttle & Tuttle, for appellant. C. A. Tuttle, for respondent.

HART, J. The petitioner was convicted by a jury in the justice's court of township No. 9, in Placer county, upon a complaint purporting to charge him with a misdemeanor under the provisions of section 537 of the Penal Code, and was thereupon sentenced to pay a fine of $60, or, in default of the payment thereof, to be confined in the county jail of said county at the rate of one day for each dollar of said fine.

That portion of the provisions of said section within which it was sought, by the charging part of the complaint, to bring the alleged act of the petitioner reads as follows: "Any person who obtains any food or accommodation at an hotel, inn, restaurant, boarding house or lodging house without paying therefor, with intent to defraud the proprietor or manager thereof, * * * is guilty of a misdemeanor." It is claimed by the petitioner that the complaint upon which he was convicted does not state a public offense under section 537 of the Penal Code, supra, and that therefore the court was without jurisdiction to try him upon the purported charge, and that he is now restrained of his liberty under a judgment which is absolutely void. The charging part of the complaint is in the following language: "The said defendant, at the time and place last aforesaid, did willfully and unlawfully defraud the said Theros Theros, keeper of a boarding house, by leaving and going away from the said boarding house without first paying his bill, with deliberate intent to defraud the said Theros Theros out of the amount due thereon, to wit, $45." It was admitted at the hearing of this petition that the petitioner had taken an appeal from the judgment of the justice's court to the superior court of Placer county, but that said appeal is still pending.

It is scarcely necessary to remark that the complaint upon which the petitioner was convicted could not for a moment be regarded as sufficient as an accusatory pleading if tested by a demurrer. It is undoubtedly obnoxious to every criticism to which it is subjected by counsel for petitioner. But the question here is, How far may an inquiry be extended, in a proceeding upon habeas corpus in a case like the one here, where it is manifestly clear, from the averments of the complaint, that there is thus at least an attempt to charge an offense known to the law, within the jurisdiction of the justice's court? The question is not altogether free from difficulty in view of the decisions, if we do not misapprehend the full import of some of the more recent ones involving a discussion of the proposition.

In the case of Ex parte Ruef, on habeas corpus, 150 Cal. 665, 89 Pac. 605, the claim, on behalf of the petitioner that the indictments failed to state a public offense was rejected in that proceeding, the court saying: "We think the true rule is that, where an indictment purports or attempts to state an offense of a kind of which the court assuming to proceed has jurisdiction, the question whether the facts charged are sufficient to constitute an offense of that kind will not be examined into on habeas corpus. Here the indictments clearly attempt to charge extortion, a crime defined by section 518 et seq. of the Penal Code, and within the jurisdiction of the superior court." This appears to be only a restatement of the rule as it was applied to cases of misdemeanor in early cases decided by the Supreme Court. Ex parte Maier, 103 Cal. 476, 37 Pac. 402, 42 Am. St. Rep. 129; Ex parte Williams, 121 Cal. 328, 53 Pac. 706. In the last-mentioned case, in which the petitioner, as is the case here, was restrained of his liberty for an alleged violation of section 537 of the Penal Code, it is said: "While the inquiry on habeas corpus may extend to the question whether the complaint or information charges an offense known to the law, since this objection goes to the question of jurisdiction, the proceeding may not be made to subserve the office of a demurrer; and, if the facts alleged *squint at a substantive statement of the offense* (italics mine) no matter how defectively or inartificially they may be stated, or however confused and beclouded they may be rendered through intermingling them with immaterial or unnecessary averments, the writ will not lie"—citing Ex parte Whitaker, 43 Ala. 323, and Matter of Prime, 1 Barb. (N. Y.) 340.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

But my attention is called to the recent case of Ex parte Greenall, 153 Cal. 767, 96 Pac. 804, in which the court appears to extend the doctrine as to misdemeanors, and accords to it much wider scope than it has ever before been given in any other case which I have yet seen, as I understand the decision. The petitioner in that case had been convicted in a justice's court on a complaint charging him with an infraction of the provisions of a statute passed by the Legislature of 1907, designed for the regulation of the practice of medicine and surgery, osteopathy, and "other systems or modes of treating the sick or afflicted," etc. The complaint in that case seems to have attempted "to state an offense of a kind of which the court assuming to proceed has jurisdiction," as the court said was enough as to an indictment in the case of Ex parte Ruef, supra, or, as was said in Ex parte Williams, supra, squinted "at a substantive statement of the offense." In the Greenall Case the question of the sufficiency of the complaint to state a public offense under the statute involved therein is treated as though arising on a special demurrer. But the court answers the contention of the respondent in that case "that, if there is in this state such an offense as that of which petitioner was convicted, the sufficiency of the complaint is immaterial on habeas corpus," as follows: "The rule of the Ruef Case has never been applied by this court to proceedings in courts of inferior, as distinguished from courts of general, jurisdiction. To the contrary, it has been the uniform practice to consider on habeas corpus the question of the sufficiency of the complaint in such inferior courts, and to discharge the prisoner where such complaint failed to show a public offense under the laws of the state."

I frankly confess that I am unable to perceive any logical ground for drawing a distinction between felony and misdemeanor cases, where, in either case, the accusatory document fails to state facts sufficient to show the commission of a public offense known to the law, unless it is intended to arbitrarily declare that, because the law furnishes no method by which misdemeanor cases may be carried to the higher courts for the correction of errors, the writ of habeas corpus may be extended in its scope, in such cases, and made to perform practically the office of a writ of error. I see no serious objection to thus enlarging the scope of the writ, in which event there would then appear a valid reason for the distinction which appears to have been established in the Greenall Case. Of course, it is only a trite declaration to say that the sole purpose of the writ of habeas corpus is to try and determine questions of jurisdiction in the class of cases to which it is applicable, and, obviously, if either a complaint in a justice's court, or an indictment, absolutely fails to state any public offense known to the law, the court in which such accusatory pleading is filed is manifestly without jurisdiction to restrain the liberty of the person so charged, or to put him upon trial under such pretended complaint or indictment. It does not definitely appear from the opinion in the Greenall Case, supra, that the court intends to hold that the writ of habeas corpus, as to misdemeanors of which justices' and police courts have jurisdiction, shall serve the purpose of a writ or proceeding for the correction of errors, and therefore I agree with the court, in the case of Ex parte Williams, supra, that the writ is not to be made to subserve the office of a demurrer.

Section 537 of the Penal Code is a valid statute. Ex parte Ruffin, 119 Cal. 487, 51 Pac. 862, and Ex parte Williams, supra. This court may, of course, take judicial notice of its provisions, and that it contains several different clauses describing as many different acts, any one of which constitutes a public offense of which a justice's court has jurisdiction. As seen, it provides, inter alia, that any person who obtains any food or accommodation at an hotel, inn, restaurant, boarding house, or lodging house, without paying therefor, with intent to defraud the proprietor or manager thereof, may be punished as for a misdemeanor. The complaint here, while defectively and inartificially drawn, and could not for an instant, as before stated, resist the force of a demurrer, nevertheless clearly discloses an attempt at charging an offense under that section. It cannot be said, without challenging common intelligence, that a mere reading of the document will not at once indicate that it was sought therein to charge the petitioner with the violation of the first clause of section 537 of the Penal Code.

Counsel for petitioner, criticising the complaint as though its sufficiency were being tested by a special demurrer, declares that it cannot be ascertained from its allegations whether the alleged "bill" was incurred for "food or accommodations at any hotel, inn, * * * or boarding house," etc., and whether the "defendant defrauded the proprietor or manager of any hotel," etc. In support of the first-stated criticism it is suggested that the alleged "bill" may have been "incurred for laundry, livery hire, or any such matter."

Tested by this proceeding, I think the complaint must not be construed into an absurdity, for certainly it would be absurd to say that the "bill" referred to in the complaint was incurred for some purpose which this court judicially knows could not be made the foundation of a criminal prosecution, if incurred under the circumstances shown by the complaint. I have said that the complaint, by its allegations, fairly represents a "squint" at a substantive statement of a public offense under section 537 of the Penal Code. If this be true, would it not do violence to common sense to declare that the "bill" alleged in the complaint was not incurred for "food or accommodation" at the boarding house of which the complaint alleges that the party alleged to have been defrauded is the keeper? It is a fact within the range of common knowledge that "laundry work" and "livery hiring" are not amongst the natural concomitants of the business of keeping a "boarding house." With equal logic and reason it could be argued that the word "bill," as used in the complaint, might refer to the fee of a lawyer or the wages of a laborer. The word should be given, in this proceeding, the meaning it must naturally import in the connection in which it is used in the complaint. This court, as I have declared, judicially knows that the offense sought to be charged is that denounced by the section of the Code referred to, and it would therefore be absurd for the court to say that the word "bill" has reference to some other subject or matter than some one of those to which the section relates.

I think the second objection to the complaint is equally as untenable in this proceeding. The statute uses the words "proprietor or manager" of an inn, hotel, or boarding house, whereas the complaint alleges that the complaining witness is "keeper of a boarding house," and counsel insists that this deviation from the language of the statute is fatal to the jurisdiction of the court. It is true that, as a general rule, in charging a person with a crime, if the allegations of the accusatory pleading are substantially in the language of the statute under which the charge is made, it is sufficient. But this rule does not mean that the language of the statute should be literally followed. In some cases a literal following of the language of the statute without some other averments would not be sufficient to state an offense. The true rule is that, if the offense charged is set forth with such "particulars of time, place, person, and property as to enable the defendant to understand distinctly the character of the offense complained of, and to answer the complaint," then the pleading is impregnable against demurrer. Section 1426, Pen. Code.

The meaning of the word "keeper" as employed in the complaint is not so obscure or indefinite as to compel a court to declare, in a proceeding of this character, that, by its use in lieu of either of the words used in the statute as descriptive of the persons who may be defrauded, the want of jurisdiction in the court of the person of the petitioner is made to appear. In truth, the word has a broader meaning than either the word "proprietor" or "manager," as employed in the statute, for it may include either or both. According to Webster, "keeper" is one who has the care, custody, or superintendence of anything," or "one who has or holds possession of anything." Colloquially the term "saloon keeper" is generally understood to mean the proprietor of a saloon. I think the phrase "keeper of a boarding house" has commonly the same meaning. If the complaint had alleged that the complainant was "the owner of a boarding house," counsel would surely not, on demurrer, contend that the language of the statute had not been substantially followed, the complaint being otherwise sufficient, although the word "owner" is not used in the section. I entertain no doubt that the word "keeper" as used in the complaint, so far as that part of the document is concerned, with sufficient clearness, at least for the purposes of this proceeding, indicates that the party who is alleged to have been defrauded by the petitioner is either proprietor or manager, or both, of the boarding house referred to in the complaint.

The petitioner, as seen, has preserved the last remedy available to him in the ordinary course of law, and I do not hesitate to venture the opinion that, had he pressed his appeal in the superior court, there would have been no necessity for seeking his summary discharge through this proceeding.

For the reasons stated in the foregoing, the alternative writ is discharged, and the petitioner remanded.

We concur: CHIPMAN, P. J.; BURNETT, J.

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10 Cal. App. 534

POTOMAC OIL CO. et al. v. DYE.

(Civ. 661.)

(Court of Appeal, Second District, California. May 6, 1909.)

1. Mandamus (§ 7*)—Nature of Writ—Discretion of Court.

Where one has a substantial right to protect or enforce, and there is no other adequate remedy at law, he is entitled, as a matter of right, to mandamus, or at least it is an abuse of discretion to refuse it.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 5; Dec. Dig. § 7.*]

2. Mandamus (§ 128*)—Subjects of Relief—Title to Corporate Office.

The courts of the state will entertain an action of mandamus by a foreign private corporation against one of its officers, resident of this state, of whom it cannot obtain jurisdiction in its own domicile, to compel such officer to turn over books, papers, etc., belonging to the corporation, notwithstanding the title to the office may be incidentally involved.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 263; Dec. Dig. § 128.*]

Application by the Potomac Oil Company and another for writ of mandamus against J. M. Dye. Demurrer to petition overruled, and motion to dismiss proceedings denied.

H. J. Stevens and O'Melveny, Stevens & Millikin, for petitioners. J. W. P. Laird and C. L. Claflin, for respondent.

TAGGART, J. Mandamus. Petition shows the corporation petitioner was incorporated under the laws of the territory of Arizona, with its principal place of business at Phœnix, Ariz., and a provision in its articles of incorporation that it should have a branch office in the city of Los Angeles, Cal., and that the purpose of its incorporation was to buy, lease, hold, and operate oil lands and oil wells, and deal in the products thereof throughout the United States; that all its property is situated in the state of California, and it is, and has been for several years, engaged in operating its said property in that state, and during all this time all its business transactions and operations have been, and now are, carried on through its office established at Los Angeles in the state of California, in accordance with the provisions therefor in its articles of incorporation; that all of its directors' meetings, except two or three, have, since December 29, 1908, been held in California, and that its fixed purpose and intent is to continue to so carry on its business and operations in said state; that the officers of said corporation, according to the provisions of the by-laws thereof, are elected and hold office at the pleasure of the board of directors; that more than a year prior to the date named the respondent was elected secretary of said corporation, and continued to hold that office until the said 29th day of December, 1908, when the petitioner B. M. Lovell was, at a meeting of the board of directors thereof, held in accordance with the by-laws at Phœnix, Ariz., regularly elected to succeed him, and said B. M. Lovell ever since said date has been, and now is, the secretary of the said corporation petitioner; that respondent, during the time he was secretary of said corporation and ever since, has been, and now is, a resident of the state of California, and while acting as such secretary maintained an office of said corporation in the county of Kern, state of California, where he kept in his possession the books, seal, papers, and other matters and things connected with said office of secretary; that he still retains custody, possession, and control of such office, and of the books, papers, and other matters pertaining thereto, and refuses to deliver the same to petitioner B. M. Lovell, or admit him into the use or enjoyment of said office, or any of the privileges thereof, notwithstanding respondent has been notified of Lovell's election to said office, and the said Lovell has, as secretary of said corporation, made demand for the books, papers, matters, etc., belonging thereto. The prayer of the petition is for a writ of mandate commanding the respondent to turn over all books, papers, etc., belonging to said office of secretary to said Lovell, and also the office itself, and to admit Lovell to the use and enjoyment thereof, and to all the rights and privileges incident thereto. An alternative writ issued in accordance with the prayer of the petition, and for return thereto respondent files a demurrer to the petition, a motion to dismiss the proceedings, and an answer. The issues of law raised by the demurrer and motion to dismiss present the questions of: The jurisdiction of this court to deal with the internal affairs of the corporation petitioner, its domicile being in the territory of Arizona, and the appropriateness of the remedy by mandamus.

For the purpose of passing upon the issues of law raised by the demurrer and motion to dismiss, the petitioner appears in the light of a foreign corporation, seeking to recover from a former officer the books, papers, etc., of his former office, he having refused to give them up after his term of office has expired; such former secretary being a resident of this state, having the books, etc., in his possession in this state, and entirely removed from the jurisdiction of the courts of the state of which the petitioner is a resident. While it is possible that the prayer might suggest that title to the office is involved in the controversy, the allegations of the petition leave no question in this regard. It hardly seems necessary to cite authorities to show that on the face of the petition this court has jurisdiction to entertain such a proceeding.

As to the remedy. Mandamus is no longer treated as a purely prerogative writ. In its use in an original proceeding in modern practice the writ has come to be considered as merely an action at law between the parties. The right to the writ, and the power to issue it, has ceased to depend upon any prerogative power. It is nothing more than the ordinary process of a court of justice to which every one is entitled, where it is the appropriate process for asserting the right he claims. Marbury v. Madison, 1 Cranch, 137, 176, 2 L. Ed. 60; Kendall v. U. S., 12 Pet. 524, 615, 9 L. Ed. 1181; Kentucky v. Dennison, 24 How. 66, 98, 16 L. Ed. 717; U. S. v. Henry Co., 6 Wall. 166, 198, 18 L. Ed. 768. Mandamus, although it is an extraordinary legal remedy, is in the nature of an equitable interference, supplementing the deficiencies of the common law. It will ordinarily be issued where a legal duty is established, and no other sufficient means exists for enforcing it, says the Connecticut court in Bassett v. Atwater, 65 Conn. 355, 32 Atl. 937, 32 L. Ed. 575. In this case a mandamus issued to enforce a provision of a by-law of the corporation relating to the calling of a special meeting of the stockholders, a distinction being drawn between a contractual right and a duty imposed by the by-laws of a private corporation; it being conceded that the writ would not lie to enforce a mere private contractual obligation. Its issuance is not necessarily a matter of right, but lies rather in the discretion of the court, but where one has a substantial right to protect or enforce, and this may be accomplished by such a writ, and there is no other plain, speedy, and adequate remedy in the ordinary course of law, he is entitled, as a matter of right, to the writ, or, perhaps more correctly, in other words, it would be an abuse of discretion to refuse it. Notwithstanding the loss of its prerogative character, the courts, in the issuance of the writ, will still be governed by the same rule and purpose for which it issued at common law, to wit, in order to prevent a failure of justice. Gay v. Torrance, 145 Cal. 144, 78 Pac. 540.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

As a means to compel a person claiming to act as an officer of a private corporation to deliver up to the corporation its seal, books, papers, records, etc., it has been frequently issued; the leading case to this effect being the case of American Railway Frog Co. v. Haven, 101 Mass. 398, 3 Am. Rep. 377. Other cases in the same jurisdiction (Massachusetts) approving this rule are cited in New England Mut. Life Co. v. Phillips, 141 Mass. 535, 6 N. E. 541. See, also, Haupt v. Rogers, 170 Mass. 71, 48 N. E. 1080, 1082. Says the Missouri Court of Appeals: "It is now well settled that mandamus will lie upon the petition of a private corporation to compel the surrender of its records, books, and papers, which are unlawfully withheld by one of its former officers." State v. Davis, 54 Mo. App. 447, 450. Even where the books, records, etc., detained were purchased and paid for by the secretary and the corporation had not repaid him, it was held that this gave no right to detain them when he ceased to be secretary, and that mandamus would issue to compel their delivery to the corporation. State v. Goll, 32 N. J. Law, 285, 292. It has been held proper for the writ to issue for this purpose at the suit of a foreign corporation, under circumstances which cannot well be distinguished from those in the case before us, under a statute identical with ours (State v. Cronan, 23 Nev. 437, 49 Pac. 41, 43); and we find nothing in the authorities cited from this state in conflict with this view, so that the demurrer will have to be overruled, and the motion to dismiss denied.

In respect to the jurisdiction of this court to try the issues raised by the answer in a proceeding of this kind, we are of the opinion that it is competent for us to do so. So long as the respondent remains without the jurisdiction of the territory of Arizona, it is apparent that the courts of that territory will be powerless to determine, either the relation of the respondent to the office of secretary, or his rights in respect to the books, papers, etc., belonging to the office, for the purpose of enforcing the adjudication so had in the state of California. No other remedy has been suggested in which the title to the office could be first tried in this state but that of quo warranto, and the cases cited to support this view all relate to title to public offices. Smith v. Olds, 3 Cal. 167, 58 Am. Dec. 398; Meredith v. Supervisors, 50 Cal. 433; Kelly v. Edwards, 69 Cal. 460, 11 Pac. 1. No distinction being drawn in People v. Harvey, 62 Cal. 508, and the record not disclosing the character of the office in question, it will be assumed that it is the same as in the other cases. The reason for the denial of relief by mandamus in these cases was because there was an adequate remedy at law in the quo warranto proceeding. No such reason exists where the office in question is one in a private corporation. The title to such an office cannot be tried in an action in equity (New England v. Phillips, 141 Mass. 535, 6 N. E. 534); or by quo warranto in most jurisdictions (Haupt v. Rogers, 170 Mass. 71, 48 N. E. 1080). And it cannot be tried in an action in replevin to recover the papers and books, or a suit for a mandatory injunction, in a jurisdiction in which by statute the proceeding in quo warranto is made applicable. Standard Co. v. Byers, 31 Wash. 100, 71 Pac. 766. We are of opinion that it is competent for the courts of this state to entertain an action by a foreign private corporation against its officers resident of this state, of whom it cannot obtain jurisdiction in its own domicile. (Miller v. Quincy, 179 N. Y. 294, 72 N. E. 116), and that in this state the remedy by mandamus is appropriate for the purpose of the proceeding before us, notwithstanding the title to the office may be incidentally involved.

Demurrer overruled, and motion to dismiss denied.

We concur: ALLEN, P. J.; SHAW, J

10 Cal. App. 524

PEOPLE v. WARD. (Cr. 119.)

(Court of Appeal, Second District, California. May 5, 1909.)

1. LARCENY (§ 51*)—EVIDENCE.

In a trial for larceny of a horse and bridle, having a single driving rein, testimony that witness was awakened about 1 o'clock on the morning of the day following the theft; saw in his yard a horse, from which a man was running away; that as witness approached the horse to secure him, he saw some one coming from the direction in which he had seen the man running; that the man claimed the horse, on which was a bridle with a single driving rein; that the man resembled the defendant, and he believed him to be the same person—was admissible as tending to prove defendant in possession of a horse at the time when, and in the vicinity where, the horse with such a bridle was stolen.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 144; Dec. Dig. § 51.*]

2. Larceny (§ 55*) — Sufficiency of Evidence.

In a trial for larceny, evidence *held* sufficient to support a verdict of guilty.

[Ed. Note.—For other cases, see Larceny, Dec. Dig. § 55.*]

Appeal from Superior Court, Los Angeles County; W. H. Jamison, Judge.

J. D. Ward was convicted of grand larceny, and from the judgment, and from an order denying his motion for new trial, he appeals. Affirmed.

A. A. Sturges, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. Defendant was convicted upon an information charging him with the crime of grand larceny. The subject of the larceny was a certain horse belonging to one Frank A. Marston. The appeal is from the judgment and an order denying defendant's motion for a new trial.

The first assignment of error is that the court erred in denying the defendant's motion to strike out the entire evidence of witness John Beardsley, who testified on behalf of the prosecution. It appears that the horse was stolen from Marston's stable in Pasadena on the night of August 9th, and that with the horse there was taken a bridle having attached thereto a single driving rein. Beardsley lived on the road leading from Pasadena to Los Angeles, at which place the horse was subsequently found in a stable which defendant had theretofore rented, and of which, the evidence tended to show, he was in the exclusive possession. Beardsley, in effect, testified that he was awakened about 1 o'clock on the morning of August 10th, and, looking out, saw in his yard a horse, from which a man was running away; that as he approached the horse for the purpose of securing him, he (Beardsley) saw some one coming from the direction in which he had seen the man running; that this man claimed the horse, upon which was a bridle to which was attached a single driving rein; that the man in size, build, voice, and walk, marked by a noticeable limp in the left leg, resembled the defendant, who was likewise lame, and whom he confidently believed to be one and the same person. This testimony, taken in connection with the evidence of other circumstances, was competent, in that it tended to prove defendant in possession of a horse at a time when, and in the vicinity where, a horse with this peculiarly marked bridle had been stolen. There was no error in denying the motion to strike out. Any objection thereto should be directed to its weight rather than to its competency.

There is no merit in the claim that the evidence is insufficient to support the verdict. The evidence tends to prove that on August 6th defendant, claiming to be a horse trainer, rented a barn at 916 South Broadway in the city of Los Angeles; that he took possession of the barn and put a padlock upon one of the doors thereof; that the horse was stolen from Marston's stable on the night of the 9th of August, and found in this barn on August 15th, from which it was recovered by Marston on the 18th of August; that a bridle with a piece of rein attached thereto similar to that taken was found in the barn with the horse; that defendant was arrested on August 13th, at which time he had in his possession a key which unlocked the padlock with which one of the doors to said barn was secured. This and other evidence, considered with that of Beardsley heretofore referred to, was sufficient to warrant the jury in finding a verdict of guilty. Whether or not it constitutes proof is a question, "in the first instance, for the jury, and, in the second, for the trial judge upon hearing the motion for new trial." People v. Cain, 7 Cal. App. 163, 93 Pac. 1037; People v. Wong Chong Suey, 110 Cal. 117, 42 Pac. 420.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

10 Cal. App. 526

PEOPLE v. TURPIN. (Cr. 161.)

(Court of Appeal, First District, California. May 6, 1909.)

1. Homicide (§ 253*) — Premeditation and Deliberation.

Evidence *held* sufficient to show premeditation and deliberation to sustain a verdict of murder in the first degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 525; Dec. Dig. § 253.*]

2. Homicide (§ 282*)—Questions for Jury—Degree of Offense.

The degree of murder is particularly a matter for the determination of the jury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 574; Dec. Dig. § 282.*]

3. Homicide (§ 332*)—Appeal and Error—Review of Questions of Fact.

The degree of murder being a question for the jury, the Supreme Court will not interfere with the verdict as to the degree of the crime, except in a clear case of absence of evidence to support it.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 699; Dec. Dig. § 332.*]

4. Criminal Law (§ 823*) — Instructions — Error Cured by Giving Other Instructions.

Where the court in a prosecution for homicide used some objectionable expressions in an instruction as to self-defense, but in other instructions fully and correctly set forth the law as to self-defense, the defects in the former instruction are cured.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1992; Dec. Dig. § 823;* Homicide, Cent. Dig. §§ 718, 719.]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Edward Turpin was convicted of murder, and appeals. Affirmed.

Aynesworth & Sprouse and N. C. Caldwell, for appellant. Attorney General Webb, for the People.

HALL, J. Defendant was charged by information with the crime of murder for the killing of Frederick Roetzscher on the 16th day of June, 1908, in the county of Fresno. He was convicted of murder in the first degree, and his punishment fixed at imprisonment for life. This appeal is from the judgment and the order denying his motion for a new trial.

The killing of Roetzscher by defendant was admitted; the only defense attempted being that the killing was done in necessary self-defense. Deceased and his partner, Otto Trehse, were farmers, and resided on their farm, situated near Fowler, in Fresno county. The homicide occurred on this farm. There also resided on this farm one Carl Leyman, an employé of the partners, and one Mrs. Stella Crane and her three young children. Mrs. Crane was employed to do the cooking and housework on the place, and had been so employed for about six weeks prior to the day of the tragedy. Defendant was acquainted with all the persons living on the Roetzscher place, and since the employment of Mrs. Crane had frequently called on her there. Evidence was given that he had sometimes visited her clandestinely and late at night; that prior to the day of the homicide both the deceased and his partner, Otto Trehse, had told defendant that he was not wanted at their home, and had forbidden him to come there. Upon two occasions at least he had been so forbidden by deceased. On Monday afternoon, June 15, 1908 defendant borrowed a six-shooter revolver, loaded in five chambers, of one David Wright, in the town of Fowler, saying at that time that he "just wanted to carry it this evening." Shortly after getting the pistol, and at about 7 o'clock of the same evening, defendant appeared at the Roetzscher house while the inmates were at supper. Deceased stepped out of the house to the back porch and met defendant, who said he had a letter for Mrs. Crane, and insisted on giving it to her in person. Deceased informed Mrs. Crane of this, and she came out and received the letter, which was written by defendant. Defendant came on a wheel, and after four or five minutes left, and returned to Fowler. Apparently nothing unpleasant occurred at this visit. After supper the three men members of the household also left the premises, but before doing so deceased, according to evidence given by Mrs. Crane, had a talk with her about defendant, in which he said that he thought defendant would come to the house again that night, and stated that he (deceased) would kill defendant if he came on the place again. Deceased returned home at about 10 o'clock, while his partner stopped for a short while at a neighbor's immediately across the road from the Roetzscher place. Deceased, according to the testimony of Mrs. Crane, immediately went to her room, where she was lying on the bed with her three sleeping children, and engaged her in conversation about defendant. As he started to leave her room, he looked out of the window, and then quickly left the room, went to his own room, and then passed out onto the porch, clamming the door as he did so. (In deceased's room a shotgun was usually kept, and had been placed there this particular afternoon upon being returned by a neighbor who had borrowed it. It had been put away unloaded.) Mrs. Crane testified that she next heard a person, whom she believed by his voice to be deceased, say, "I'll shoot you, you son of a bitch," and a person, whom she believed from his voice to be defendant, say, "Don't you move, don't you move, don't you move." This was followed by some shots. She then heard some one run by her window. On going out of the house she found deceased lying at the bottom of the steps leading from the back porch. Subsequent examination disclosed that he had about his face three contused wounds, one gun-shot wound near the left eye, and two gun-shot wounds entering the chest, either of which was fatal. He died shortly after midnight. Deceased's shotgun was found under the window of Mrs. Crane's room, where defendant testified that he had dropped it as he fled from the premises after shooting deceased. This shotgun was unloaded by Mrs. Crane, and the cartridges afterwards taken possession of by the sheriff. No testimony was given as to whether they bore any evidence or marks showing that the gun had been snapped. Defendant fled from the premises to Fowler, where he got a coat and changed his hat for one belonging to a friend, borrowed some money, took a horse from his father's barn, and on the horse continued his flight to Fresno, where he bought a ticket to Stockton, but was arrested about 1 o'clock as he attempted to board the train. On being arrested he gave his name as Baker, but later admitted that he had shot deceased, and on learning he was dead said he was "damn glad of it."

Mrs. Crane was not examined as a witness for the prosecution, but was a witness for defendant, with whom she was evidently very friendly. The defendant was a witness on his own behalf. He gave no reason for borrowing the pistol on this occasion, saying simply that he did not know why he borrowed it this particular evening. He testified that he left a saloon at Fowler about 10 o'clock and went to the Roetzscher house to call on Mrs. Crane. He testified: That deceased had never told him not to come to the place, but that, on the contrary, on that afternoon he, defendant, had told deceased that he was coming back that night, and that deceased said "All right." That, as he passed Mrs. Crane's window, he tapped on the screen and walked on toward the porch steps. That as he reached the steps deceased came out with a shotgun in his hand, and closed the door and walked towards defendant, and asked "'Who it it?' and I says, 'It's me'; but he says, 'Is that you, Ted?' I says 'Yes'; and he says, 'You son of a bitch, I'll kill you.' As he did, he rushed off the porch, come down off the steps, and threw his shotgun up at me. Whether the shotgun snapped or whether it breeched, I don't know, and as he did I grabbed, that is, I got it with my hands, caught the barrel and throwed my gun up, pulled my gun and told him not to move—I think three different times, but he kept fighting all the time, and he grabbed hold of my gun, and as he grabbed it I jerked the gun loose from him and struck him with it along the face, and then he grabbed hold of his gun with both hands and jerked back, and I had right hold of the muzzle of his gun, the muzzle of the gun was right in my hands, small grip on it. He grabbed his gun with both hands, when I shot him three times. I ain't sure I shot him three times. When I hit, struck him with this gun, the gun went off. One shot, I ain't sure."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It is not contended that the evidence is not sufficient to justify the verdict except in that it is claimed that the jury was not warranted in finding premeditation and deliberation necessary to constitute murder of the first degree. With this claim we cannot agree. From the evidence the jury might well believe that defendant armed himself in full expectation of an encounter, and with the deliberate purpose to take advantage of the occasion to kill his rival; that the claim of self-defense was but a pretense; that the encounter was deliberately sought for the purpose of killing the deceased; and that the killing was but the accomplishment of such deliberately formed purpose. The degree of murder is peculiarly a matter for the determination of the jury, and this court will not interfere with a verdict as to the degree of the crime except in a clear case of absence of evidence to support it. This is certainly not such a case.

The only errors relied on concern the giving of certain instructions, and the refusal to give others. The court instructed the jury as follows: "You are further instructed that, under the law of this state, every person has a right to protect his home from intrusion, and to employ such force as may be necessary to repel the intruder." Later on, after giving instructions that are not criticised, covering nine folios in the transcript, the court, in defining the right of self-defense, after referring to the right as a part of the law of nature, and one recognized in the laws of all civilized people, said: "The right is expressly recognized in our statutes, and the conditions under which it may be asserted are clearly defined. These are (1) that the party was not himself the first aggressor, or, if the aggressor, that he had in good faith withdrawn from the contest before the fatal shooting; (2) that the slaying was necessary to prevent the infliction upon himself of great bodily injury by the party slain. To justify the killing of another in self-defense, it must appear that the danger was so urgent and pressing that, in order to save his own life or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary, and it must appear that the person killed was the assailant, or that the slayer had already and in good faith endeavored to decline further struggle before the fatal wound was given."

Appellant discusses these instructions together, and urges that when considered together and in relation to the evidence in the case they were calculated to impress upon the jury (1) "that the coming of defendant upon deceased's ranch was an assault, and that such coming made defendant an assailant; (2) that such coming of defendant upon the ranch was in law an intrusion upon deceased's home; (3) that deceased might, under his rights, and as a protection to his home, make a deadly assault upon defendant if defendant would not otherwise leave the ranch, although he made no assault and used no violence against either deceased or his home; (4) that defendant could not defend himself against such deadly assault upon him by deceased until defendant had first endeavored in good faith to leave deceased's ranch."

The instructions above set forth are certainly not free from objections, and contain some loose and inaccurate statements. Among other things the court was unfortunate in the use of the word "aggressor," instead of the statutory and approved word "assailant," in the first part of the instruction regarding the law of self-defense. But the quoted and attacked portions of the instructions are not all that the court said on the subject of the law of self-defense. If they were, there would be much plausibility in the criticisms of appellant.

The instruction concerning the right to protect one's home from intrusion was an isolated instruction, apparently not given in connection with the law of self-defense, but doubtless given in view of certain evidence introduced by defendant through Mrs. Crane, apparently intended to show that defendant had a right to visit her at the home of deceased, notwithstanding the objections or protests of deceased, even to the extent of clandestinely visiting her there at her room at late hours of the night. As it appears in the transcript, this instruction was not given in connection with the law of self-defense, but was separated from the instructions upon that subject by nine or ten folios of instructions on other subjects. After dealing with the usual phases of a trial for murder, the court, at the close of its instructions, took up the law of self-defense, and the entire instructions given by the court upon this subject were such as to fairly present the law to the jury and to fully protect the defendant in his rights in this regard. At the conclusion of its instructions upon the other phases of the law of homicide, the court, of its own motion, said: "In the present case, if the jury believe from the evidence that the defendant fired the shot by which the deceased was slain, then they will consider the claim of the defendant that it was in necessary self-defense, and to repel a violent and dangerous attack which the deceased was then making, or was about to make upon him. The right of self-defense of a party violently assaulted by another to repel such attack, and fully protect himself, is a law of nature, it antedates all written enactments, and is fully recognized in the laws and legislation of all civilized people." Then follows the portion on the subject of self-defense above quoted, which, in turn, is followed by a full exposition of the right of the person attacked to act upon appearances.

Immediately following the instructions thus given by the court of its own motion upon the right of self-defense, the court, at the request of the defendant, instructed the jury as follows:

(1) "If the jury believe from the evidence that at the time of the fatal shot complained of here, the defendant was attacked by the deceased in a manner to excite the reasonable fear of a reasonable man, and did so excite the reasonable fear of the defendant herein, that he was in danger of great bodily harm at the hands of the deceased, and that the defendant, while still under and by reason of such reasonable fears, shot and killed deceased, then such killing was not a crime."

(2) "It is a law of this state that, when a person not in fault is violently attacked by another, he is under no obligation to retreat, but may stand his ground and defend himself, even to the extent of taking the life of his adversary, if necessary. In such a case it is the duty of the one attacking to desist."

(3) "If you find from the evidence introduced in this case that the deceased came rushing out of his house with a loaded gun in his hand, and attempted to slay the defendant without any provocation on the part of the defendant, and that it was necessary to kill deceased in order to save his own life, then you are instructed that you must acquit the defendant."

(4) "You are also instructed that the fact that one is a trespasser upon the premises of another will not justify the other in taking life, and if the one trespassing is violently attacked, and is threatened with serious bodily injury, he may repel that attack by whatever force is necessary, even to the extent of taking his assailant's life."

In view of these very explicit and direct instructions given by the court upon the right of self-defense, it is impossible to believe that the jury did not fully understand that defendant had a right to defend himself against threatened serious bodily injury even to the taking of the life of his assailant, though defendant were himself a trespasser upon the premises of deceased.

While in the first part of its instruction on the right of self-defense the court committed the fault of using the word "aggressor" instead of "assailant," and the words "withdrawn from the contest" instead of "have endeavored to decline any further struggle," in other parts of the same instruction the proper words were used, and, as we have seen, explicit and direct instructions as to the right of self-defense predicated upon the precise claim of defendant as to the facts. The faults in the instructions are not such as to call for a reversal of the judgment. People v. Newcomer, 118 Cal. 263, 50 Pac. 405.

In addition to the point urged as to the giving of the instructions above discussed, appellant very briefly refers to the refusal of the court to give four instructions proposed by defendant. As to these offered instructions, it is sufficient to say that we have examined them, and so far as they embody correct principles of law, or were applicable to the case, they were fully covered by other instructions given.

No other errors have been called to our attention.

The judgment and order are affirmed

We concur: COOPER, P. J.; KERRIGAN, J

(10 Cal. App. 540)

H. P. SMITH CO. v. SUTTICH. (Civ. 596.)

(Court of Appeal, Third District, California. May 6, 1909.)

1. WAREHOUSEMEN (§ 27*)—ACTIONS AGAINST —RIGHT OF ACTION—ACTION FOR CHARGES.

Where defendant's warehouse was destroyed by plaintiff's negligence in overcrowding it in storing goods therein, defendant was at least entitled to recover the storage charges, even if she was not damaged by the destruction of the building under the circumstances.

[Ed. Note.—For other cases, see Warehousemen, Cent. Dig. § 60; Dec. Dig. § 27.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. APPEAL AND ERROR (§ 1033*)—HARMLESS ERROR—FAVORABLE TO COMPLAINING PARTY.

Plaintiff cannot complain because the verdict for defendant is too small.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4061; Dec. Dig. § 1033.*]

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by the H. P. Smith Company against Martha A. Suttich, in which defendant filed a cross-complaint. From a judgment for defendant on her cross-complaint, and an order denying a new trial, plaintiff appeals. Affirmed.

W. H. Barrows, for appellant. W. M. Gibson, for respondent.

BURNETT, J. Defendant was the owner of a warehouse built out over the water of the bay of San Francisco. Plaintiff under agreement with defendant had certain hay stored in said warehouse, and on December 10, 1906, during a storm, the warehouse was demolished, and the hay fell into the water. The plaintiff alleged that the accident was caused by defendant's negligence in allowing the piling and supports of the warehouse to become decayed and out of repair and in failing to provide proper protection from the wash of drift against it, and it prayed for damages in the sum of $3,500.

Defendant denied that the warehouse was unsafe or unfit in any respect for the storage of the hay. By way of cross-complaint it was alleged that the agreement between the parties was that only 250 tons should be stored in said warehouse, but in violation of said agreement plaintiff put therein 461 tons of hay, and that this over-crowding, in connection with the act of the plaintiff in leaving open the large doors of the warehouse, thereby permitting the high winds prevailing to enter and lift the roof from its supports, was the proximate cause of the accident. Defendant sought to recover $6,000 for the destruction of the warehouse and $250 for the storage agreed to be paid. The jury found for defendant in the sum of $230.50.

1. At the close of the trial plaintiff asked leave to amend the complaint by adding an allegation charging improper construction of the warehouse and negligence in not securely fastening the roof to the walls of the building. The purpose of this, as claimed by plaintiff, was to make the complaint conform to the evidence. The motion was denied. The power of the court to allow amendments that causes may be tried and determined upon their merits should undoubtedly be liberally exercised. Farmers' Bank v. Stover, 60 Cal. 396; Marr v. Rhodes, 131 Cal. 267, 63 Pac. 364. But there was no evidence in support of the proposed amendment, and hence it would have been idle for the court to allow it. Unless good cause be shown for an amendment, it certainly cannot be an abuse of discretion to disallow it. Hayden v. Hayden, 46 Cal. 332.

2. There is some substantial evidence from which the jury had a right to infer that plaintiff's employés carelessly left the door open, and that this circumstance contributed to the accident. Again, there was testimony that the warehouse was crowded beyond its capacity in violation of the warning and instruction of defendant. No one can say that in the absence of this condition, the warehouse would have been destroyed. Upon either theory there is sufficient warrant for a finding against plaintiff.

3. It is claimed by appellant that there is no evidence that defendant was damaged in the sum of $230.50 by the loss of the warehouse. It is true that defendant testified that "nearly all of the lumber and timbers from which the warehouse was built were saved," and there is no direct testimony as to the value of the salvage. However, it is shown that the warehouse was worth $8,000, and within a short time plaintiff had expended $600 in repairs. We agree with respondent that the jury had a right to conclude that such a building standing and in good repair was worth at least $230.50 more than the material that went into its construction.

But, since there was evidence that the destruction of the building was caused by the negligence of plaintiff, defendant was at least entitled to the storage which was more than the amount recovered, and plaintiff cannot complain because the verdict is too small.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(10 Cal. App. 542)

In re DAMON'S ESTATE.

DAMON v. McDOUGALD, City and County Treasurer. (Civ. 572.)

(Court of Appeal, Third District, California. May 6, 1909.)

APPEAL AND ERROR (§ 497*)—CONSTITUTIONAL LAW (§ 42*)—RIGHT OF REVIEW—PERSONS AGGRIEVED.

The court will not pass upon the question whether the inheritance tax law of March 20, 1905 (Laws 1905, p. 341, c. 314) is unconstitutional because discriminating between the citizens of the state and those of other states, where it does not appear to which class appellant urging the objection belongs, since it cannot be determined that she is an aggrieved person.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2954; Dec. Dig. § 497;* Constitutional Law, Cent. Dig. §§ 39, 40; Dec. Dig. § 42.*]

Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Action by Amelia S. Damon, executrix of James E. Damon, against John E. McDougald, City and County Treasurer. From an order directing the payment of an inheritance tax, the executrix appeals. Affirmed.

J. C. Bates, for appellant. Hartley F. Peart, for respondent.

BURNETT, J. The appeal is from an order of the superior court of the city and county of San Francisco directing the widow, sole devisee under the will of said James E. Damon, deceased, to pay $1,172, "inheritance tax," under the act of the Legislature approved March 20, 1905 (Laws 1905, p. 341, c. 314).

Appellant's only contention seems to be that said law is repugnant to the Constitution of the state and especially to the fourteenth amendment of the Constitution of the United States. The argument is based principally upon the theory that there is a discrimination between the citizens of this state and those of other states, but it would be a sufficient answer to say that it does not appear to which class appellant belongs, and hence, granting such discrimination, it cannot be determined that appellant is an aggrieved party. What was said in Estate of Johnson, 139 Cal. 534, 73 Pac. 425, 96 Am. St. Rep. 161, might well therefore be invoked: "A court will not decide a constitutional question unless such construction is absolutely necessary; and in the Mahoney Case, since the appellants were aliens and claimed no protective rights as citizens, no constitutional question was involved. It would have been sufficient in disposing of their appeal to have said, as was said by the federal court in the case last cited: 'When a nonresident of the state assails the constitutionality of a statute upon the ground that it denies to him the privilege granted to the citizens of this state, it will be time enough to consider the constitutional question suggested. Courts will not listen to those who are not aggrieved by an invalid law.' As the Supreme Court of the United States has said in Chicago Ry. Co. v. Wellman, 143 U. S. 339, 12 Sup. Ct. 400, 36 L. Ed. 176: 'But exercise of the power to declare the statute unconstitutional and void is the ultimate and supreme function of courts. It is legitimate only in the last resort and as a necessity in the determination of a real, earnest, and vital controversy between individuals.'"

But, again, appellant admits that "the validity of said law has been upheld by several decisions of the Supreme Court" and therefore she hardly expects "the court to go back of their own rulings." With less reason, of course, could she expect us to overrule those decisions.

All the questions, indeed, discussed by counsel have been settled adversely to appellant's contention in the following cases: Estate of Wilmerding, 117 Cal. 281, 49 Pac. 181; Estate of Stanford, 126 Cal. 112, 54 Pac. 259, 58 Pac. 462, 45 L. R. A. 788, and Estate of Martin, 153 Cal. 225, 94 Pac. 1053.

The order is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(155 Cal. 708)

CLAYBURGH v. AGRICULTURAL INS. CO. OF WATERTOWN, N. Y.

(S. F. 4,862.)

(Supreme Court of California. June 18, 1909.)

INSURANCE (§ 324*) — FIRE INSURANCE — "FALLEN BUILDING" CLAUSE.

The clause in a fire policy, "If a building or any part thereof fall," except as the result of fire, insurance shall cease, is properly interpreted by the instructions, taken as a whole, that the meaning of the language is that the building must have fallen in whole or part to such an extent that its integrity as a building was destroyed or substantially impaired; that insured could recover if the building was substantially in its entirety, and not materially impaired after the falling of parts shown to have fallen; and that the insured was not entitled to verdict unless the substantial integrity of the building was impaired to such an extent as to render it unsuitable for use as an entire building, or unless the falling of the parts that fell exposed the interior of the building or its contents to the inclemency of the weather, or rendered the building or its contents more easily subject to ignition by fire, and thereby materially impaired the building as a building.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 749; Dec. Dig. § 324.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Simon Clayburgh against the Agricultural Insurance Company of Watertown, N. Y. Judgment for plaintiff. Defendant appeals. Affirmed.

Goodfellow & Eells, T. C. Coogan, and H. B. M. Miller, for appellant. Naphtaly & Freidenrich, for respondent.

SLOSS, J. Action to recover $6,000 on a policy of fire insurance covering a building in the city of San Francisco. Upon a trial before a jury, the plaintiff recovered a verdict for the amount claimed. The defendant appeals from the judgment entered upon the verdict, and from an order denying its motion for a new trial. There was no denial of the fact that the insured building had on the 19th day of April, 1906, been totally destroyed by fire, and that by its destruction, plaintiff had suffered damage to an amount exceeding his insurance. The only defense was that on the 18th day of April, 1906, a part of the building had fallen as a result of the earthquake occurring on that day. The policy contained this provision: "If a building or any part thereof fall, except as the result of fire, all insurance on such building or its contents shall immediately cease."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The subject of the insurance was a five-story brick building on the southerly line of Geary street, leased to a firm which occupied the whole of it as an art store. The defendant introduced in evidence a photograph of the building, taken on the morning of April 18th, from some point in a structure on the opposite side of the street. This photograph, taken after the occurrence of the earthquake, and before fire had attacked the building, showed that there had been some injury to plaintiff's building. The upper part of the walls had been shaken down to such an extent as to expose to sight the uprights supporting what appeared to be the roof of the building, and to allow a view across the top of the building between these supports. The testimony of witnesses was offered to show that the photograph fairly represented the condition of the building. On behalf of plaintiff, there was evidence to the effect that the flat surface over the building, shown on the photograph, was not, in reality, the roof, but was merely a tin deck, built some three or four feet above the roof, and that its sole purpose was to provide an air space over the fifth story, in which the tenants were conducting operations for which they required an even temperature. It was, as explained by one of the members of the firm occupying the premises, "a superstructure that has nothing to do with the building, but was simply put there at our suggestion by the architect when the building was built for us." This witness testified, further, that he had gone through the building after the earthquake, and had found the interior perfectly intact. No part of any wall or of the roof was broken from the fifth floor to the basement. Nothing had fallen except the cornice and a portion of the fire wall, which was located above the roof, to and beyond the tin deck. No part of the interior of the building was exposed to the elements, and the tenants "could have gone right on" with their business. The architect who had designed the building testified, as did the witness just referred to, that the construction above the fifth floor—i. e., the fire deck and the walls surrounding it—was not an essential part of the building.

The court gave to the jury the following instructions:

"(1) By the terms of the policy of insurance in this case it is provided that if the insured building or any part thereof fall, except as the result of fire, the insurance thereon immediately ceases. As to what constitutes a falling of the building within the meaning of this clause, I charge you that the meaning of the language is that the building must have fallen in whole or part to such an extent that its integrity as a building was destroyed or substantially impaired.

"(2) If you find from the evidence that the building was substantially in its entirety, and not materially impaired after the falling of such parts thereof which the evidence shows to have fallen, then your verdict should be for the plaintiff.

"(3) Defendant is not entitled to a verdict in this case unless you find from the evidence that the substantial integrity of the building was impaired to such an extent as to render it unsuitable for use as an entire building, or unless the falling of such parts as you shall find did fall exposed the interior of the building or its contents to the inclemency of the weather or render the building or its contents more easily subject to ignition by fire, and thereby materially impairing the building as a building."

If these instructions correctly defined the clause of the policy relied on, it cannot be doubted that the jury was warranted by the evidence in finding that there had not been such a falling of any part of the building as to terminate the insurance. It was for the jury to pass upon the credibility of the witnesses, and to draw any reasonably permissible inferences from their testimony. The showing made by plaintiff, if accepted as true, furnished a sufficient basis for the conclusion that no part of the building proper had fallen, but that the only damage was to a false roof or superstructure, which did not form an essential or integral portion of the edifice.

We have no doubt that these instructions, taken as a whole, properly interpreted the clause upon which the defense was rested. The language employed in the policy is to be given a reasonable construction, in view of the purposes, as well of the entire contract, as of the particular condition under discussion. The general object of the policy is to indemnify the insured against loss or damage by fire. The company, agreeing to furnish this indemnity in return for a certain premium, seeks to limit its risk by various provisions. Generally speaking, their purpose is to avoid liability in the event of the occurrence of circumstances which would naturally tend to increase the hazard beyond that which was in the contemplation of the parties when the insurance was effected. The insurer seeks to guard itself against liability in the event that the condition of the insured property should so change that the risk upon such property in its altered condition would presumably not have been assumed for the premium paid. Cf. Goorberg v. Western Assur. Co., 150 Cal. 510, 515, 89 Pac. 130, 10 L. R. A. (N. S.) 876, 119 Am. St. Rep. 246. One of these provisions is the "fallen building" clause. The reason for its insertion in a policy is to be found in the knowledge of the fact that a building which has fallen or has suffered the loss of so material a part as to afford a more ready means of access to flames is more likely to burn than one which is intact. The fall of a trivial or minute part of a building may, however, occur without increasing the hazard in the slightest degree. It is not to be supposed that the parties intended to contract that such fall should avoid the policy. Whether there has been a fall of a part of the building, within the meaning of the policy, will depend upon the extent and character of the portion fallen.

These views are, in substance, in accord with those announced in all the cases in which this clause has received consideration. In Nelson v. Traders' Ins. Co., 181 N. Y. 472, 74 N. E. 421, the court said: "The meaning of the clause in question, when reasonably interpreted, is that the insurer is excused from its obligation by either the fall of the building as a structure, or of such a substantial and important part thereof as impairs its usefulness as such, and leaves the remaining part of the building subject to an increased risk of fire." "The falling," it is said in Home Mut. Ins. Co. v. Tompkies & Co., 30 Tex. Civ. App. 404, 71 S. W. 812, Id., 96 Tex. 187, 71 S. W. 814, "must be of some material or substantial part of the building." See, also, L. & L. F. I. Co. v. Crunk, 91 Tenn. 376, 23 S. W. 140.

The instructions given in this case fairly left to the determination of the jury the question of fact in issue; i. e., whether there had been a fall of a material or substantial part of the building. It is urged that the first instruction above quoted is virtually the same as that declared to be erroneous in Home, etc., Co. v. Tompkies, supra. The charge there was that the falling must be of "such an integral part of the building as a whole, as that the falling of the same would destroy the distinctive character of the structure." This was held to require the insurer to show a case in which "the structure could no longer be considered a building, but only débris or ruins." Here, however, the instruction went further. It included in its definition, not only the destruction, but the substantial impairment of the integrity of the building. Furthermore, the third instruction so limited and explained the expressions used in the earlier instructions that the charge, as a whole, could not have been understood as declaring the rule denounced in the Tompkies Case.

The judgment and the order appealed from are affirmed.

We concur: ANGELLOTTI, J.; MELVIN, J.; HENSHAW, J.; LORIGAN, J.

155 Cal. 659

McCOLLOUGH v. HOME INS. CO. OF NEW YORK. (L. A. 2,244.)

(Supreme Court of California. June 16, 1909.)

1. Vendor and Purchaser (§ 3*)—Sale Distinguished from Lease.

A contract recited receipt of $3 as a deposit to secure a described lot, stating that the deposit was accepted as rent for one week, and that the plaintiff was to pay the further sum of $1.50 as weekly rent for 97 weeks, and the further sum of $1.50 when the company issuing the contract would convey the lot to plaintiff, and that default in payment for four weeks would work forfeiture. *Held*, that the contract was of sale, and not lease.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 3; Dec. Dig. § 3.*]

2. Insurance (§ 282*) — "Unconditional and Sole Ownership" of Property.

A vendee in possession under a contract not signed by him, but referring to an application to purchase signed by him, was within the rule that the holder of an equitable title is the "unconditional and sole owner" within the meaning of that condition in a policy of insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 601–635; Dec. Dig. § 282.*

For other definitions, see Words and Phrases, vol. 8, pp. 7154–7155.]

3. Insurance (§ 558*) — Proof of Loss — Waiver by Agent.

Where an insurance company had actual notice of loss 4 days after the fire, and insured had an interview with an adjuster within the 60 days allowed for proof, and the adjuster stated that, while sworn proofs ought to be made, it was not actually necessary, and that he would settle just the same, and the company did not deny liability until after the 60 days, there was a waiver of the requirement of sworn proofs.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1382–1390, 1405; Dec. Dig. § 558.*]

4. Insurance (§ 561*) — Proof of Loss — Waiver.

An agreement signed by insured reciting that any action taken by the company in investigating the cause of fire and ascertaining the amount of loss should not waive any of the conditions of the policy did not apply to affirmative representations to the insured that he need not furnish sworn proofs of loss.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1406–1409; Dec. Dig. § 561.*]

5. Insurance (§ 376*)—Waiver—Power of Agent—Provision of Policy.

The clause of a policy providing that no officer, agent, or other representative of the company shall have power to waive any condition of the policy except such as may be indorsed thereon or added thereto has no reference to those stipulations which are to be performed after a loss has occurred, such as giving notice and furnishing preliminary proofs.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 952–955; Dec. Dig. § 376.*]

Department 1. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by C. M. McCollough against the Home Insurance Company of New York. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Kemp & Collier, for appellant. C. W. Pendleton, for respondent.

SLOSS, J. On July 31, 1905, the defendant issued to plaintiff a policy of fire insurance in the sum of $3,000. Of this amount $2,000 was on a frame building, and $1,000 on household furniture and effects contained therein. The building and contents were destroyed by fire, and this action was brought on the policy. The plaintiff had judgment for $2,650, with interest and costs, and defendant appeals from the judgment and from an order denying its motion for a new trial. The appellant bases its position upon two clauses of the policy, one relating to the title of the insured, and the other to the furnishing by him of sworn proofs of loss within a certain time.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

1. The policy provided that it should "be void * * * if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by insured in fee simple." The court found, following the allegations of the complaint, that, before the policy was issued, the plaintiff fully stated and disclosed to the defendant and its agents the nature and character of his interest in said land—i. e., that he held the land under a contract of purchase, was paying for the same upon installments, and did not yet have a deed—and found, further, that at all times since the issuance of the policy the plaintiff had been the sole and exclusive owner of the building and the land, "except as aforesaid." These findings, in so far as they import either a compliance with the terms of the policy, or a waiver of a breach, are attacked as unsupported by the evidence.

The facts shown in connection with plaintiff's interest in the property were these: On April 22, 1904, the Golden State Realty Investment Company, a corporation, was the owner of the land, described as lots 62 and 63 in the Watts Junction Tract. On that day it issued to plaintiff two papers, similar in form, referring to lots 62 and 63, respectively. Each acknowledged the receipt from plaintiff of $3, "as a deposit to secure" the lot described, and went on to state that the deposit was accepted as rent of said property for one week, that plaintiff was to pay the further sum of $1.50 as weekly rent for 97 weeks, and that upon payment of said sums, and the further sum of $1.50, the Golden State Company would convey the property, free and clear of incumbrance, to plaintiff. The contracts contained a provision for forfeiture in the event of a default in payment for four weeks. At the date of the issuance of the policy, July 31, 1905, the plaintiff had made 56 weekly payments on each of the contracts. Subsequently the remaining payments were made and the property conveyed to plaintiff. The building on the land was erected by plaintiff, and was occupied by him.

The papers issued by the Golden State Company bore the designation "Lease Contract." Notwithstanding this, and the further fact that the weekly payments were described as "rent," there can be no doubt that the instruments were in fact not leases, but contracts of sale. Parke, etc., Co. v. White River L. Co., 101 Cal. 37, 35 Pac. 442; Parke, etc., Co. v. White River L. Co., 110 Cal. 658, 43 Pac. 202; Holi Mfg. Co. v. Ewing, 109 Cal. 353, 42 Pac. 435. The clause of the policy providing that it shall be void if the insured's interest is other than sole and unconditional ownership, or the subject be a building on ground not owned by the insured in fee simple, is designed to remove from him the temptation to profit by the willful destruction of property not entirely owned by him. Imperial Fire Ins. Co. v. Dunham, 117 Pa. 460, 12 Atl. 668, 2 Am. St. Rep. 686. "It therefore follows that the clause is in most cases held to refer to the character and quality of the title—to the actual and substantial ownership, rather than to the strictly legal title." 2 Cooley, Ins. 1369. An equitable title in the insured is a sufficient compliance with the condition in question. A vendee in possession of property under a valid contract of purchase which he is entitled to enforce specifically is the holder of such equitable title. Id. 1376. And the great weight of authority supports the proposition that such vendee is the "sole and unconditional owner" within the meaning of the policy, even though a portion of the purchase price may yet remain unpaid. Id.; Pennsylvania F. I. Co. v. Hughes, 108 Fed. 497, 47 C. C. A. 459; Phenix Ins. Co. v. Kerr, 129 Fed. 723, 64 C. C. A. 251, 66 L. R. A. 569; Loventhal v. Insurance Co., 112 Ala. 108, 20 South. 419, 33 L. R. A. 258, 57 Am. St. Rep. 17; Dupreau v. Hib. Ins. Co., 76 Mich. 615, 43 N. W. 585, 5 L. R. A. 671; Pelton v. Westchester F. I. Co., 13 Hun, 23, affirmed 77 N. Y. 605; Imperial Ins. Co. v. Dunham, supra; Franklin F. I. Co. v. Crockett, 7 Lea (Tenn.) 725; Johannes v. Standard Fire Office, 70 Wis. 196, 35 N. W. 298, 5 Am. St. Rep. 159. This doctrine would not apply to the case of one in possession of land under a mere option, which does not bind him to make the payments or to complete the purchase. Phenix Ins. Co. v. Kerr, supra. Here, however, while the instruments executed by the Golden State Company were not signed by the plaintiff, they referred to and incorporated a prior application signed by him, and we think the contract and application, read together, did amount to an agreement on McCollough's part to purchase and pay for the property. Under the facts shown there was, therefore, no breach of the condition of ownership, and there is no occasion to consider whether the evidence supports the finding of a waiver of the supposed breach.

2. The policy contained the usual clause requiring the insured to furnish sworn proofs of loss within 60 days after the fire. This condition was not complied with, but the court found, following plaintiff's averment, that oral notice and proof were given by plaintiff within four days after the fire, and that the defendant then and there waived written notice and proof. There was evi-

dence to the effect that within the 60 days allowed for proofs the plaintiff had an interview with one Layng, an adjuster for the company; that at this interview Layng and he went over the items of loss claimed in an effort to arrive at the value of the property destroyed; and that at this time Layng stated to plaintiff that the proof "ought to be sworn to, but it was not necessary. * * * He said it didn't make any difference; he would go ahead and settle just the same." The plaintiff testified that he failed to make formal proofs because of these statements. At various times thereafter McCollough and Layng had discussions regarding the amount of loss, but no denial of liability was made by the company until more than 60 days had elapsed from the time of the fire.

The court was fully justified in finding from this evidence that the company had waived the requirement of written and sworn proof of loss. 4 Cooley's Briefs on Ins. 3483, 3487, 3490, 3511, and cases cited; May on Ins. § 468; Williams v. Insurance Co., 54 Cal. 442, 448, 35 Am. Rep. 77; Carroll v. Insurance Co., 72 Cal. 297, 13 Pac. 863. The clause of the policy providing that no officer, agent, or other representative of the company shall have power to waive any condition of the policy except such as may be indorsed thereon or added thereto "has no reference to those stipulations which are to be performed after a loss has occurred, such as giving notice and furnishing preliminary proofs." Wheaton v. Insurance Co., 76 Cal. 415, 428, 18 Pac. 758, 764, 9 Am. St. Rep. 216; Franklin F. I. Co. v. Ice Co., 36 Md. 102, 11 Am. Rep. 469; 4 Cooley, Ins. 3503, and cases cited. Furthermore, this provision itself may be waived by certain officers or agents (Carroll v. Girard F. I. Co., supra; Arnold v. Insurance Co., 148 Cal. 660, 84 Pac. 182; Mackintosh v. Insurance Co., 150 Cal. 440, 89 Pac. 102, 119 Am. St. Rep. 234), or the company may be estopped from relying on it (Blake v. Exchange Mut. Ins. Co., 12 Gray [Mass.] 265).

The appellant relies upon a "nonwaiver agreement" signed by McCollough during the pendency of his negotiations with Layng. This paper provided that "any action taken by said party of the second part (the company) in investigating the cause of fire or investigating and ascertaining the amount of loss and damage * * * shall not waive or invalidate any of the conditions of the policy." This agreement has no bearing upon the question before us. It has no reference to affirmative representations calculated to lead the insured into the belief that written proofs would not be required. A statement that such proofs were not necessary is no part of action by the company "in investigating the cause of fire or ascertaining the amount of loss."

In view of what we have said, none of the other assignments of error are of sufficient importance to merit particular discussion.

The judgment and order appealed from are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

155 Cal. 675

VAN SLYKE v. ARROWHEAD RESERVOIR & POWER CO. (L. A. 2,252.)

(Supreme Court of California. June 17, 1909.)

1. DEEDS (§ 124*)—ESTATES CONVEYED—FEE SIMPLE—INTENTION OF GRANTOR.

A deed conveying "all that real property * * * described as follows: Being all of the land, * * *" etc., expresses an intention to grant the fee, or the entire estate, in whatever is described.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 346–351; Dec. Dig. § 124.*]

2. DEEDS (§ 138*)—CONSTRUCTION—"RESERVED"—"EXCEPTION."

The word "reserved" in a strict technical sense is not synonymous with "exception," but is applied to a clause in a deed which creates some right or privilege for the benefit of the grantor in the land granted, and withholds it from the operation of the grant so that the title to the thing passes to the grantee, and the right or privilege concerning it is the only thing retained by the grantor, while the term "exception" applies to something which constitutes a part of the thing described as granted and which would pass but for the excepting clause, and the title to the thing excepted remains in the grantor, but the difference between the terms is so slight that the technical meaning will give way to the manifest intent, even though the technical term to the contrary be used.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 456; Dec. Dig. § 138.*

For other definitions, see Words and Phrases, vol. 3, pp. 2539–2542; vol. 8, p. 7656; vol. 7, pp. 6144–6146.]

3. DEEDS (§ 124*) — CONSTRUCTION — ESTATE CONVEYED—"RESERVATION."

A grantor conveyed all of a tract of land not included in a tract intended for a reservoir and dam to be built thereon. Subsequently the grantor conveyed to others all of the same tract that might be wanted by the grantee for a reservoir, the dam of which was to be built on the land, the reservoir site to include the quantity of land necessary therefor, together with all the reservations recited in the former deed. The first conveyance left in the grantor no property in the tract save the portion which had been excepted and reserved therein. The land was uninclosed, unused, and was of little value except for a reservoir, and the grantor had been negotiating for the sale of the reservoir site prior to making the first deed. If a reservoir had been established and had not occupied the entire site excepted from the former deed, the fringe of land around it would have been of little value to the grantor, and the reservoir would have been a permanent occupation of the land, and, if an easement therefor only had been granted, the servient estate would be practically worthless. The price paid was over six times the assessed value of the land. For 15 years after the conveyance the grantee held sole possession of the land, and paid taxes thereon, while the grantor exercised no dominion over it. *Held*, that in view of Civ. Code, §§ 1069, 1636, 1641–1647, prescribing rules for the construction of contracts, the term "reserving" as used in the former deed was not used in its technical sense, and the word "reservations" in the subsequent deed was used in its popular sense to signify everything pertaining to the tract which the grantor had not parted with by the prior deed, and the subsequent deed conveyed a fee-simple estate therein to the grantee.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 124.*

For other definitions, see Words and Phrases, vol. 7, pp. 6140–6144; vol. 8, p. 7787.]

Department 1. Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Action by W. E. Van Slyke against the Arrowhead Reservoir & Power Company. From a judgment for defendant and an order denying a new trial, plaintiff appeals. Affirmed.

Byron Waters, for appellant. Leonard & Surr, for respondent.

SHAW, J. This is an action to quiet title to a tract of land. Judgment was given in the court below in favor of the defendant, declaring it to be the owner of the land. The plaintiff appeals from the judgment and from an order denying his motion for a new trial.

The decision in the case depends on the meaning and effect of a certain deed executed on June 2, 1891, by the plaintiff to the Arrowhead Reservoir Company. The defendant company is the successor in interest of the last-named company. In order to a proper understanding of the deed, it will be necessary to give a statement of some previous transactions and the conditions existing at the date of its execution as disclosed by the record. In 1889 the plaintiff was the owner of the entire east half of section 23, township 2 north, range 4 west, San Bernardino meridian, of which the land in controversy forms a part. The land is situated in the San Bernardino Mountains, at the narrows of a stream known as Huston creek, and it includes a flat known as Huston flat. In that year Koebig, a civil engineer, made a survey of said narrows and flat as a site for a dam and reservior, at whose instance is not shown. He ran and marked, as the boundary of the proposed reservoir, a contour line around the flat above the proposed dam, at an elevation of 107 feet above the bed of the stream at the dam, inclosing about 100 acres of land. Some negotiations appear to have been pending between a promoter of the Arrowhead Reservoir Company and Van Slyke for the sale of this reservoir site to the said company. On May 1, 1890, Van Slyke by quitclaim deed conveyed to the Riverside Box & Tray Company a part of this half section of land. The material parts of the description in this deed were as follows: "All that certain land situated in the east half of section 23 (etc.) not included in that certain reservoir to be built by the raising and building of a dam at the Narrows of Huston creek in the northeast quarter of said section as surveyed by A. H. Koebig in the year 1889. Said reservoir and dam to include fifteen feet outside of the level surveyed for the high-water mark when said reservoir shall be full. Also the land required for said reservoir and dam, together with such land above the top of said dam as may be required for the purpose of obtaining ground, sand or gravel to be used in the building and maintaining of said dam, also land for ditches or conduits to convey the water of said reservoir from said dam and across said lands. Also land for ditches or conduits that may be deemed necessary to convey water into said reservoir. Also all surplus water of the east half of section 23 not used for the purpose of supplying one steam saw mill with water. Said reservoir is to be used for the purpose of storing water, and the party of the first part herein (Van Slyke) shall in no wise be liable to the party of the second part for any damages which they may sustain from the building of said dam or reservoir from the storage of water in same, or from any overflow or leakage from said reservoir. Also reserving all the timber on the west half of the northeast quarter of said section." As we understand this description, the land necessary for rights of way for ditches or conduits constituting appurtenances to the reservoir site and for sand and gravel to use in building the dam, and the water right also, were not included in the land intended to be conveyed.

The deed from Van Slyke to defendant's grantor, the Arrowhead Reservoir Company, which is the deed to be here construed, is dated June 2, 1891, and expresses a consideration of $8,500, which was actually paid to Van Slyke by the company as the price of the property transferred thereby. It purports to "grant" to said company "all that real property situated in the county of San Bernardino, state aforesaid, described as follows: Being all of the land in the east one-half of section twenty-three (23), township 2 north, range 4 west, San Bernardino Base and Meridian, that may be wanted by said party of the second part for the purpose of a reservoir, the dam of which is to be built on said land. Said reservoir site to include the quantity of land necessary therefor, and also a strip of land around the same fifteen feet above high-water mark, and to include all land in the above-described tract that may be covered with water by the erection of a dam at the Narrows of Huston creek, on said land, together with fifteen feet above high-water mark created or stored by reason of the construction of said dam upon said land. Also all the water rights owned by party of the first part that may be diverted or developed for use of filling the above mentioned reservoir save and excepting enough to supply a steam boiler for the saw mill, and domestic use for mill crew and teams. Also all rights-of-ways for ditches or conduits or flumes, or any other means for conveying water to said reservoir that may be necessary by subsequent surveys made by party of the second part across or through any other of the lands of party of the first part not included within said reservoir, together with all the reservations recited in certain deeds of date May 1, 1890, from party of the first part to the Riverside Box and Tray Factory." One of these deeds is the one first above mentioned.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

From and after the execution of this deed, down to the beginning of this action on August 2, 1906, Van Slyke performed no act of ownership, dominion, or possession upon this land. It was wild mountain land, uncultivated, uninclosed, and unoccupied by any person, except that the Arrowhead Reservoir Company and the defendant as its successor annually leased it, together with about 4,500 acres of similar land near by, to certain persons for a stock range, and the stock was allowed to run at will over the entire territory, including other lands not owned by the parties. The value of this land is not shown, except that the value as assessed for taxation was $1,400. The rentals for the entire range of 4,500 acres or more was usually $300 a year. Nothing has ever been done toward the erection of a dam or the establishment of a reservoir on the land, and no other survey of the premises has been made. Nothing further has been done to fix the location of the dam referred to in the deed to the Arrowhead Reservoir Company or the lines of the reservoir to be established. It is obvious from the granting clause of the deed to the Arrowhead Reservoir Company that the intention was to convey the entire estate in the land described, and not a mere easement or privilege to use it for a reservoir and dam. A declaration of intention to "grant all that real property * * * described as follows: Being all of the land," etc., cannot be understood otherwise than as an expression of intent to grant the fee, or the entire estate, in whatever is described. "A fee-simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended." Civ. Code, § 1105. The uncertainty, such as there may be, comes from the terms of the descriptive clause which does not give a definite boundary to the reservoir site mentioned. This clause refers especially to the previous conveyance to the Riverside Box & Tray Factory, and the closing statement in the descriptive clause operates to include in the description of the property granted all the property reserved in the former conveyance. The word "reserved" in a strict technical sense is not synonymous with "exception." The former term is applied to a clause in a deed which creates some right or privilege for the benefit of the grantor in the land described as granted, and withholds it from the operation of the grant, so that the title to the thing passes to the grantee, and the right or privilege concerning it is the only thing retained by the grantor. The latter term applies to something which constitutes a part of the thing described as granted and which would pass but for the excepting clause, the office of which is to exclude it from the thing described, and the title to the thing excepted remains in the grantor. The difference between the two terms is so slight and shadowy that in common parlance they are used interchangeably, "and the technical meaning will give way to the manifest intent, even though the technical term to the contrary be used." 13 Cyc. 674. For illustration, it is held that a clause in a deed retaining to the grantor the right to enter upon the land granted and cut and remove the timber growing thereon would be a reservation; whereas a clause retaining in the grantor the timber growing on the land described as granted is technically an exception. In the first case the title to the standing trees passes to the grantee; in the second it remains in the grantor. Sears v. Ackerman, 138 Cal. 586, 72 Pac. 171; Butler v. Gosling, 130 Cal. 422, 62 Pac. 596; Rich v. Zeilsdorff, 22 Wis. 522, 99 Am. Dec. 81; Knotts v. Hydrick, 12 Rich. Law (S. C.) 317; Howard v. Lincoln, 13 Me. 122; Goodwin v. Hubbard, 47 Me. 595; Martin v. Gilson, 37 Wis. 360. The so-called "reservation" of timber in the deed to the tray factory is therefore technically an exception of the same character as the exclusion of the reservoir site surveyed by Koebig. On the other hand, the right to the surplus water of the half section, and the right to the land necessary for sand and gravel for the use in building and maintaining the dam, which are described as among the things "not included" in the property granted to the tray factory, are perhaps technical reservations, rather than exceptions. All this shows that the grantor was not using the word "reserving" in its technical significance in the first deed in the clause reserving the timber, and it indicates that the word "reservations" in the last deed was there used in its popular and general sense to signify everything in or pertaining to the half section mentioned which he had not parted with by the prior conveyance.

The following rules of interpretation are particularly applicable to this deed: "The whole of a contract is to be taken together, so as to give effect to every part of it, if reasonably practicable, each clause helping to interpret the other." Civ. Code, § 1641. "A grant is to be interpreted in favor of the grantee" with certain exceptions not here applicable. Civ. Code, § 1069. "A contract must be so interpreted as to give effect to the mutual intentions of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." Civ. Code, § 1636. "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties." Civ. Code, § 1643. "The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense." Civ. Code, § 1644. "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." Civ. Code, § 1647.

The circumstances under which the instrument appears to have been made strongly indicate an intention to convey all that Van Slyke possessed in the half section of land. Prior to the first deed he had been negotiating for the sale to the reservoir company of a certain part of it which was considered suitable for reservoir purposes. A survey of this site had been made and its boundaries definitely ascertained and marked on the ground. In the deed to the tray factory company this reservoir site was expressly excepted and reference was made to the survey thereof previously made by Koebig. This conveyance left in Van Slyke no property or rights in the half section, save the portion thereof which had been excepted and reserved in the deed to the tray company. The land was entirely uninclosed and unused, and was of little value except for reservoir purposes. If the reservoir had been established and had not in fact occupied the entire site as surveyed by Koebig, it is obvious that the fringe of land around the site would be of little value to Van Slyke, and would be a constant source of annoyance and dispute between him and his grantee if he had withheld it from the conveyance. If a reservoir had been established, it would have been a permanent occupation of the land, and, if an easement therefor only had been granted, the servient estate in the land would be practically worthless. There was little inducement to the grantor to grant less than a fee-simple estate, or to convey less than the entire property not included in the prior deed. In these circumstances, it is extremely improbable that the parties would have arranged for the sale of any interest in the reservoir site other than the absolute fee, or for the transfer of less than the entire site surveyed. This is further confirmed by the fact that the price paid was more than six times the value of the property as assessed for taxation. If further confirmation is necessary, it is found in the conduct of the parties immediately following the execution of the last deed. For 15 years thereafter the grantee held sole possession of the land, so far as it was occupied at all, and paid all the taxes thereon, while the grantor exercised no dominion whatever over the property, did not give it in to the assessor for taxation, and paid no taxes thereon. From all these circumstances, and in view of the rules of interpretation above stated, we are of the opinion that the deed to the Arrowhead Reservoir Company should be given effect as a conveyance of all the right, title, interest, and estate of Van Slyke in the half section of land described except what had been previously conveyed to the Riverside Box & Tray Company.

This conclusion makes it unnecessary for us to consider the additional argument of the respondent to the effect that the conveyance to the reservoir company, taking the first clause in the description alone, was an instance of that class of conveyances wherein the property transferred is not definitely described, but its limits are to be ascertained by some subsequent act either of the grantor or of the grantee or by the joint act of both, whereby the boundaries are to be ascertained and determined. It may be that the deed could be upheld as a complete conveyance of all of the remaining estate in the half section upon the principles stated in the cases cited in support of this argument. See Hull v. Fuller, 4 Vt. 199; Smith v. Furbish, 68 N. H. 123, 44 Atl. 398, 47 L. R. A. 226; Dohoney v. Womack, 1 Tex. Civ. App. 361, 19 S. W. 883, 20 S. W. 950; Nye v. Moody, 70 Tex. 434, 8 S. W. 606; Crocker v. Crocker, 5 Hun (N. Y.) 589; Armstrong v. Mudd, 10 B. Mon. (Ky.) 144, 50 Am. Dec. 545.

It also disposes of the divers contentions of the appellant wherein he claims that the estate granted is an estate upon condition and would not vest until the dam was built; that it was an attempt to create a perpetuity, and for that reason void; that there were no words of conveyance operating upon any definite quantity of land, because it was left to the grantee to take such as "may be wanted," and that an easement in gross only was conveyed, in which case it is claimed that the attempt to convey it to the defendant was an abandonment of the right. These contentions we hold to be entirely untenable.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

155 Cal. 620

GOODING v. CHUTES CO. (S. F. 4,990.)

(Supreme Court of California. June 14, 1909. Rehearing Denied July 14, 1909.)

1. Animals (§ 66½*) — Vicious Domestic Animals—Duty of Owner.

It is the duty of one who owns or keeps domestic animals known to be vicious to guard them in such a manner as will absolutely prevent the occurrence of an injury to others through such vicious acts of the animals as they are naturally inclined to commit.

[Ed. Note.—For other cases, see Animals, Cent. Dig. § 231; Dec. Dig. § 66½.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. ANIMALS (§ 66½*) — VICIOUS DOMESTIC ANIMALS—PERSONS ENTITLED TO CARE.

The duty of protection against known vicious domestic animals is owing to the public generally, to strangers as well as those dealing with or standing in some relation to the owners, those only being excluded from its operation who are themselves in fault.

[Ed. Note.—For other cases, see Animals, Cent. Dig. § 231; Dec. Dig. § 66½.*]

3. ANIMALS (§ 70*)—VICIOUS DOMESTIC ANIMALS—BITE OF CAMEL.

A Chutes Company, as part of its place of amusement, kept a zoo, in charge of a general manager, and employés hired by the manager were under duty to clean the stall of the camel therein, and they knew that the camel was vicious. Another employé, not knowing and not being informed of the vicious character of the camel, on a change of shifts was in duty to clean the stall, and in doing so was injured by the bite of the camel. *Held*, that notice of his co-employés of the vicious character of the animal would be imputed to the Chutes Company.

[Ed. Note.—For other cases, see Animals, Cent. Dig. § 230; Dec. Dig. § 70.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Addison Gooding against the Chutes Company for personal injuries. From a judgment for plaintiff, and from an order denying defendant's motion for new trial, defendant appeals. Affirmed.

Naphtaly F. Freidenrich and M. L. Schmidt, for appellant. Carl Westerfeld and R. D. Duke, for respondent.

SHAW, J. This is an action for damages caused by the bite of a camel. The defendant was keeping animals for exhibition at a place called "The Chutes." The place in which the animals were on exhibition was commonly called the "Zoo." Among these animals was a camel. Plaintiff was employed by the defendant to look after, care for, and attend to the animals in the zoo, including the camel. Upon entering the camel's stall to clean it, the camel seized the plaintiff's leg with his teeth, lifted him from the ground and swung him about in the air, biting his leg so severely that the bones were crushed, rendering amputation necessary. For this injury the plaintiff brings this suit. The jury returned a verdict in his favor, and judgment was entered thereon. The defendant appeals from the judgment and from an order denying its motion for a new trial. The errors assigned are that the evidence is insufficient to justify the verdict, and that the court erred in giving certain instructions and in certain rulings upon the admission of evidence.

The answer admits that the plaintiff was employed by the defendant to look after, care for, and attend to the camel; that the plaintiff was injured; and that, at and prior to the time of the injury, the plaintiff did not know of the vicious disposition of the camel and had not been informed thereof by the defendant. There is evidence to the effect that the camel was of a vicious disposition, addicted to biting persons attending upon it, and that the defendant's superintendent knew of that disposition at the time he hired the plaintiff. There is therefore no foundation for the claim that the evidence does not sustain the verdict.

The "Chutes" had several departments, each presenting different performances or means for the amusement and entertainment of the public, all within one general inclosure. The zoo constituted one of these departments. The place was under the general charge of a general manager named Levy. The zoo was under the special supervision of a superintendent named Lawrence. Several men were employed about the zoo whose duty it was to sweep out the place daily, clean the cages and stalls every morning, and throughout the day when necessary, feed and otherwise care for the animals, watch the animals and visitors, and take care that the animals were not teased by the visitors and that the visitors were not injured by the animals. These men were divided into two shifts for two different parts of the work, one of which included the care of the camel and its stall and the other did not, and they were changed from one shift to the other every week. The plaintiff was one of the men employed in this work. He was not assigned to the shift which included the care of the camel, until the day he was injured, one week after he began the service. The contract of employment was made with Lawrence, the superintendent of the zoo. It does not appear from the evidence who directed him to go upon the shift to take care of the camel. He had at that time acquired by his own observation knowledge of the fact that when upon the new shift it was his duty to clean the camel's stall, and he entered the stall for that purpose without being specially directed to do so, and was immediately bitten as alleged. The evidence shows, without conflict, that two of these fellow employés of the plaintiff knew of the vicious disposition of the camel at the time plaintiff was hired. As to the knowledge thereof by Lawrence, the superintendent who hired him, the evidence was conflicting.

The court gave the following instruction: "(2) If you believe from the evidence that the care of the animals in defendant's zoo was intrusted to employés of the defendant, and that said employés were notified and knew that the camel in question had vicious propensities, the defendant had notice and knowledge of such vicious propensities of said camel."

In view of the facts above stated, the jury would naturally understand this instruction to refer to the subordinate employés aforesaid engaged about the zoo in the actual work above described. With respect to knowledge imputed to the owner of a domesticated animal of the fact that such animal is of vicious habits or disposition, the law is that, if knowledge of such fact is brought home to an agent or servant employed about the animal, and whose duty, is such agent or servant, requires him, if he knows of the vicious character of the animal, to act in respect thereof toward third persons, or toward the animal for the protection of third persons, in any matter involving a breach of such duty such knowledge of the servant is imputed to the master, although not imparted to him. Clowdis v. Fresno Flume Co., 118 Cal. 315, 50 Pac. 373, 62 Am. St. Rep. 238; McGarry v. N. Y. & H. R. Co. (Super. Ct.) 18 N. Y. Supp. 196, affirmed in Court of Appeals, 137 N. Y. 627, 33 N. E. 745; Brice v. Bauer, 108 N. Y. 430, 15 N. E. 695, 2 Am. St. Rep. 454; Brown v. Green, 1 Pennewill (Del.) 535, 42 Atl. 991; Niland v. Geer, 46 App. Div. 194, 61 N. Y. Supp. 696; Keenan v. Gutta P. Mfg. Co., 46 Hun, 546; Corliss v. Smith, 53 Vt. 532; Harris v. Fisher, 115 N. C. 318, 20 S. E. 461, 44 Am. St. Rep. 452; Hammond v. Johnson, 38 Neb. 248, 56 N. W. 967; Applebee v. Percy, L. R. 9 C. P. 647; Lynch v. Kineth, 36 Wash. 371, 78 Pac. 923, 104 Am. St. Rep. 958.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It was a part of the duty of these employés, while occupied about the zoo, to know whether or not the animals, or any of them, were dangerous to persons about them, and to take care that no person within the inclosure should be injured by such animals. For that purpose, they each represented the Chutes Company, and were discharging that part of the duty of the Chutes Company toward persons allowed to enter the zoo. For a failure to discharge that duty by such employés, the principal would, of course, be responsible, and if one of these employés, knowing the vicious propensity of the camel, carelessly suffered a person to go near enough to the camel to be bitten by it, and such person was so bitten, the defendant would be liable for the damages thereby caused.

The defendant's claim that the above instruction is erroneous is sustainable only on the theory that the men engaged in the zoo in the actual work of caring for the animals were not charged with the duty of protecting any person against the attacks of animals, known to them to be vicious, except visitors coming there for entertainment, or other strangers, and that, consequently, their knowledge of such vicious character will not be imputed to the defendant in any matter involving danger to persons connected with the establishment. The rule cannot be thus limited. It is the duty of one who owns or keeps domestic animals known to be vicious to guard them "in such a manner as will absolutely prevent the occurrence of an injury to others through such vicious acts of the animals as they are naturally inclined to commit." 2 Cyc. 368. This language is used in the authority cited with respect to the duty of an owner of wild animals, which are presumed to be ferocious. The rule is the same, however, with regard to domesticated animals when they are in fact vicious, and their real nature is known to the owner or keeper thereof. Laverone v. Mangianti, 41 Cal. 139, 10 Am. Rep. 269; 2 Cyc. 369; 2 Am. & Eng. Ency. of Law, 352. The duty of protection against such animals is owing to the public generally, to strangers as well as to those dealing with or standing in some relation to the owner, those only being excluded from its operation who are themselves in fault. Earhart v. Youngblood, 27 Pa. 331; Marble v. Ross, 124 Mass. 44; Laverone v. Mangianti, supra; Muller v. McKesson, 73 N. Y. 199, 29 Am. Rep. 123; May v. Burdett, 9 Ad. & El. (N. S.) 101. Upon the discovery of the vicious character of the camel, these men, as its keepers, were required to keep it in such a manner as to prevent it from injuring any and all persons lawfully within the inclosure, and to warn them of the danger, regardless of the purposes of their coming. This obligation rested on them as representatives of the defendant, and in performing it they were performing a duty which the defendant owed. In all such cases the knowledge of the servant is imputed to the master. The obligation was due from them, on behalf of the defendant, to the plaintiff when he entered the zoo as an employé, as much as to any other person allowed to enter. The fact that he then became a fellow servant is immaterial. The duty to warn the plaintiff was not at that time owing to him as a fellow servant; it was owing to him in common with all other persons in the same situation. In discharging that duty these employés would have represented their principal, the defendant, and would not have been acting as fellow servants of the plaintiff. It is correct, therefore, in contemplation of law, upon the admitted facts of this case, to say, as this instruction says, that if these employés knew that the camel had vicious propensities, then the defendant also had notice thereof.

Some rulings upon the admission of evidence are assigned as error, but they are of so insignificant a character that we do not think it necessary to discuss them. We find no substantial error in the record.

The judgment and order are affirmed.

We concur: SLOSS, J.; ANGELLOTTI, J.

10 Cal. App. 641

HARRIS v. MUNRO CO. (Civ. 586.)

(Court of Appeal, First District, California. May 14, 1909.)

JUDGMENT (§ 101*)—DEFAULT JUDGMENT—ACTION ON NOTES.

The complaint contained two counts, each on a note. The note sued on in the first count was past due, but the note sued on in the second was neither due when the complaint was filed nor when a default judgment was entered for the sum of the two notes. *Held*, that the judgment was erroneous, and not supported by the pleadings.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 168–170; Dec. Dig. § 101.*]

Appeal from Superior Court, City and County of San Francisco; Carroll Cook, Judge.

Action by Isaiah Harris against the Munro Company. From a judgment for plaintiff, defendant appeals. Reversed.

J. S. Spilman and L. T. Hatfield, for appellant. Lucius Solomons, for respondent.

HALL, J. Plaintiff took judgment against defendant by default upon a complaint containing two counts, each upon a promissory note. The note sued upon in the first count was past due, but the note sued upon in the second count was neither due when the complaint was filed nor when judgment was entered. The judgment was for the sum of the two notes, and is clearly erroneous, and not supported by the pleadings. The note sued on in the second cause of action appearing by its terms as set forth in the count not to have been due when the action was commenced, such count stated no cause of action. Harmon v. Ashmead, 60 Cal. 439. The first count does not support the judgment, as the judgment is for nearly twice the amount claimed under such count. The case of Hunt v. City of San Francisco, 11 Cal. 250, cited by respondent, differed from the case at bar, in that the default judgment in that case was for the amount claimed under each of several counts, only one of which was defective. The court said: "It will be observed that the money counts are each of them for the amount for which judgment was taken."

The judgment is reversed, and the court directed to enter judgment for the plaintiff upon the first count for the amount of the principal of the note set forth in such count, together with interest thereon from the date of said note till the entry of judgment at the rate of 6 per cent. per annum, as provided in said note, and to dismiss said action as to the second count thereof, without prejudice to the right of plaintiff to bring a new action on the note set forth in said count.

We concur: COOPER, P. J.; KERRIGAN, J.

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10 Cal. App. 641

LUCAS v. REA et al. (Civ. 568.)

(Court of Appeal, Third District, California. May 25, 1909. Rehearing Denied by Supreme Court July 24, 1909.)

1. MECHANICS' LIENS (§ 147*)—NOTICE OF LIEN—STATEMENT OF DEBT.

There is no material difference between a statement in a notice of a lien of the amount due without setting out credits and a statement of the whole amount of the debit side of the account and also of the credits.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 253; Dec. Dig. § 147.*]

2. MECHANICS' LIENS (§ 277*)—ENFORCEMENT—EVIDENCE.

Where the notice of a lien for materials used in the construction of a building alleged an express agreement to pay a specified sum for the materials, which sum was actually the market value, barring a slight variance on account of an error in the account by the claimant, the failure to prove an agreement to pay the specified sum did not defeat the right to foreclose the lien.

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 277.*]

3. MECHANICS' LIENS (§ 277*)—ENFORCEMENT—EVIDENCE.

A notice of a lien by a materialman for materials furnished for a building, which alleged that the contractor agreed to pay a specified sum due on the completion of the work, that the claimant was employed by the contractor to furnish materials, that there were no conditions attached to the contract and no time set for the payment thereof, except that the amount due claimant was to be paid as soon as the work was completed, was uncertain as to whether claimant relied on an express or implied contract, and his failure to prove an express contract did not defeat his right to enforce the lien.

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 277.*]

On petition for rehearing. Granted. Former opinion modified. Judgment and order affirmed.

For former opinion, see 101 Pac. 537.

BURNETT, J. A rehearing of this cause was granted principally to give further consideration to the question of variance between the evidence and the notice of lien as to the nature of the contract involved.

A portion of the former opinion we adopt as follows:

"The judgment in favor of plaintiff established and decreed the foreclosure of a lien for materials used in the construction of a residence belonging to defendant Rea, and which was mortgaged to the said Bank of Ukiah.

"(1) The complaint states facts sufficient to constitute a cause of action. The cases cited to the contrary by appellants are not in point. For instance, in Nason v. John, 1 Cal. App. 540, 82 Pac. 566, it is stated: 'The action is by a materialman against the owner (appellant) for the value of material furnished the contractor for the painting of the house of appellant. There is in the complaint no attempt to allege that at the time of filing the notice of lien or of bringing the action there was anything owing from the owner to the contractor, nor is any attempt made in the complaint to allege any fact, such as a premature payment by the owner to the contractor, or the like, that under section 1184 of the Code of Civil Procedure might be claimed to give the materialman a lien against the property of the owner for the value of his material.' It was rightly held in line with many authorities that the complaint failed to state a cause of action. Here, however, it does not appear from the complaint that the material was furnished to the contractor. On the contrary, the allegation is: 'That on or about the 6th day of July, 1906, R. R. Lucas and T. A. Lucas, comprising the firm of Lucas Bros., entered into an agreement with the defendant S. L. Rea wherein and whereby the said R. R. Lucas and T. A. Lucas agreed to furnish, * * * and the defendant, pursuant to said contract, agreed to pay to the said Lucas Bros. for the said material so furnished as aforesaid the sum of $780.70 upon the completion of said building.' Thus it is seen that the complaint shows a contract directly between the materialman and the owner, and it presents an action in assumpsit with additional appropriate averments for the establishment and foreclosure of a materialman's lien. The material was actually furnished, however, to the contractor, and under a contract with him, and not by virtue of any agreement between the Lucas Bros. and defendant Rea, the owner of the building. This appears from the evidence, and also from the notice of lien, which recites: 'That the name of the person by whom claimants were employed and to whom they furnished the material is A. S. Howell, the original contractor with S. L. Rea for the erection of said building, and said A. S. Howell agreed to pay said sum of seven hundred and ninety-nine and $^{97}/_{100}$ dollars,' etc. Wherefore appellants make the further contention that there is a variance between the proof and the allegations of the complaint, and that the complaint was rendered ambiguous and uncertain by reason of said notice of lien which was attached to and made a part of said complaint. The evidence, though, shows further that the contract between the owner and the contractor was and is void because, being for more than $1,000, it was not recorded until after the work was begun and the plans and specifications, which were made a part of the contract, were not recorded at all. Section 1183, Code Civ. Proc.; Yancy v. Morton, 94 Cal. 558, 29 Pac. 1111; Burnett v. Glas (Cal. App.) 99 Pac. 856. Therefore the materials furnished as aforesaid are deemed to have been furnished at the personal instance of the owner and a lien can be maintained therefor. Section 1183, Code Civ. Proc. The result is that by operation of law the contract of the Lucas Bros. with the contractor is considered a contract with the owner, and the Supreme Court has held that it may be so alleged, although not in accordance with the actual transaction.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"In Yancy v. Morton, supra, it is said: 'The complaint in this case is upon a contract for the value of goods sold at the special instance and request of defendant (the owner). Sections 1183 and 1184 of the Code of Civil Procedure provide that when the contract between the parties, for any of the reasons therein enumerated, is void, materials shall be deemed to have been furnished at the special instance and request of the owner, and the building is subject to a lien for the same. In support of his complaint, plaintiff introduced the contract in evidence for the purpose of showing that it was void. The court found such to be the fact, and the evidence and findings were justified under the complaint. No substantial reason is suggested to us why the necessity existed for plaintiff to set out the contract and then allege its invalidity. Such matters were matters of evidence, and the completeness of the pleading did not demand it.' See, also, Lumber Co. v. Gottschalk, 81 Cal. 646, 22 Pac. 860; Reed v. Norton, 90 Cal. 598, 26 Pac. 767, 27 Pac. 426; McClain v. Hutton, 131 Cal. 135, 61 Pac. 273, 63 Pac. 182, 622. In the McClain Case it is stated that 'Mrs. Hutton (the owner) was properly named as the person by whom the claimant was employed, * * * and there is no objection to the use of this form of statement.' It seems to me the better practice to allege the facts as they occur and leave the court to draw the conclusion that the property is subject to the lien, but it is settled that, where the original contract is void, plaintiff may pursue that course or aver a direct agreement with the owner. This is conceded by appellants in their closing brief, but it is insisted that the notice of lien renders the complaint subject to the special demurrer for uncertainty and ambiguity. An allegation that the contract was made with the owner is certainly inconsistent with a recital that it was made with the contractor; but, admitting that the special demurrer should have been sustained on that ground, it is clear that appellants have not been prejudiced by the error. At the beginning of the trial, an objection was made to the evidence on the ground of variance between it and the complaint and of the uncertainty growing out of the recitals of the notice of lien, but the objection was overruled, the court justifying its ruling 'on the theory the law makes the contract between the plaintiff and Rea.' The case was tried upon that theory. No doubt counsel for appellants upon the argument of the demurrer were informed of plaintiff's contention in that regard, and it would be inexcusable now to reverse the case and impose the additional cost of a new trial simply because of the said apparent uncertainty.

"(2) If controverted, the terms of the contract must be proved by the claimant substantially as set out in his notice of lien. Appellants complain of a variance inasmuch as while the notice states that the amount due over and above all set-offs is $799.97, and that Howell agreed to pay the same on completion and there was no other condition, the proof shows that the amount of the bill was not the sum stated either in the complaint or in the notice, and that there never was an agreed sum to be paid nor any agreement as to the time of payment."

It is true that the complaint alleges a demand for $780.70, but Mr. Lucas testified that this was the amount actually due. The testimony also reveals that a mistake of about $19 was made by claimants in their notice, and that they attempted to state therein the amount due after deducting the payments that had been made. But, as there is no evidence of fraud, it is unimportant that the complaint is for a small amount less than what is called for in the notice. Barber v. Reynolds, 44 Cal. 519; Malone v. Big Flat Gravel M. Co., 76 Cal. 578, 18 Pac. 772; Harmon v. S. F., etc., R. R. Co., 86 Cal. 617, 25 Pac. 124. Again, there is no material difference between a statement of the amount due without setting out the credits and a statement of the whole amount of the debit side of the account and also of the credits. Star Mill & Lumber Co. v. Porter, 4 Cal. App. 470, 88 Pac. 497.

On the first hearing, the second point discussed seemed fatal to the judgment in view of certain decisions of the Supreme Court cited in the former opinion. After further consideration, we have reached the conclusion that these decisions are not necessarily inconsistent with the said Star Mill & Lumber Co. Case, which is authority for the position of respondent herein. In that decision by the Second District Court of Appeal it is said: "The notice is, indeed, incorrect in stating as one of the terms of the contract that the claim was based on a quantum meruit, instead of upon a special promise to pay a fixed amount; and this doubtless as a matter of pleading would constitute at common law a material variance, though hardly under existing practice. Code Civ. Proc. § 469. But, as we have already said, the technical doctrine of variance has no application to a notice of lien, when all that is required is that the statement of the terms of the contract shall be substantially true. There are indeed many cases cited by the appellant, and other cases, which might be conceived to hold the contrary doctrine. Reed v. Norton, 99 Cal. 619, 34 Pac. 333; Palmer v. Lavigne, 104 Cal. 34, 37 Pac. 775; Santa Monica L. & M. Co. v. Hege, 119 Cal. 380, 51 Pac. 555; Wilson v. Nugent, 125 Cal. 283, 57 Pac. 1008. But these or most of them are distinguished from the present case, in that it did not appear that the fixed price stated was the market price. In the absence of this fact, the statement would be substantially false, and might mislead the owner to his prejudice. But, where the fact appears, no injury can result to the owner; nor can the misstatement be regarded as material." In the case at bar, conceding that the statement in the notice, "and said A. S. Howell agreed to pay said sum of seven hundred ninety-nine and 97/100 dollars so due upon completion of the work." sets forth an express agreement at the time the material was ordered, it is difficult to see how the appellants were injured, as the evidence shows that this was actually the market value, barring a slight variance on account of an error committed in the account by Mr. Lucas.

But, again, the said notice is at most simply uncertain as to whether claimants relied upon an express or an implied contract. In the endeavor to comply with the requirement of the statute to set out the "terms, time given, and conditions of his contract," this statement was made in said notice: "That the terms, time, and condition of the contract between claimants and said A. S. Howell are as follows: The claimants were employed on or about the 6th day of July, 1906, by said A. S. Howell, the original contractor for said building, to furnish lumber and building material to be used in the construction and erection of said building and its additions. That there were no conditions attached to said contract between these claimants and said A. S. Howell, and no time was set for the payment thereof, except that the amount due claimants was to be paid as soon as the work was completed and finished by them." The foregoing purports to contain all the terms of the contract, and therefore there is ground for the contention that the declaration in the previous portion of the notice as to the promise to pay was intended to affirm an express agreement to have been subsequently made, to wit, "upon completion of the work." There is, indeed, evidence of an account stated, although the agreement was reached after the completion of the work. The exact time, however, is manifestly immaterial if, as it seems quite probable, this was the promise to which claimants referred in their said notice. By construing the phrase "upon completion of the work" as fixing the time when the promise was made the said notice is rendered harmonious and consistent. At any rate, if there be such an uncertainty in this particular as to render the notice, if it were a complaint, subject to a special demurrer, in view of the circumstances already detailed it would be technical in the extreme to hold the defect fatal to the lien.

We have thus been led to follow what we conceive to be the just and reasonable rule laid down in the Porter Case, supra, which upon examination will be found substantially in harmony with the Supreme Court decisions.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

10 Cal. App. 586

CURTIN v. DUNNE. (Civ. 599.)

(Court of Appeal, First District, California. May 14, 1909.)

1. Appeal and Error (§ 935*) — Review — Presumptions.

Where, on a motion to set aside a default judgment, neither plaintiff nor the person who signed a stipulation in plaintiff's behalf extending the time for answering denied his authority to give the stipulation, the appellate court must presume, in reviewing an order setting aside the default, in favor of the implied finding of the lower court that the stipulation was authorized by plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3785; Dec. Dig. § 935.*]

2. Appeal and Error (§ 957*) — Review — Discretion of Court—Setting Aside Default.

To justify the reversal of an order setting aside a default judgment, abuse of the lower court's discretion must clearly appear.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3823; Dec. Dig. § 957.*]

3. Judgment (§ 155*) — Default — Setting Aside—Notice.

There is no merit in the contention that a notice was to set aside a default and the order as made to set aside the judgment, for the default is the foundation of the judgment, and, if it is set aside, the judgment falls with it.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 306; Dec. Dig. § 155.*]

4. Appeal and Error (§ 224*)—Objections in Trial Court—Default—Setting Aside —Notice.

The objection that a notice was to set aside a default and the order as made to set aside the judgment is not available where no objection was made to the form of the notice on the hearing in the court below to set aside the default.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1337; Dec. Dig. § 224.*]

Appeal from Superior Court, City and County of San Francisco; E. M. Mogan, Judge.

D. A. Curtin had a default judgment against Mary E. Dunne, and, from an order setting the same aside, appeals. Affirmed.

James H. Boyer, for appellant. Jas. P. Sweeney, for respondent.

COOPER, C. J. This is an appeal from an order setting aside a default judgment. It appears without conflict that the action was commenced by plaintiff in propria persona. The defendant in due time appeared by her attorney, and filed a demurrer to the complaint. Thereafter the plaintiff employed one Boyer as his attorney, who appeared in court on the argument of the demurrer, but no notice was given to the defendant of such employment other than the appearance of Boyer on the argument of the demurrer, and the service of notice by Boyer of the order overruling the demurrer. No substitution was made of Boyer as attorney of record in the place of the plaintiff who had acted as his own attorney in bringing the action. The demurrer was overruled, and the defendant was given time in which to answer. Before the time given for answering had expired, defendant's attorney prepared a written stipulation, of which the following is a copy: "It is hereby stipulated and agreed that the defendant Mary E. Dunne may have ten days from the date hereof within which to answer the complaint of plaintiff, or take such proceedings as she may be advised in said action. This stipulation need not be filed.—Dated May 29, 1908. [Signed] D. A. Curtin, Attorney for plaintiff, by H. J. Poswa." Before the time named in the stipulation had expired the attorney for the plaintiff went to the county clerk's office, and had the default of defendant entered, and also a judgment upon such default.

It is claimed by the plaintiff that Poswa had no authority to enter into the stipulation, and that it was made without the authority or consent of plaintiff, and that for this reason it was not binding upon him. The affidavit on the motion to open the default filed on behalf of defendant states that the stipulation was obtained from the plaintiff. The affidavit of plaintiff's attorney states that the stipulation was given by Poswa, who was a clerk in the employ of plaintiff, but that it was given without the authority or consent of either plaintiff or his attorney. It is a significant fact that there is not a word, by affidavit or otherwise, from the plaintiff or from Poswa in denial of the alleged authority to give the stipulation. We must therefore presume in favor of the implied finding of the court to the effect that the stipulation was authorized by plaintiff. If plaintiff was present when it was given, or if it was so authorized by plaintiff and the defendant acted upon it, we will not under the circumstances of this case pause to consider as to whether or not, as a purely legal proposition, Poswa had authority to bind plaintiff by the stipulation. It would have to be made clearly to appear that the court abused its discretion before we would be justified in annulling an order by the very terms of which a defendant is allowed to appear and answer upon the merits. If the plaintiff has a just cause, and the defense is without merit, he will not be injured. On the other hand, if the defendant has a meritorious defense, she ought not to be deprived of such defense except in a clear case of laches or other default on her part.

There is no merit in the contention that the notice was to set aside the default, and the order as made was to set aside the judgment. The default was the foundation of the judgment, and, if the default is set aside, the judgment falls with it. Not only this, but it does not appear that any objection was made to the form of the notice when the motion came on for hearing in the court below. The whole matter was before the court, and it granted the relief which appeared to be just and in furtherance of a hearing of the case upon the merits.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The order is affirmed.

We concur: KERRIGAN, J.; HALL, J.

10 Cal. App. 580

HENDERSON v. COHEN et al. (Civ. 535.)

(Court of Appeal, Third District, California. May 13, 1909.)

1. VENUE (§ 63*)—CHANGE OF VENUE—NOTICE OF MOTION.

Where it is sought to show that a party is not interested in an action, and is fraudulently joined as defendant to prevent its transfer to the proper place for trial, the alleged fraud must be distinctly specified in the notice of motion for change of venue before proof thereof may properly be heard.

[Ed. Note.—For other cases, see Venue, Dec. Dig. § 63.*]

2. VENUE (§ 63*)—CHANGE OF VENUE—NOTICE OF MOTION—WAIVER OF OBJECTIONS.

If a deposition, introduced by plaintiff at the hearing of a motion for change of venue, wherein it was sought to show that a party was fraudulently joined as defendant to prevent its transfer, conclusively showed that such defendant was not interested, plaintiff thereby waived any right to complain because the notice of the motion omitted to specify as ground for the change the improper joinder of such defendant.

[Ed. Note.—For other cases, see Venue, Dec. Dig. § 63.*]

3. VENUE (§ 70*)—PROCEEDINGS FOR CHANGE—EFFECT OF DEPOSITION—DEFENDANT JOINED TO PREVENT TRANSFER.

On a motion for change of venue, it was claimed that one of the defendants was not interested in the action, and was fraudulently joined to prevent its transfer, and a deposition of such defendant admitted that the account sued on was in the main correct, and that the balance due was approximately so, and had not been paid, and that he personally contracted most of the items, though only as agent of the other defendants, who filed an affidavit of merits. *Held*, that the deposition did not clearly disclose, and was not conclusive, that the defendant was not a necessary or proper party, and that under the circumstances it was proper for plaintiff to join him.

[Ed. Note.—For other cases, see Venue, Dec. Dig. § 70.*]

4. APPEAL AND ERROR (§ 1024*)—REVIEW—CONFLICTING AFFIDAVITS.

Where there is a substantial conflict in the affidavits as to the residence of a party affecting the right to a change of venue, the Supreme Court must abide by the finding of the court below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3836; Dec. Dig. § 1024.*]

Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

Action by Orrin S. Henderson against A. H. Cohen and others. From an order denying a motion to change the place of trial, defendants appeal. Affirmed.

James H. Creely, for appellants. A. H. Carpenter, for respondent.

HART, J. The court below made an order declining to grant the motion of the defendants for a change of the place of trial, and this appeal is taken by said defendants from said order.

The defendants appeared and demurred to the complaint specifically and generally, and at the same time filed an affidavit of merits and the demand required by section 396 of the Code of Civil Procedure, and gave notice of their intention to move for a change of the place of trial to the county of Alameda. The action was instituted for the purpose of recovering against the apellants judgment for the sum of $498.15, alleged to be originally due and owing the assignors of plaintiff for furnishing materials and for services rendered to the defendants "in repairing and building wagons, vehicles, and other personal property."

The grounds of the motion, as set forth in the notice, were the following: "That the county of San Joaquin, state of California, is not the proper county for the trial of said action, and that the county of Alameda, state of California, is the proper county for the trial of said action; that the defendants are not, and never have been, residents of said county of San Joaquin, but that they are now, and were at the time of the commencement of this action, and long prior thereto had been, residents of the county of Alameda, state of California." The affidavit of the defendant W. G. Cohen alleges that the defendants were, at the time of the commencement of the action, and long prior thereto had been, "and now are, residents of the county of Alameda; that affiant and the other defendants have fully and fairly stated all the facts of the case to J. H. Creely, the counsel and attorney of said defendants and affiant, and the said J. H. Creely, residing and having an office in the city of Oakland, state of California, and after such statement this affiant and the other defendants are advised by their attorney that they have a good and substantial defense upon the merits of the action, which this affiant and the other defendants verily believe to be true. * * * Affiant further alleges that W. F. King, who is named as a defendant herein under the name of W. H. King, is not a real or necessary party in interest herein, and is merely a nominal party," etc.

It has been held that where it is sought to show that a party is in no manner or degree interested in an action, and is fraudulently joined as a defendant therein for the purpose of preventing the transfer of the action to the proper place for the trial thereof, it is necessary that such alleged fraud should be distinctly specified in the notice of motion before proof addressed thereto may properly be heard. McKenzie v. Barling, 101 Cal. 462, 36 Pac. 8; McDonald v. California Timber Co., 151 Cal. 161, 90 Pac. 549. In the last-mentioned case Chief Justice Beatty says: "We doubt not that a motion based upon that ground is a proper proceeding, and one that ought, in a proper case, to be sustained, but we think that where a fraud of that character is the ground of the motion, it should be distinctly specified in the notice of motion, and, unless so specified, that the plaintiff cannot at the hearing of the motion be held bound to support by specific proofs the allegations of his complaint showing a cause of action against the resident defendant."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The notice of the motion, in the case at bar, it will be observed, does not specify, as one of the grounds upon which the motion would be made, the fact involved in the claim that King is not a real or necessary party to the action. But the respondent, having caused the deposition of King concerning the merits of the case to be taken, offered and had received in evidence said deposition at the hearing of the motion. King testified that from the month of May, 1906, up to within a short time before the commencement of this action, he was the superintendent of the farm and dairy owned by the other defendants and situated in San Joaquin county; that in that capacity he was authorized to receive, and did receive, all moneys which were paid in for dairy products and for the sale of stock, etc., and that he deposited said moneys in a bank for the Cohens in his own name as trustee; that he was authorized by the Cohens to pay from the fund so established all the expenses of the business, and for that purpose would draw on said fund through the medium of checks, to which he signed his name as trustee; that he had authority to cause to be made such repairs to the wagons and machinery used upon the farm and in connection with the dairy as were found necessary, and to purchase such articles as were requisite to properly carry on the business. He admitted authorizing the services and the purchase of most of the articles itemized in the account upon which this action was brought. Although it does not appear from the deposition that King expressly disclaimed being a proper party to the action, or that he had any real interest in the event of the litigation, the irresistible inference is that his connection with the transactions of which this action is the outgrowth was wholly through his capacity as agent or trustee of the other defendants. While it may scarcely be doubted that this deposition was introduced in evidence on this hearing mainly for the purpose of showing that King was a resident of San Joaquin county at the time this action was brought, it was nevertheless before the court in this proceeding for all the purposes it might properly subserve. If, therefore, it could be said that the deposition conclusively showed that King was not interested in any way in the action, and was consequently not a necessary or proper party thereto, we are of the opinion that we would be required to hold that, said deposition having been introduced in evidence on this hearing by the plaintiff, and thus the evidence from which such fact was made to appear being voluntarily furnished by the respondent himself, the latter had waived any right to complain because the notice had omitted to specify as a ground for the change the fact of the improper joinder of King as a party defendant.

But the deposition does not clearly disclose, nor, as far as it goes, is it conclusive upon the proposition, that King is not a necessary or a proper party to the action. King admits, as will be seen upon an examination of the deposition, that the account upon which the action is founded is, in the main, correct, and that the balance claimed to be due is approximately correct and has not been paid. Cohen, in his affidavit, alleges that he has a meritorious defense to the action. King personally contracted most of the items in the account, although he says only as the agent of the Cohens. How could plaintiff or his assignors have known in the first instance, and how can they tell now, in view of the declaration of the defendant Cohen that a good defense exists against the cause of action stated in the complaint, but that the Cohens may claim that they did not authorize the account declared upon to be contracted against them, and that King exceeded the scope of his authority in ordering the materials to be furnished and the services to be performed as for them, and was without authority, therefore, to have the items making up the account charged against them? It does not by any means clearly appear from King's deposition that he is not a proper party to the action, and, under the circumstances, we think the plaintiff not only acted properly in joining him but that it was the safest course for him to adopt.

The testimony upon the question as to the residence of King when the complaint in this action was filed is conflicting. King himself declared in his deposition, taken on the initiative of plaintiff, that he "resided" in, and was a "resident" of, San Joaquin county at the time of the commencement of the action, and had been such resident from May 20, 1906, up to a short time before the commencement of the action, June 16, 1908. But he contradicts this statement in an affidavit filed on behalf of the defendants in this proceeding, declaring that his residence is, and has always been, in Alameda county, that he is registered as a voter in said county, and that he and his family were only temporarily in San Joaquin county. L. T. Freitas deposes that he "knows that King is, and was at the time of the commencement of this action and for a long time prior thereto, a resident of the county of San Joaquin, state of California, and that he is and was not, during any of the time above mentioned, a resident of the county of Alameda." Freitas further states that King "acknowledged and stated to affiant that the cause of action set forth in plaintiff's complaint herein was just and should be paid, and that if affiant would take an assignment thereof he would pay it off in monthly payments." Orrin S. Henderson, plaintiff, states in an affidavit that King is, and was at the time of the institution of the action, a resident of San Joaquin county.

The evidence, it will thus be seen, upon the question of King's residence is conflicting in a marked degree, and it is therefore beyond the power of this court to disturb the ruling of the court below. McKenzie v. Barling, 101 Cal. 462, 36 Pac. 8. "In the consideration of an appeal from an order made upon affidavits, involving the decision of a question of fact, this court is bound by the same rule that controls it where oral testimony is presented for review. If there is any conflict in the affidavits, those in favor of the prevailing party must be taken as true, and the facts stated therein must be considered established." Doak v. Bruson, 152 Cal. 18, 91 Pac. 1001, and cases therein cited. Section 395 of the Code of Civil Procedure provides that in cases of the class to which the one at bar belongs the action must be tried in the county in which the defendants, or some of them, reside at the commencement of the action; and, as the court below found upon affidavits presenting facts in which, as stated, there is a substantial conflict showing that King, one of the defendants, was a resident of the county of San Joaquin at the time that this action was brought, this court must abide by that finding.

The order appealed from is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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10 Cal. App. 519

PEOPLE v. WIELAND. (Cr. 117.)

(Court of Appeal, Second District, California. May 5, 1909.)

1. Burglary (§ 41*)—Sufficiency of Evidence.

Evidence *held* to support a conviction of burglary.

[Ed. Note.—For other cases, see Burglary, Dec. Dig. § 41.*]

2. Criminal Law (§ 696*)—Evidence—Refusal to Strike Out.

In a prosecution for burglary, when the arresting officer was testifying in detail concerning the circumstances of the arrest and identification of accused, it was not error to refuse to strike out remarks as to the viciousness of a dog, which were merely incidental to the narrative, and harmless.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 696.*]

3. Burglary (§ 36*)—Prosecution—Evidence.

It was not error to refuse to strike out testimony of the witness as to reasons given by accused when arrested for being in the neighborhood, and as to his appearance at that time; such facts being competent evidence.

[Ed. Note.—For other cases, see Burglary, Dec. Dig. § 36.*]

4. Burglary (§ 38*)—Prosecution—Admissibility of Evidence.

In a burglary case, where the stolen articles had been identified by the owner and were in evidence, a statement by the arresting officer as a witness narrating the circumstances of accused's arrest and identification that he had arrested accused for stealing, and that he "had the stuff on him, stealing from this house, which we have here and proven," was not incompetent; he meaning no more than that accused had on his person the articles in evidence, and that, therefore, he had arrested him.

[Ed. Note.—For other cases, see Burglary, Dec. Dig. § 38.*]

5. Criminal Law (§ 1043*)—Appeal—Reservation of Grounds of Review—Sufficiency of Objection.

In a burglary case, an objection to evidence that, "Like to have the record show that all this line of examination is under objection. * * * We ask that all this testimony be stricken"—is insufficient to warrant the court of appeal in considering the specific exception that the evidence tended to establish a separate, independent offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2654, 2655; Dec. Dig. § 1043.*]

6. Burglary (§ 35*)—Prosecution—Admissibility of Evidence.

In a burglary case, testimony as to the finding, with the stolen property of a pipe which belonged at a house other than the one robbed, where accused was identified as a man seen standing outside the house on the night of the burglary, and as to the identity of the pipe, was but a part of the identity of accused, and was not incompetent.

[Ed. Note.—For other cases, see Burglary, Dec. Dig. § 35.*]

Appeal from Superior Court, Los Angeles County; W. H. Jamison, Judge.

Julian Wieland was convicted of burglary, and appeals from the judgment, and an order granting a new trial. Affirmed.

Edward Judson Brown, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

TAGGART, J. Defendant was informed against for the crime of burglary, and upon a verdict of guilty in the first degree was sentenced to imprisonment in the state prison for five years. He appeals from the judgment and an order denying his motion for a new trial, and assigns as grounds for a reversal of the judgment: (1) That the verdict is not supported by the evidence; and (2) the refusal of the trial court to strike out certain testimony of the arresting officer.

The evidence discloses that the complaining witness and his wife left their home on the afternoon of July 10, 1908, about 4 o'clock p. m., to remain away over night, and the servants of the household left the house between 6 and 7 p. m. and retired to adjacent houses on the same premises for the night. The next morning the screen of a window usually kept closed was found up and the window open, and there was evidence of the house having been entered; burned matches were strewn about the floor, two bureau drawers were open, and several articles of jewelry missing. The same night at about quarter to 8 o'clock a lady living at a house some four or five blocks from the house above mentioned heard a noise at her window, and, lifting the curtain, saw the defendant standing outside and asked him "what he wanted," but received no response. An officer was notified, and about half past 8 o'clock returned with the defendant, who was identified by this lady as the man who had stood near her window and was placed under arrest. Along the road that defendant was taken on his way to jail from the place of his identification were found at various places different pieces of the jewelry taken from the first house, and also a pipe which belonged at the house at which he was identified, and, when he was searched, there was discovered in his possession a pair of bracelets taken from the first house mentioned. His manner when arrested and when taken back to the second house for identification all tended to contradict his explanation of finding the bracelets after he had been taken into custody, and this statement itself bore about it such inherent evidence of improbability that it tended rather to incriminate than to exculpate him. The articles of jewelry were identified beyond question as property taken from the house charged in the information to have been burglarized, and the evidence leaves no possible doubt of the guilt of the defendant. His guilt does not rest upon evidence of guilty possession alone.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The statement asked to be stricken out was made by the arresting officer, who was narrating the circumstances of the arrest and identification in response to a question of the district attorney in the form of an invitation to "Go ahead." The matter was being stated much in detail, when the attorney for defendant said: "I wish to object to all that. It is not responsive to the question whatever." The witness then said: "Well, I arrested that man then for stealing. That is the whole subject. That man had the stuff on him, stealing from this house which we have here and proven." Counsel then moved that the remarks of the witness be stricken from the record and the witness cautioned, and was requested by the court to "put in your objection." Whereupon he moved that the remarks of the witness be stricken out as impertinent and not responsive to any question, and specified "the remarks regarding the viciousness of the dog," "and the appearance of the man," and what "the man said about the building lots and houses."

The statements of the witness as to the dog were merely incidental in the narrative and harmless, and the remarks as to the "lots and houses" were reasons given by the defendant for being in the neighborhood where he was found. This explanation with his appearance when arrested were competent evidence, and the court properly refused to strike out the testimony relating to them. The objection stated did not include the testimony as to "stealing" from the house, etc. The articles of jewelry were already identified by the owner and were in evidence before the jury, and the language used by the witness meant no more than that the defendant had on his person the articles before the jury, and therefore he took him into custody.

The testimony as to the finding of the pipe taken from the second house was not objected to, except as the objection interposed also included testimony as to the admissibility of which there was no question. In form it was: "Like to have the record show that all this line of examination is under objection," etc. "We ask that all this testimony be stricken out." Such an objection or motion in the record will not warrant this court on appeal in considering the specific exception that the evidence tended to establish a separate, independent offense. Aside from this, the identification of the pipe was but a part of the identification of the defendant, and the pipe was found along the road with the articles of jewelry taken from the other house.

There is nothing in the record to justify a reversal.

Judgment and order affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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10 Cal. App. 564

OLDER v. SUPERIOR COURT et al.

(Civ. 622.)

(Court of Appeal, Third District, California. May 10, 1909.)

1. MANDAMUS (§ 31*)—JUDICIAL PROCEEDINGS—COMPELLING CONSIDERATION OF MOTION FOR CHANGE OF VENUE.

Where one charged with criminal libel files an application for a change of venue, and contends that, though Penal Code, § 1033, authorized a change of venue on defendant's application only on the ground that a fair trial cannot be had in the county, the provision of the Constitution making the venue of a prosecution against a newspaper for libel either in the county of the newspaper's office or of the residence of plaintiff, unless the place of trial is changed "for good cause," entitles defendant to a change of venue on the ground that it would be in the interest of justice, and because most of the witnesses would come from the county to which the change was sought, an alternative writ of mandamus will be issued requiring the trial judge to entertain and decide petitioner's motion upon the merits.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 74, 75; Dec. Dig. § 31.*]

2. MANDAMUS (§ 31*)—PROCEEDINGS—APPEAL—QUESTION PRESENTED FOR REVIEW—APPLICATION FOR ALTERNATIVE WRIT.

On an application for an alternative writ of mandamus to compel respondent to entertain and decide defendant's motion for a change of venue in a prosecution for libel, on the ground that the Constitution entitles him to a change on the grounds alleged, the question for decision is not whether petitioner's construction of the Constitution is proper, but whether the question is debatable as to the trial court's duty to entertain the application.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 74, 75; Dec. Dig. § 31.*]

3. EVIDENCE (§ 64*) — PRESUMPTIONS — PERFORMANCE OF OFFICIAL DUTY.

It must be assumed that members of the bar at all times act in good faith toward the courts in the performance of their professional duties, in absence of a contrary showing.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 84; Dec. Dig. § 64.*]

4. COURTS (§ 207*) — JURISDICTION—AUTHORITY TO ISSUE MANDAMUS—DISTRICT COURTS OF APPEAL.

While Const. art. 6, § 4, authorizes District Courts of Appeal to issue writs of mandate, and does not prohibit their issuance out of the territorial jurisdiction of the court, as a matter of comity such writ should be applied for to the court of the district in which the cause for the writ arises, unless the special circumstances justify its issuance by the court of another district, but where it would be impracticable to present the application for an alternative writ of mandamus to the court of the district wherein the action arose, and petitioner's trial was set for the day after the application for the writ was made, the district court of one appellate district will issue the writ though the cause therefor arose in another district.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 512, 516; Dec. Dig. § 207.*]

Application for mandamus by Fremont Older against the Superior Court and others. Alternative writ issued.

Hiram W. Johnson, for petitioner.

PER CURIAM. This is an application for an alternative writ of mandate, to compel the respondents to entertain and decide, upon the merits, a certain question involved in petitioner's motion for a change of the place of trial of a certain criminal cause, wherein the petitioner and one R. A. Crothers are the defendants, from the county of Kern to the city and county of San Francisco. Ordinarily this court does not feel called upon to file an opinion, giving its reasons for the issuance of a preliminary writ within its jurisdiction to cause to be issued, and ordinarily will not issue such writ where the cause out of which it grows originates in a county not within the territorial jurisdiction of the court. But, as the action out of which this application originates is pending in Kern county, which constitutes a part of the Second appellate district, and, as we recognize that there should exist between the several district appellate courts such degree of comity as should justify us, ordinarily, in refusing to entertain an application for a writ of any character affecting a cause of action or originating from any cause arising in another district, we think that, as we feel constrained, under the circumstances as presented, to order the issuance of the alternative writ here applied for, it is proper—in fact, it is due our Brothers of the Second district—to briefly state our reasons therefor.

The facts may thus be briefly stated: The petitioner and the said R. A. Crothers, managing editor and publisher, respectively, of the San Francisco Bulletin, an evening newspaper published in the city and county of San Francisco, were on the 25th day of May, 1908, informed against by the district attorney of Kern county for criminal libel, by publishing an alleged defamatory article concerning one William S. Tevis. Said petitioner and said Crothers, upon being arraigned upon said charge, each entered a plea of not guilty thereto. Thereafter, the Honorable Paul W. Bennett, judge of the superior court of Kern county, before whom said defendants were arraigned as aforesaid, requested the respondent, the Honorable C. W. Norton, a judge of the superior court of San Joaquin county, to preside at the trial of said defendants, and said Norton consented thereto. The trial of said defendants was duly fixed for the 11th day of May, 1909. On the 1st day of May, 1909, the petitioner filed with said superior court of Kern county, and served the same upon the district attorney of said county, a notice of motion for a change of the place of the trial of said actions, as before stated. On the 6th day of May, 1909, upon agreement of counsel, and for the purposes of convenience, said motion was presented and argued before the said respondent, the Honorable C. W. Norton, in the city of Stockton.

Among the grounds alleged for the change of venue in the notice was that for "good cause" other than that specified in section 1033 of the Penal Code; it being alleged that it would be in the interest of justice to order the change as asked for, and it being further alleged in this connection that there will probably be called to testify in behalf of the defendants in said actions approximately forty witnesses, all of whom either reside in the city of San Francisco or in places conveniently adjacent thereto. The respondents held that the right of the petitioner to ask for a change of the place of the trial of the action is restricted to the ground specified in said section 1033 of the Penal Code, which provides that such an action may be removed from the court in which it is pending on application of the defendant "on the ground that a fair and impartial trial cannot be had in the county," and refused to pass upon the question of the convenience of witnesses or other "good cause" for the reason that the court was without jurisdiction to do so.

Counsel for petitioner contend that the provision of the Constitution enlarges the grounds upon which such a motion may be made in criminal libel actions; that said provision is self-executing, and invests the court with jurisdiction to entertain such motion upon the ground that it would be in the interest of justice to do so, for any good reason, other than that mentioned in section 1033 of the Penal Code—as, for instance, the convenience of witnesses, etc.—which might be made to appear to the satisfaction of the court. In other words, it is petitioner's contention, as we understand it, that, inasmuch as the Constitution provides that the venue in a criminal libel action is in either the county where the newspaper committing the alleged libel has its publication office or where the party alleged to be libeled resided at the time of the alleged libelous publication, by the use of the language in said provision, "unless the place of trial shall be changed for good cause," the framers of the Constitution intended to authorize the change to be made for any sufficient reason, in addition to that declared in the Code section referred to, which might be satisfactorily exhibited to the court, and that the Code section cannot, of course, have the effect of restricting or limiting or qualifying any right in this behalf which the Constitution itself authorizes. It will be observed that the only question now presented to us by the petition is, not whether the petitioner's construction of the constitutional provision is sound, but whether the proposition is one which presents a debatable question as to the jurisdiction and duty of the respondents in the matter involved. In other words, we are not now called upon to pass upon or decide the proposition whether a peremptory writ should or should not be granted.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Counsel for petitioner declare, and we must assume that all members of the bar at all times act in good faith with the courts, that it would be inconvenient, and in fact impracticable, to present this application to the Second Appellate District Court; that they were limited in the time within which to prepare the elaborate petition which has been filed here and that the actual trial of the petitioner is set for the 11th day of May, 1909—one day from that on which this application is presented.

The Constitution (section 4, art. 6) confers upon the District Courts of Appeal the jurisdiction of issuing writs of mandate, and does not confine the issuance of such writs by such courts within their territorial jurisdiction. But, as a matter of comity, as we have declared, such writs should invariably be applied for to the court of the district in which the cause for the writ arises, unless there are shown, as there are here, special circumstances which justify the issuance of the writ by a court of another district.

An alternative writ of mandate will therefore be issued as prayed for.

LYNCH v. McDONALD et al. (S. F. 4,889.)

(Supreme Court of California. June 18, 1909. On Rehearing, July 17, 1909.)

1. CONTRACTS (§ 179*)—CONSTRUCTION—PARTIES.

Where, in an action by an attorney against a corporation and an individual for services rendered under a contract, in form between the corporation and the individual on the one part and the attorney on the other, but signed by the individual only in his capacity as president of the corporation, it appeared that the attorney knew the individual's relation to the corporation and of the resolution authorizing him to act for the corporation, the attorney could not complain because the judgment was against the corporation only, though the individual deceived the attorney as to the net earnings of the property of the corporation, and though the individual owned nearly all the stock of the corporation.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 179.*]

2. EVIDENCE (§ 459*)—PAROL EVIDENCE—PARTIES TO CONTRACTS.

Where a contract in form between a corporation and an individual on the one part and a third person on the other part was signed by the individual as president and as stockholder, the question whether he was bound personally must be determined by parol testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2110; Dec. Dig. § 459.*]

3. CONTRACTS (§ 179*)—CONSTRUCTION—PARTIES—EVIDENCE.

Where, in an action by an attorney against a corporation and an individual for services under a contract in form between the corporation and the individual on the one part and the attorney on the other, but signed by the individual only as president of the corporation and as stockholder, the evidence showed that the attorney had been the confidential adviser of the individual, but did not show that the attorney had explained that a prior agreement was not binding on the individual personally, but that the new one would be, the court was justified in refusing to extend the new contract so as to bind the individual personally, because of the failure of the attorney to show good faith.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 179.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Edward Lynch against M. Jasper McDonald and another. From a judgment granting insufficient relief, plaintiff appeals. Affirmed.

Edward Lynch and Bertin A. Weyl, for appellant. Robbins & Breeze and Wm. H. Hamilton, for respondents.

MELVIN, J. Plaintiff and appellant sued on a certain written contract, and obtained judgment according to the prayer of his complaint against the defendant corporation. The superior court entered judgment dismissing the complaint as against M. Jasper McDonald individually, and this appeal is taken from that part of the judgment.

The contract upon which the action was based was drawn (as were other contracts put in evidence) by the plaintiff, who had been for a long time the attorney for the mining company and for McDonald. The contract recited the services of Lynch as attorney and mining expert, and provided for the payment to him for such services, from the sale of a group of mines at Amador City, owned by the Keystone Consolidated Mining Company, the sum of $20,000, and in case there should not be an early sale of said property, the said sum of $20,000 was to be paid from the monthly proceeds of the mine, not to exceed 10 per cent. of the net profit. The agreement also contained a provision for the payment of a salary to Lynch for legal and other services to be rendered. This contract was dated March 1, 1901. While in form it was between the corporation and McDonald on the one part and Lynch on the other, it was signed by McDonald only in his capacity as president of the corporation, by Anderson as secretary thereof, and by plaintiff. The court found: "That the provision of the contract set forth in the complaint, as follows: 'Said parties of the first part hereby employ the party of the second part to render all such services for three years from date hereof; and it is agreed that said Lynch shall be paid by the parties of the first part $150.00 per month for said services'—was continued in force by two certain agreements entered into and executed by and between said defendants and said plaintiff, dated February 12, 1904, and September 27, 1904, wherein and whereby reference was made to said contract dated March 1, 1901, copied in the complaint, and it was provided in each of said agreements, dated February 12, 1904, and September 27, 1904, that 'the agreement made March 1, 1901, between the said parties as are contracting hereby providing for payment to said Lynch of $150 per month shall remain in full force and effect until the provisions thereof are fully performed.'"

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appellant contends that, inasmuch as McDonald owned nearly all of the capital stock of the corporation and dominated its policy, it was his "alter ego," that its acts were McDonald's acts, and that the judgment should therefore be against him personally, as well as against the Keystone Consolidated Mining Company. Plaintiff earnestly protests that the corporate name was merely a cloak, which McDonald should not be allowed to use to prevent plaintiff from securing a personal judgment against him, particularly in view of the court's finding that McDonald misrepresented to plaintiff the matter of profits from the mine, and in contemplation of the further fact that the agreements made after that of 1901 were signed by McDonald in his personal, as well as his presidential, capacity.

If this were an action by a stranger to the facts, who had been injured by ignorance of McDonald's holding of nearly all of the stock of the company, there might be some force in appellant's position, and some necessity for the application of the principle which he invokes; but appellant was not only an attorney at law, but was one who by years of association with McDonald and service for him and the company was thoroughly familiar with all the facts concerning the president's relation to the corporation. If he was content to act under a contract which respondent refused to sign except as an officer of the company, he cannot complain that McDonald, who was not a party signatory to the instrument, is not bound. True, McDonald, according to the findings, deceived Lynch with reference to the net earnings of the mines, but this deception had nothing to do with McDonald's relation to the corporation. Lynch knew all about McDonald's holdings, was cognizant of the resolution of the board of trustees authorizing the president to act for the corporation in practically all matters, and had advised respondent in all business affairs, including the effect of the various contracts prepared by Lynch and signed by him and one or both of these defendants.

The contract of September 27, 1904, is signed by McDonald as president of the company, and again as "stockholder." If we treat the signature as the personal sign manual of McDonald, and ignore the words "as stockholder," still we cannot say that by any method of construction the liability of the signer is extended to the debt of $20,000 mentioned in the instrument bearing date of March 1, 1901, because the promise of latest date is made with respect to the salary only. There was sufficient evidence to justify the court in the conclusion that by the use of the words "as stockholder" McDonald wished to show that he did not intend to be bound personally. That was a matter to be determined by parol testimony. S. P. Co. v. Von Schmidt Dredge Co., 118 Cal. 371, 50 Pac. 650. But whether or not ordinarily such a signature would amount to a personal assent to the terms of the agreement, there are other facts in evidence which would justify the lower court's decision. It was shown that Lynch was McDonald's confidential adviser, and it nowhere appears that upon presenting for signature any one of the various contracts following that of March 1, 1901, the attorney had explained that the former agreement was not binding upon McDonald, but that the new one would be. It was appellant's duty to show such good faith affirmatively. He failed to do so, and the trial court was justified in refusing to consider that the contracts following that of March 1, 1901, operated to extend the liability of the original contract to respondent McDonald. See 2 Pom. Eq. Jur. § 902; Felton v. Le Breton, 92 Cal. 469, 28 Pac. 490; Cox v. Delmas, 99 Cal. 104, 33 Pac. 836.

It follows that the judgment must be affirmed, and it is so ordered.

We concur: LORIGAN, J.; HENSHAW, J.

On Rehearing.

PER CURIAM. A rehearing of this cause is denied, but it is proper to say that, so far as the department opinion may seem to imply that Mr. Lynch failed in his professional duty to the defendant McDonald, such a conclusion is unwarranted. The findings of the court and the evidence in the case show that throughout the transactions between himself and the defendants he acted in perfect good faith.

(155 Cal. 727)

In re SUTRO'S ESTATE. (S. F. 4,768.)

(Supreme Court of California. June 24, 1909. Rehearing Denied July 24, 1909.)

1. Charities (§ 10*)—Charitable Trusts—Validity—Purposes.

Civ. Code, §§ 847, 857, limiting the purposes for which express trusts may be created to trusts to sell real property, and apply the proceeds in accordance with the instruments creating the trust, to mortgage or lease real property for the benefit of legatees, or to satisfy any charge thereon, and to receive the rents and profits of real property and pay them to the use of any person, or to accumulate the same for certain purposes, apply only to private, and not to trusts for charitable, uses, and at common law trusts to convey to charitable uses are valid, and, in the absence of any constitutional or statutory provision to the contrary, the common-law rule applies to them, under the provisions of Pol. Code, § 4468.

[Ed. Note.—For other cases, see Charities, Dec. Dig. § 10.*]

2. Perpetuities (§ 8*)—Gifts to Charities.

Const. art. 20, § 9, declares that "no perpetuities shall be allowed except for eleemosynary purposes." A testator directed that certain lands should be held in trust by his executors for 10 years after his death, and then conveyed to a board of trustees provided for in the will, but the lands were not to be sold or disposed of by any one having the charge thereof during the life of the last survivor of testator's children, and at the death of the last survivor, or as soon thereafter as the board of trustees should deem for the best interest of the trust created, that the bulk of the real estate should be sold by the trustees as speedily as possible, and the funds realized should be managed by said board of trustees for such "charities, institutions of learning and science and for premiums to be set apart for distinguished scholarships and scientific discovery and inventions as shall be directed by my executors," and that the executors shall file a decision as to the specific purpose to which the funds were to be devoted within three years after testator's death, and in the event of their failure that the board of trustees should at once organize and determine to what purpose the funds shall be applied. The application of the funds was expressly prohibited "to any institution, or charity, or purpose which is in any degree sectarian in the management of which any priest, clergyman, minister, or rabbi, or other religious officer, shall have any voice or control." The testator also directed that on the death of the last surviving of his children, the property left in trust should vest in the trustees, and that the same might be sold and the proceeds applied to "the uses and purposes, charitable, educational and other, which are in this my will, provided and specified." *Held*, that the trust was invalid because it authorized the funds to be devoted to purposes other than charity, and left the question whether it should be so devoted entirely in the discretion of the executors or the trustees.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 57–66; Dec. Dig. § 8.*]

3. Perpetuities (§ 8*)—Constitutional Provisions — "Eleemosynary" — "Charitable."

The word "eleemosynary" as used in Const. art. 20, § 9, forbidding perpetuities except for eleemosynary purposes, is synonymous with "charitable."

[Ed. Note.—For other cases, see Perpetuities, Dec. Dig. § 8.*

For other definitions, see Words and Phrases, vol. 2, pp. 1074–1088; vol. 8, p. 7600; vol. 3, pp. 2343, 2344.]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Adolph Sutro, deceased. From a decree of partial distribution, appeals are taken. Affirmed.

See, also, 152 Cal. 249, 92 Pac. 486, 1027.

U. S. Webb, Atty. Gen., for the People. Morrison & Cope, Bradley & McKinstry, and J. C. McKinstry, for other appellants. Charles S. Wheeler and Garret W. McEnerney, for respondent.

SHAW, J. Adolph Sutro died in the city of San Francisco August 8, 1898, leaving a last will and testament, dated May 22, 1882. He left surviving him six children, and died the owner of a large amount of property. To his children he bequeathed the sum of $10,000 each, and the residue of his estate, specially excepting, however, from said residue a portion thereof, consisting of about 1,200 acres of land within the city and county of San Francisco known as a part of the Cliff House ranch and a part of the San Miguel Rancho, which the testator devoted to charitable uses under a trust for that purpose, which he assumed to create in his will, and which tracts were referred to in his will as numbered I and II.

The clauses of his will as to such trust, material to be considered here, are as follows: By paragraph XXV thereof the testator declared: "I will and direct that the title in fee of said parcels of land marked I and II last hereinbefore described and each thereof shall go in trust into the hands of my executors, to be by them preserved and managed for and during the period of ten (10) years after my death, and then by my executors to be conveyed in trust, to the board of trustees hereinafter provided for, but not to be sold or disposed of by any one having the charge or management thereof during the life of the last survivor of my children mentioned in this will, and at the death of said last survivor, or as soon thereafter as may be deemed, by the board of trustees hereinafter mentioned, for the best interest of the trust hereinafter created and appointed, I will and direct that the bulk of the whole of said parcels of real estate marked as aforesaid I and II shall be sold by said board of trustees, as speedily as possible, but in the manner they shall deem best, for realizing the largest amount, and the funds realized from such sales, shall be managed and applied by said board of trustees for such charities, institutions of learning and science and for premiums to be set apart for distinguished scholarships and scientific discovery and inventions as shall be directed by my executors."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

To provide for a more specific determination of the purposes to which the funds were to be devoted, the will further declared that a decision of the executors upon that subject should be filed in the county recorder's office within 3 years after his death, and that if the executors failed to give such direction, then the board of trustees provided in the will should at once organize, and within 12 months thereafter select the application to be made of the funds comprising the trust. To enable them to act more intelligently in selecting the purposes of the trust they were further directed to advertise in the newspapers of San Francisco, New York, and London, offering a prize of $1,500 for the best treatise upon the subject, $1,000 for the second best, and $500 for the third best. They were expressly prohibited from directing the application of any of the funds "to any institution, or charity, or purpose, which is in any degree sectarian or in the management of which any priest, clergyman, minister or rabbi, or other religious officer, shall have any voice or control." The final board of trustees appointed for the execution of this trust was to consist of 13 members, namely, the Governor of the state, the Chief Justice of the Supreme Court, the presiding judge of the superior court of the city and county of San Francisco, the United States Circuit Judge for the District of California, the mayor of San Francisco, the president of the San Francisco chamber of commerce, the president of the board of regents of the California University, and their successors in office, and 6 other members to be chosen by the above-named officers, 3 from the leading bankers of San Francisco, and 3 from the male descendants of the testator or of his brothers bearing the name of Sutro. The property which was to be devoted to the trust thus to be ascertained comprised the bulk of the testator's estate, and it was further provided, in effect, that it should remain undisposed of until the death of the last survivor of his children, and that upon that event it should "vest in said board of trustees and their successors, in trust, that the same may be sold and the proceeds therefrom be applied to the uses and purposes, charitable, educational and other, which are, in this my will, provided and specified."

On October 1, 1898, Clara A. Sutro, Edgar E. Sutro, Kate Nussbaum, and Rosa V. Morbio, children of the testator, brought an action against Emma L. Merritt and W. H. R. Adamson, "as trustees under an instrument purporting to be the will of Adolph Sutro," and Emma L. Merritt, George W. Merritt, her husband, and Charles W. Sutro, individually, the said Emma L. Merritt and Charles W. Sutro and plaintiffs being the only children of said Adolph Sutro, deceased. The complaint alleged that the plaintiffs were the owners in fee of an undivided two-thirds interest in the real property in controversy; that the defendants Emma L. Merritt and Adamson claimed as trustees under the Sutro will, and as such trustees claimed an estate and interest in the property adverse to plaintiffs; that the other defendants Emma L. Merritt and Charles W. Sutro, individually, claimed the property adversely to the plaintiffs, but that all claimed without right as to said undivided two-thirds of said property. The prayer was that the claim of the defendants and all question as to the validity of any devise or trust under the aforesaid will be finally determined, and that it be adjudged that the defendants, as trustees or otherwise, had no right, title, or interest in the property. This action was begun and brought to trial and judgment before the will was admitted to probate. The defendants as trustees set up the provisions of the will in opposition to the complaint. Judgment was rendered in favor of plaintiff, declaring the plaintiffs owners in fee of a two-thirds interest in the property, and that the trust attempted to be created by the will of Adolph Sutro was void, because, as the conclusions of law declare, the fund "was not intended wholly for charitable purposes, but was intended for purposes partly charitable and partly other than charitable, and that the purposes for which it was intended are vague and uncertain, and cannot be made certain." No appeal was ever taken from this judgment, and it has become final. It was entered on June 19, 1899.

On May 23, 1903, the persons who were plaintiffs in that action filed a petition in the matter of the administration of the estate of Sutro, asking for partial distribution to them of the property of said estate, including therein the property devoted by the will to the trust therein attempted to be created. Upon the hearing of this petition the judgment in Sutro v. Merritt was set up as an adjudication of the matter, and the validity of the trust provisions of the will were again challenged. The court made its degree of distribution in accordance with the prayer of petitioners, and based the decision upon two grounds: First, that the judgment in the case of Sutro v. Merritt aforesaid was a conclusive adjudication of the title of the petitioners as heirs at law and of the invalidity of the trust; second, treating the question of the validity of the trust as not concluded, the court again declared that it was invalid. The appeals are taken from that portion of the decree of partial distribution disposing of the property which by the will is to be devoted to the purposes of the trust therein attempted to be created, and also from an order denying the appellants' motion for a new trial.

It is not contended that the trust in question comes within the rule laid down in the Estate of Fair, 132 Cal. 523, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70, that a trust to convey is void. Sections 847 and 857 of the Civil Code, involved in that case, apply only to private trusts, and not to trusts for charitable uses. If the trust in question is a trust for charitable uses, it is not void because of the provisions of the aforesaid sections of the Civil Code. In Estate of Hinckley, 58 Cal. 457, it was declared that charitable perpetuities were lawful, notwithstadning the provisions of section 715 of the Civil Code relating to perpetuities in general. It was held that the last-named section did not apply to charities. This conclusion was based on the principle that the sections of the Civil Code first referred to, declaring what should constitute valid trusts as applied to real property, pertain to private trusts, and did not include trusts for charitable uses. At common law trusts to convey to charitable uses were valid; and, in the absence of any constitutional or statutory provisions to the contrary, the common-law rule relative to them applies in this state. Pol. Code, § 4468; Estate of Hinckley, supra. It is conceded by the respondents that the principle of the Fair Case has no application to trusts to convey to charitable uses.

A large part of the argument has been devoted to a discussion of the proper construction of section 738 of the Code of Civil Procedure, and to the effect of the former judgment in the case of Sutro v. Merritt. It is claimed, on the one hand, that section 738 was not intended to permit of the determination, as between the heirs and devisees, of questions relating to the validity of the provisions of the will, or which would determine their rights, as between themselves, in advance of the final decree of distribution of the estate in the probate proceeding. On the other hand, it is contended that that section was intended for the very purpose of providing for such a determination. We do not find it necessary to enter into a discussion of these questions. We are of the opinion that, as an original question, the provisions of the will attempting to create a trust for the purposes therein declared were invalid, for the reasons stated by the superior court in its conclusions of law above quoted from the record in the case of Sutro v. Merritt.

It may be conceded, for the purposes of the case, that it would have been possible, under the scheme provided, to ascertain with certainty the precise purposes to which the trust funds were ultimately to be devoted. The elaborate plan for the determination of the specific purposes, if carried out, might have resulted in a clear and certain statement as to those purposes. The fatal objection to the validity of the trust is that it authorizes the funds to be devoted to purposes other than charitable, and that it leaves the question whether it is to be devoted to charitable purposes, or to other uses not charitable, entirely in the discretion of the executors, or, in case of their default, in the discretion of the board of trustees. The Constitution declares that "No perpetuities shall be allowed except for eleemosynary purposes." Article 20, § 9. The word "eleemosynary" in this passage is synonymous with "charitable," as the latter word is used and understood in treatises and decisions upon the subject of trusts.

The rule upon this subject was stated in the decision of this court in Estate of Hinckley, 58 Cal. 509, in these words: "Where a bequest is made for charitable purposes, and also for purposes of an indefinite character, which are not charitable, the whole bequest will be void. If, for instance, a bequest is made for such charitable or other purposes as the trustees should think fit, the whole bequest will be void for uncertainty"—citing Tudor on Charitable Trusts, 223. This statement of the rule is well established by a long line of cases on the subject. In Mason v. Perry, 22 R. I. 475, 494, 48 Atl. 671, 678, the court says: "It is well settled that, in order to create a valid charitable trust in perpetuity, the language employed must require the fund to be expended for charitable purposes only, and it must not be left in the discretion of the trustees to spend the money for a charitable or noncharitable purpose. In other words, the devotion of the fund to charity must be clear and certain." In the case of In re Shattuck's Will, 193 N. Y. 446, 86 N. E. 455, decided by the New York Court of Appeals, the provision was that the trust funds were to be "paid over to religious, educational, or eleemosynary institutions" as the trustees should deem advisable. The court says: "The word 'educational' does not necessarily describe a public or charitable institution. * * * An 'institution' is an established or organized society or corporation. It may be private in its character, designed for profit to those composing the organization, or public and charitable in its purposes. An institution is a mere organism for the accomplishment of an object, and the existence of such organism cannot, in the nature of things, make such object definite. The use of the word 'institution' does not point to a public, as distinguished from a private, organization, and there is nothing whatever in the will, except in the words 'religious,' 'educational,' and 'eleemosynary,' that points in the slightest degree to a charitable use." And after holding that under the will the trustee could devote the proceeds of the trust fund to purposes which would be in whole or in part private and individual, and not public and charitable, the court says: "The possible devotion of the income of said trust in whole or in part to private use necessarily affects the entire gift, and requires that the same shall be held invalid." In Chamberlain v. Stearns, 111 Mass. 268, Gray, J., quotes from the opinion of Sir William Grant in James v. Allen, 3 Meriv. 17, the following in regard to a trust of this character: "If it might, consistently with the will, be applied to other than strictly charitable purposes, the trust is too indefinite for the court to execute." In Kendall v. Granger, 5 Beav. 300, the court say: "It is not a question whether the trustees may apply it [the fund] to a charitable purpose, but whether, by the words of the will, they are bound to do so. The decisions go to this further extent that they must have no option between a charitable and any other purpose." Quotations could be multiplied indefinitely announcing this doctrine. It is thus summarized in 2 Perry on Trusts, § 711: "There are other cases where legacies are given in trust for purposes that are clearly charitable, but these purposes are joined with words that authorize the trustees to expend the fund for general purposes which are not charitable. If the fund is not apportioned by the donor, the trustees may expend the whole for one purpose or another which is not charitable, and at the same time execute the exact power given them under the will. In such cases the courts cannot establish and administer the trust as charitable."

With respect to what purposes are deemed charitable the authorities show that those enumerated in the will of Adolph Sutro are not exclusively of that character. Mr. Perry approves the following general definition of a charitable trust given by Gray, J., in Jackson v. Phillips, 14 Allen (Mass.) 556: "A charity, in the legal sense, may be more fully defined as a gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government." This definition, as applied to charitable perpetuities, must be read with the opening phrase constantly in mind that the benefit is for "an indefinite number of persons," and not for any particular person or persons, and it must be for all persons falling within a described class, indefinite in number. The subject will be elucidated by a statement of the cases showing the subjects which have been held to be not charitable in character. The following described purposes have been so declared; the words in italics, where more than one descriptive term is used, being those which were held to vitiate the gift: "Charitable or *public*" (Blair v. Duncan, L. A. App. Cas. [1902] 37); "the religious, moral, and *social* welfare of the people" (Livesey v. Jones, 55 N J. Eq. 204, 35 Atl. 1064); "the advancement of civilization generally" (Owens v. Missionary Society, 14 N. Y. 380, 409, 67 Am. Dec. 160); "undertaking of general utility" (Kendall v. Granger, 5 Beav. 300); "charitable or *religious institutions* or societies" (Grimond v. Grimond, L. R. App. Cas. [1905] 126); "charitable or *philanthropic* purposes" (In re Macduff, L. R. Ch. Div. [volume 2, 1896] p. 451); "the establishment of a school at Montrose for the education of children" (Attorney General v. Soule, 28 Mich. 153); "charitable or *other* purposes" (Ellis v. Selby, 7 Sim. 352, 362; 1 Myl. & Cr. 286, 298); "to such charitable or *public* uses or purposes, person or persons, as may be selected" (Vezey v. Jamson, 1 Sim. & Stu. 69); "benevolence and *liberality*" (Morice v. Durham, 9 Ves. 399; 10 Ves. 521); "*benevolent*, charitable, and religious *institutions*" (Norris v. Thomson, 19 N. J. Eq. 308); "charitable, religious, or *other* societies, institutions, persons, or objects, in connection with the Roman Catholic faith" (Minty v. Bourne, L. R. Ch. Div. [1909, vol. 1] 567); "such charitable or *other* institution as is most needed" (Taylor v. Keep, 2 Ill. App. 275). In Estate of Hinckley, supra, 58 Cal. page 511, a trust for "human beneficence *and* charity" was held valid on the ground that the use of the word "and" to join the words "beneficence" and "charity," in connection with the context, showed that the two words were used synonymously, and the maxim "noscitur a sociis" was applied. The different objects named in the Sutro will cannot be thus joined. They are not synonymous, and the sentence in which they occur is, in effect, disjunctive. It is to be noted that those of the cases just cited which hold that the phrase "religious or educational institutions" indicates a noncharitable use, and also the case of Shattuck's Will, to the same effect, do so on the ground that it would permit the fund to be devoted to existing institutions which, though religious or educational, might be maintained for private profit, and therefore not charitable. They are to be distinguished from other cases where a trust for the purpose of *establishing* institutions has been held valid because the context showed that none but charitable institutions were intended.

Coming now to the particular purposes authorized by this will, we find that they include "charities," "institutions of learning and science," and "premiums" to be set apart for "distinguished scholarships," for "scientific discovery," and for "inventions." The term "charities" would, of course, include charitable uses, and perhaps could not be construed to refer to any other. But institutions of learning and science may or may not be charitable, according as the institution is carried on for public benefit alone, or for private gain. Spence v. Widney (Cal.) 46 Pac. 466, in which a rehearing was granted, but not on this point; Atty. Gen. v. Hewer, 2 Vern. 387; Atty. Gen. v. Newcomb, 14 Ves. Jr. 1; Atty. Gen. v. Soule, supra. The will would allow the fund to go to institutions of learning and science already established, whether charitable or not. And while it may be true that the encouragement of scientific discovery and inventions might, in a very general way, tend to promote the benefit of mankind and the advance of civilization, yet, in view of the decisions above cited, it cannot be said that these purposes are in themselves necessarily charitable or eleemosynary, in the sense in which these words are used in the Constitution and in the authorities on the subject. Some kinds of scholarship have no direct relation to charity or the general welfare. Scientific discoveries might be of such a nature that they would be hurtful and evil in tendency and effect. Inventions are not necessarily useful. Both scientific discoveries and inventions may be of such a character as to inure entirely to the personal profit of the discoverer or inventor or of other persons interested or affected.

The other passages in the will itself, referring to these objects, demonstrate that the testator had in mind purposes other than charitable. The trustees are expressly forbidden to apply any of the fund to "any institution, or charity, or purpose" which should be in any degree sectarian. The final direction is that when, upon the death of his last surviving child, the absolute title to the property should vest in the ultimate trustees, it should be sold and the proceeds applied "to the uses and purposes, charitable, educational and other, which are, in this my will, provided and specified." These passages show that in his estimation the purposes specified were not exclusively charitable in character. There is nothing in other parts of the will to show that the "other" purposes referred to were intended to be charitable. Without violating the directions of the will the entire fund could be devoted to institutions of learning and science carried on for private gain, of which there are many, or to the encouragement of abstract scientific discoveries not tending to benefit mankind, or to reward inventions calculated to profit the inventor alone, or those to whom he should transfer his secret or patent. The trustees could apply a part to each of the different objects, or they could apply the whole of it to one of them to the exclusion of any other. These objects not being exclusively or necessarily charitable, it follows, under the rule stated, that the entire trust was invalid, and that the decree of distribution was correct, independent of the effect of the previous judgment in the case of Sutro v. Merritt.

This conclusion makes it unnecessary to consider the other questions so elaborately presented and discussed. The motion for new trial was properly denied on this ground.

The decree and order appealed from are affirmed.

We concur: MELVIN, J.; HENSHAW, J.; ANGELLOTTI, J.

SLOSS, J. I concur on the ground that the judgment in Sutro v. Merritt was valid and binding. Even if it did not control the action of the court in probate so as to require a distribution directly to the heirs, it had the effect of conclusively determining the title of the heirs as against the trustees and others claiming under the alleged trust. A distribution to the trustees would, by virtue of the prior judgment, have inured to the benefit of the heirs, and the probate court properly concluded that it might make final disposition of the rights of the parties by decreeing distribution to the heirs in the first instance.

Upon the validity of the trust, as an original question, I express no opinion.

155 Cal. 739

ERNEST v. McCAULEY et al. (L. A. 2,283.)

(Supreme Court of California. June 25, 1909. Rehearing Denied July 24, 1909.)

1. EVIDENCE (§ 222*)—ADMISSIONS AGAINST INTEREST.

Where, in an action on a note given for the price of stock of a mining corporation, defendant claimed that the note was procured by fraud as to the value and character of the mines, and it appeared that he had visited the mines and examined them, his statement made after the last visit that he was satisfied with their character was competent as an admission against interest.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 222.*]

2. APPEAL AND ERROR (§ 1011*)—FINDINGS—CONCLUSIVENESS.

The weight of the testimony and the credibility of the witnesses are matters for the exclusive determination of the trial court where there is a substantial conflict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3989; Dec. Dig. § 1011.*]

Department 1. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by J. W. Ernest against J. W. McCauley and others. From a judgment denying relief and from an order denying a new trial, plaintiff appeals. Affirmed.

L. M. Fall, for appellant. D. P. Hatch and Gibson, Trask, Dunn & Crutcher, for respondents.

SHAW, J. The plaintiff brought this action against the defendants to obtain a decree canceling a note for $3,937.70, executed by the plaintiff to defendant Johnson, and by him indorsed to the defendant bank before maturity, as collateral security for a note executed by Johnson to the bank for $3,750. The complaint also asked, in case it was determined that the cancellation could not be had as against the bank, that it be restrained from collecting from the plaintiff any greater sum than the amount due upon the note of Johnson to the bank, and that as to the residue the note be canceled. The appeal is from the judgment and from an order denying the plaintiff's motion for a new trial.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The bank filed a cross-complaint against the plaintiff and Johnson, asking judgment against the plaintiff upon the note executed by the plaintiff to Johnson, and against Johnson upon the note which he had executed to the bank. The court made separate findings and judgments, giving judgments in favor of the bank against the plaintiff for the amount of the note sought to be canceled, and against Johnson upon his note to the bank, for which the plaintiff's note was held as security. The judgment against Johnson was greater in amount than that against the plaintiff. Judgment was also given in favor of Johnson and McCauley against the plaintiff.

The complaint alleged that the note of plaintiff to Johnson, which was assigned by him to the bank, had been procured by misrepresentations and fraud concerning the value and character of certain mines in Shasta county. The note was given for the purchase price of 39,377 shares of stock in the company owning said mines. The court found that there was no misrepresentation, that the note was given for a valuable consideration, and that the bank was a purchaser for value before maturity and without notice of the nature of the consideration, or of any misrepresentations or fraud.

The plaintiff claims that the court erred in allowing testimony to prove that, after the execution and delivery of the note to Johnson, the plaintiff had visited the mines, and had fully examined them, and thereafter expressed himself as satisfied with their character and value. We do not perceive any error in this ruling. The plaintiff's statement, taken in connection with the fact that he had previously made several examinations of the mines, constituted an admission against his interest tending to show that the representations complained of were not false. The testimony showed that he had made one visit to the mines before executing the note, and had spent some four hours examining their character, and was then so well satisfied that their condition and value was as represented that he executed the note for the stock, and that a few weeks afterward he made another visit to the mines and spent several days there making a thorough examination, after which he expressed himself as satisfied with the bargain he had made. The testimony as to these acts and declarations by him was clearly admissible against him.

The only other error assigned is that the evidence is insufficient to sustain the findings of the court. It is unnecessary to discuss this assignment of error at length. The case presents the familiar one of a conflict of the evidence. The plaintiff testified to the effect that the character of the mines was grossly misrepresented, and that he was prevented from making a proper examination by the artifices of Johnson and McCauley. There was other testimony to the contrary which, though not entirely conclusive, was sufficient to present a substantial conflict for the trial court to consider and determine. With respect to the First National Bank, there is no sufficient testimony from which the court could have held that it was a purchaser in bad faith. Under these circumstances, we cannot disturb the findings. The rule is too well settled to require the citation of authority to the effect that the weight of the testimony and the credibility of the witnesses are matters for the exclusive determination of the trial court in any case where there is a substantial conflict.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

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155 Cal. 692

DUNDAS v. LANKERSHIM SCHOOL DIST. (L. A. 2,294.)

(Supreme Court of California. June 18, 1909.)

1. Appeal and Error (§ 356*)—Time—Effect of Delay—Dismissal.

Appeal from judgment not being taken within six months from entry thereof, as required by Code Civ. Proc. § 939, subd. 1, will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1926, 1927; Dec. Dig. § 356.*]

2. Boundaries (§ 49*) — Establishment — Practical Location and Acquiesence.

Where the point of beginning of land conveyed to defendant, described in the deed as a point in a certain line of a street a certain distance west and a certain distance south of a certain other point, was by the parties ascertained by a survey made for that purpose, and marked on the ground prior to the conveyance, and the northerly and southerly lines of the lot were then fixed by the parties with reference to said point, and marked on the ground by stakes at the corners of the lot, and all parties in interest, with knowledge of the location and extent of the land claimed and occupied by defendant under its deed, acquiesced in the location for the period for obtaining title by prescription, and every successor in interest of the owner of the property adjoining defendant's land on the south (owned at the time of the conveyance to defendant, by its grantor), including plaintiff, purchased with knowledge of the actual possession by defendant to the line claimed by it to constitute, and marked on the ground as constituting, its southerly boundary line, the point of beginning actually located and marked on the ground, and the line then located and marked on the ground as the southern boundary, must be accepted, the one as the point of beginning actually described in the deed and the other as the true southerly line, and defendant be held to hold to such line by virtue of its deed, regardless of the accuracy of such locations as shown by subsequent measurements.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 248; Dec. Dig. § 49.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Department 1. Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by George E. Dundas against the Lankershim School District. From a judgment for defendant, and from an order denying a new trial, plaintiff appeals. Appeal from judgment dismissed. Order affirmed.

Kemp & Collier and John W. Kemp, for appellant. T. R. Archer, for respondent.

ANGELLOTTI, J. This is an action to quiet title commenced November 5, 1906. The controversy is about a strip of land ranging from 46.34 feet on the easterly end to 42.87 feet on the westerly end, and about 420.64 feet long, being the southerly portion of a lot of land occupied and used for school purposes by defendant for over 16 years next preceding the commencement of the action. Defendant had judgment, and plaintiff appeals from the judgment and from an order denying his motion for a new trial.

The appeal from the judgment was taken more than 11 months after its entry. Not having been taken within six months from the entry of judgment, it must be dismissed. Code Civ. Proc. § 939, subd. 1. There remaining only an appeal from the order denying a motion for a new trial, we are not concerned with any question of the sufficiency of any pleading, or of the sufficiency of the findings to support the judgment.

The principal claim on the appeal from the order denying the motion for a new trial is that the finding that defendant is the owner of this land is not sustained by the evidence. It is undisputed that defendant acquired from the Lankershim Ranch, Land & Water Company, the original owner of all the land referred to in the deeds under which the parties claim, and from Miles Dodd, the immediate grantee of said company, a lot of land for school purposes, the northeasterly corner of which was on what was intended to be the southwesterly line of a street known as San Fernando avenue, the boundaries of which are as follows, viz.: Running from said point west 270.64 feet; thence south 300 feet; thence east parallel with the northerly line over 400 feet to the southwesterly line of San Fernando avenue; thence northwesterly along said line of said avenue to the point of beginning. The real controversy here is as to the location of the point on the southwesterly line of San Fernando avenue constituting the northeasterly corner of the lot. If it be at the place claimed by defendant, the northerly and southerly boundary lines of the school lot are as claimed by defendant and found by the court, thus including the strip in dispute. If it be at the place claimed by plaintiff, over 40 feet to the north of the place claimed by defendant, the southerly boundary line of defendant's lot would be thrown more than 49 feet to the north, and the strip in dispute would thus be excluded. Plaintiff is the owner of the land lying south of and adjoining the lot of defendant, having on March 21, 1906, acquired the title thereto of the Lankershim, etc., Company and Miles Dodd, through mesne conveyances.

The following facts are clearly established by the evidence: Defendant school district went into actual possession of the property claimed by it in 1888 or 1889, under a proposition from the Lankershim Company to the effect that, if it would use the same as a site for its schoolhouse and build thereon a schoolhouse to cost a specified sum of money, the company would give it the land. The ground to be so given was immediately upon the acceptance of the offer marked out on the ground by the company by stakes placed at the corners, in pursuance of a survey then made by the company's surveyor, assisted by Mr. W. H. Andrews, one of the then trustees of the school district. On this survey, the northeasterly corner of the lot was fixed at the point on San Fernando avenue claimed by the defendant to be the true corner, and a stake was there driven which was replaced two years later by an iron stake, which the trial court was warranted by the evidence in concluding is still in place. Defendant almost immediately proceeded to more clearly define and permanently mark on the ground the location of the northerly and southerly lines of the lot by planting rows of cypress and pine trees along the same, about one foot inside of each line, which trees have ever since continued in place. Mr. Andrews, the then owner of the property to the west, planted a row of gum trees about one foot west of the westerly line of the lot. Defendant immediately proceeded with the construction of its schoolhouse on this property, and the same was completed in 1889 or 1890. Ever since that time all of the land claimed by defendant has been openly and exclusively possessed and used by defendant for school purposes under claim of absolute ownership, a claim acquiesced in and not denied by any one until about the end of the year 1905. On June 3, 1891, soon after the completion of the schoolhouse, the Lankershim Company executed its conveyance to the defendant wherein the property was described as "beginning at a point in the southwesterly line of San Fernando avenue, which point is 370.64 feet west, and 642.26 feet south of the northeast corner of lot 160." On October 29, 1891, Miles Dodd, the successor of said company, executed to defendant his deed to a triangular piece of land lying between the easterly line of the land conveyed by the Lankershim Company and the southwesterly line of San Fernando avenue, and of which the point of beginning was the same as that of the lot conveyed by the Lankershim Company. This deed described said point of beginning in the same way as did the

Lankershim Company deed. This point of beginning for the school lot had been previously described in the same way in a provision of the deed of the Lankershim Company to Miles Dodd executed November 20, 1890, whereby said company excepted from the operation of its conveyance to Dodd a lot of land 270.64 feet by 300 feet, describing it by metes and bounds, and as commencing at such point. The claim of plaintiff is based solely on a survey made in 1905 for the then owner of the land lying south of the school district's land, for the purpose of ascertaining the true southerly boundary of said school district land, on which survey the surveyor concluded that the point on the southwesterly line of San Fernando avenue which was 370.64 feet west and 642.26 feet south of the northeast corner of lot 160, as he considered the said northeast corner of said lot 160 to be, was over 40 feet to the north of the point that had up to that time been marked on the ground and accepted by all parties as the true location. Mr. Andrews was a predecessor in title of plaintiff of the property adjoining defendant's land on the south, owning such property from June 20, 1892, to December 16, 1901. During all this time he openly acknowledged that the southerly line of trees before referred to was the north line of his property, and pointed out to his purchaser, a Mr. Stiffler, the rows of trees as being the lines of the school property, his deed to Stiffler describing the land conveyed by reference to the lines of the property of the school district.

The finding as to defendant's ownership is amply sustained by this evidence. Indeed, we do not perceive how any other finding could have been made. The point of beginning of the land conveyed by the Lankershim Company to defendant, described in the deed as a point in the southwesterly line of San Fernando avenue, 370.64 feet west and 642.26 feet south of the northeast corner of lot 160, was by the parties ascertained by the survey made for that purpose and marked on the ground prior to the conveyance, and the northerly and southerly lines of the lot were then fixed by the parties with reference to said point and thereupon marked on the ground by stakes at the corners of the lot. The deed was clearly intended to convey the property so located and marked out on the ground. All parties in interest, with full knowledge of the exact location and extent of the land claimed and occupied by defendant under its deeds, acquiesced in this location for three times the period prescribed by the statute of limitations for obtaining title by prescription, and every successor in interest of Andrews, including this plaintiff, purchased with full knowledge of the actual possession by defendant to the line claimed by it to constitute, and marked on the ground as constituting, its southerly boundary line. Under these circumstances, defendant's claim of title is sustained by the rules discussed in Young v. Blakeman, 153 Cal. 477, 480, 95 Pac. 888. Under those rules, the point of beginning actually located and marked on the ground must be accepted as the point of beginning actually described in the deeds, regardless of the accuracy of the actual location, as it may appear by subsequent measurements. The line at the same time located and marked on the ground as the southerly line of defendant's property, by measuring from said point of beginning, must likewise be accepted as the true line, regardless of the accuracy of such location as shown by subsequent measurements, and the defendant holds to such line by virtue of its title deeds. See, also, Lewis v. Ogram, 149 Cal. 505, 87 Pac. 60, 10 L. R. A. (N. S.) 610, 117 Am. St. Rep. 151. These considerations render it unnecessary to consider other points made by defendant in support of the finding of ownership. Certain other findings attacked are immaterial in view of our conclusion that the finding as to ownership is fully sustained by the evidence.

Many rulings of the trial court in admitting evidence over the objection of plaintiff and in refusing to strike out evidence on the motion of plaintiff are assigned as errors. We have examined all of these assignments, and find in the rulings complained of no prejudicial error, and no matter calling for discussion here.

The appeal from the judgment is dismissed. The order denying a new trial is affirmed.

We concur: SHAW, J.; SLOSS, J.

155 Cal. 665

MacDONALD v. MacDONALD. (S. F. 4,333.)

(Supreme Court of California. June 16, 1909.)

1. Divorce (§ 27*) — Grounds — "Extreme Cruelty."

Under Civ. Code, § 94, defining "extreme cruelty" justifying a divorce as the wrongful infliction of grievous bodily injury or grievous mental suffering by one spouse on the other, the wrongful infliction of grievous mental suffering by one spouse on the other is "extreme cruelty," though no injury to the health of the spouse injured is caused thereby, and a single act of cruelty may be of such a nature, though it consists solely of unfounded charges, as not only to inflict the most grievous mental suffering, but also to render impossible the subsequent living together of husband and wife, justifying a divorce.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 62–83; Dec. Dig. § 27.*

For other definitions, see Words and Phrases, vol. 3, pp. 2630–2634.]

2. Divorce (§ 27*)—Grounds—Extreme Cruelty—False Charges.

A false charge in writing made by a wife against her husband that he is a drunkard, a lewd and dissolute character, unfit to be a member of any fraternal organization, or to associate with decent people, that he had admitted that, if it were not for his parents, he would adopt the method of living on the earnings of a prostitute, with whom he had consorted after his marriage, causing the husband grievous mental suffering, justifies a divorce.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 62–83; Dec. Dig. § 27.*]

3. Divorce (§ 184*)—Appeal—Question of Fact—Cruelty.

Whether grievous mental suffering has been inflicted by one spouse on the other because of the making of false charges is a question of fact, depending on the circumstances of the particular case, keeping in view the intelligence, apparent refinement, and delicacy of sentiment of the complaining spouse, and the trial judge must be invested with a wide range of discretion, and his finding will not be disturbed on appeal, unless the evidence in support thereof is so slight as to indicate a want of ordinary good judgment and an abuse of discretion.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 572; Dec. Dig. § 184.*]

4. Divorce (§ 127*)—Evidence—Corroboration.

The main purpose of Civ. Code, § 130, providing that no divorce can be granted on the default of defendant or on the uncorroborated testimony of the parties, is to prevent collusion.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 405–407; Dec. Dig. § 127.*]

5. Divorce (§ 127*)—Evidence—Corroboration.

In a suit by a husband for divorce on the ground of the wife's malicious charges of misconduct, the testimony of the husband that he sustained grievous mental suffering as a result thereof is sufficiently corroborated when the court may infer from the nature of the charges, the circumstances under which they were made, the publicity given them, that he sustained mental suffering, though it be assumed that Civ. Code, § 130, requires corroboration.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 405–407; Dec. Dig. § 127.*]

6. Divorce (§ 127*)—Extreme Cruelty—Evidence—Corroboration.

Civ. Code, § 130, providing that no divorce can be granted on the uncorroborated testimony of the parties, does not apply to a suit for divorce by the husband on the ground that his wife had maliciously charged him with being a drunkard, a lewd and dissolute character, unfit to associate with decent people, and a divorce may be granted on his testimony that he sustained grievous mental suffering in consequence of the charges.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 405–407; Dec. Dig. § 127.*]

7. Divorce (§§ 27, 116*)—Grounds—Extreme Cruelty—Malicious Charges—Evidence.

The mere fact that husband and wife were living separate and apart when false charges were maliciously made by the wife against the husband does not necessarily prevent them constituting extreme cruelty, and the fact that they were so living is relevant only in determining whether they inflicted grievous mental suffering.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. §§ 27, 116.*]

8. Divorce (§ 130*)—Misconduct of Husband—Evidence.

In an action for divorce by the husband on the ground of the wife making false charges against him, evidence *held* to justify a finding that the conduct of the husband did not preclude him from complaining of the wife.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 130.*]

9. Divorce (§ 127*)—Residence—Evidence—Corroboration.

The testimony of a husband suing for divorce that he had been a resident of the county for at least one year next preceding the commencement of the action, as required by Civ. Code, § 128, is sufficiently corroborated within section 130, providing that no divorce can be granted on the uncorroborated testimony of the parties, by the testimony of witnesses as to his reputation indicating that he had been a resident of the county for many years preceding the action.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 405–407; Dec. Dig. § 127.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by Alexander John MacDonald against Josephine MacDonald. From a judgment for plaintiff, defendant appeals. Affirmed.

Henley & Costello, for appellant. William A. Kelly, for respondent.

ANGELLOTTI, J. This is an appeal by defendant from an interlocutory decree in favor of plaintiff in an action for divorce on the ground of extreme cruelty.

1. It is claimed that the complaint did not show cruelty warranting a divorce, and that a demurrer interposed for want of facts should have been sustained. The extreme cruelty alleged is the infliction of grievous mental suffering by an act of defendant done on or about the 11th day of March, 1903. In this behalf it was alleged substantially as follows: Plaintiff was a member in good standing of Hesperian Parlor of the Native Sons of the Golden West, a fraternal order. Defendant filed with such parlor an affidavit made and verified by her, in which she charged plaintiff "with being a drunkard, a constant habitue of saloons, a lewd and dissolute character, a person unfit to be a member of the Hesperian Parlor, Native Sons of the Golden West, or any other fraternal organization, and a person unfit to associate with decent and respectable people." She further charged that since the date of the marriage, December 3, 1902, plaintiff had not contributed to her support, had made no effort to procure work or provide means for her support, that she had supported him with means supplied by her father; that plaintiff had admitted to her that he had spent a night with a certain prostitute at a place known as Belden Place in San Francisco; that plaintiff had stated to her that he did not have to work to support her or himself, as said prostitute would support him at any time; and that he had stated to her that if it were not for his parents, he would have adopted this mode of livelihood long ago. Each and all of these charges and statements were false, unfounded, and malicious, and were made by defendant for the sole purpose of grieving plaintiff. Such char-

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ges became known to many persons in the community and to plaintiff's fellow members in said Hesperian Parlor and were communicated to plaintiff, and by reason thereof he suffered grievous mental pain and anguish, and was subjected to great shame. Defendant's point in this connection is solely that there is only a single act of cruelty alleged, and that the law does not permit a divorce on the ground of extreme cruelty for any single act of violence or abuse. There are decisions of some other states that sustain this claim, but it certainly is not the law in this state. Our statute defines extreme cruelty as "the wrongful infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage." Section 94, Civ. Code. Ever since the decision in Barnes v. Barnes, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660, it has been the accepted law of this state that the wrongful infliction of grievous mental suffering by one party to the marriage upon the other constitutes extreme cruelty under this statute, even though no injury to the health of the party thus injured is caused thereby. It was said in that case, quoting from Carpenter v. Carpenter, 30 Kan. 743, 2 Pac. 144, 46 Am. Rep. 108: "It was formerly thought that to constitute extreme cruelty, such as would authorize the granting of a divorce, physical violence is necessary; but the modern and better considered cases have repudiated this doctrine as taking too low and sensual a view of the marriage relation, and it is now very generally held that any unjustifiable conduct on the part of either husband or wife, which so grievously wounds the feelings of the other, or so utterly destroys the peace of mind of the other, as to seriously impair the health * * * or such as utterly destroys the legitimate ends and objects of matrimony, constitutes extreme cruelty under the statutes." The court further said: "Section 94 of the Civil Code is in harmony with the law as thus stated, and under it the infliction of grievous mental suffering is extreme cruelty." In that case the cruelty alleged and for which a divorce was granted was the imputing to plaintiff by defendant, in the presence of others, the grossest immorality and personal impurity. See, also, Nelson on Divorce and Separation, § 276. It is manifest that a single act of cruelty may be of such a nature, even where that act consists solely of the making of unfounded charges and cruel imputations, as not only to inflict the most grievous mental suffering, but also to render impossible the subsequent living together of husband and wife upon any such terms as are essential to the accomplishment of the legitimate ends and objects of matrimony, if marriage is to be viewed "from a different standpoint than as a mere physical relation." Barnes v. Barnes, supra. A false charge deliberately and maliciously made in writing by a wife against her husband, for the sole purpose of lowering him in the estimation of his friends and associates and all decent people to the effect that he is a drunkard, a lewd and dissolute character, a person unfit to be a member of any fraternal organization, a person unfit to associate with decent and respectable people, a person who had admitted to her that, if it were not for his parents, he would long ago have adopted the method of living on the earnings of a prostitute, with whom, it was charged, he had admitted having consorted after his marriage, might well bring about such a result. If it does, it certainly measures up to the requirements of our statute. See, generally, Nelson on Divorce and Separation, §§ 277, 279. As we have seen, it was squarely alleged that the conduct of the defendant in this regard did cause him grievous mental pain and suffering. The demurrer was properly overruled.

2. In her answer defendant expressly admitted the allegations of the complaint in regard to the making of the charges by her against plaintiff. She denied that they became known to many persons in the community or to his brother members of Hesperian Parlor, or that the charges were made for the sole purpose of grieving plaintiff, or that they were at all false or malicious, or that plaintiff was thereby or at all subjected to great shame or to grievous or any mental anguish or suffering. Upon all of these matters, the findings of the trial court were in favor of plaintiff and against defendant. It was alleged by specifications in the bill of exceptions that the evidence was insufficient to justify the conclusion evidenced by the findings that plaintiff suffered grievous or any mental pain or anguish by reason of the act of defendant, and also the conclusion that such charges were made for the sole purpose of grieving plaintiff, were made known to many persons in the community and to his brother members in Hesperian Parlor, and that they were false, unfounded, and malicious.

No claim is made in the briefs that the evidence was not sufficient to warrant the trial court in finding that the charges so made against plaintiff by defendant were false and unfounded in fact, and that they were made for the sole purpose of grieving plaintiff and subjecting him to shame and contempt, and, in view of the record before us, we do not see how any such claim could reasonably be made. The evidence to the effect that they were known to his fellow members in Hesperian Parlor is uncontradicted; in fact, the evidence shows that such charges were formally investigated by the members of the parlor, and that he was acquitted thereof.

It is strenuously urged that, in view of all the facts, the finding that by reason thereof the plaintiff was occasioned grievous mental suffering is not sufficiently supported by evidence. "Whether in any given case there has been inflicted this 'grievous mental suffering' is a mere question of fact, to be deduced from all the circumstances of each particular case, keeping always in view the intelligence, apparent refinement, and delicacy of sentiment of the complaining party, and no arbitrary rule as to what probative facts shall exist in order to justify a finding of the ultimate facts of its existence can be given. * * * A correct decision must depend—as most cases depend—upon the sound sense and judgment of juries and courts." Barnes v. Barnes, supra. From the very nature of the question it results that in its determination the trial judge, who has the parties before him for observation in the light of the evidence, must be invested with a wide range of discretion. It is settled that the finding of the trial court on this question will not be disturbed on appeal unless the evidence in support thereof is so slight as to indicate a want of ordinary good judgment and an abuse of discretion by the trial court. Andrews v. Andrews, 120 Cal. 184, 187, 52 Pac. 298; Avery v. Avery, 148 Cal. 239, 244, 82 Pac. 967. This certainly cannot be held to be the situation here when we consider the general nature of the charges made against plaintiff by his wife, the persons to whom such charges were communicated, the falsity of the charges and plaintiff's knowledge of the making and circulation thereof. Defendant's principal claim in this connection is that the evidence of plaintiff to the effect that he was occasioned grievous mental suffering by reason of the making of these charges by his wife was not corroborated by other testimony, and that corroboration thereof was required by section 130 of the Civil Code, which provides that no divorce can be granted upon the default of the defendant, "or upon the uncorroborated statement, admission or testimony of the parties." The main purpose of this section is to prevent collusion between the parties. Andrews v. Andrews, supra; Avery v. Avery, supra. We are aware of no case in this state where it has been squarely held that to satisfy the requirements of this section, which has existed in its present form ever since 1873, it is essential that there should be any corroboration of the plaintiff's testimony as to the mental suffering entailed upon him by reason of the acts of the defendant other than such corroboration as is afforded by the evidence showing the nature and circumstances of the acts, considered in the light of all the circumstances of the case, including the character, temperament, and disposition of the parties. We do not understand the case of Haley v. Haley, 67 Cal. 24, 7 Pac. 3, as holding this, although there are one or two expressions in the opinion tending to support the defendant's contention. The principal difficulty in that case was that, in the view of this court, there was no corroboration of the evidence of plaintiff to the effect that the defendant had willfully and wrongfully made a false charge of adultery against her. With reference to the fact of grievous mental suffering, in view of the nature of such a question, we do not see how any other corroboration could ordinarily be had. Mental suffering is generally known only to the sufferer. "The common judgment of mankind recognizes the fact that there may be unfounded charges and cruel imputations which are not more easily borne than physical bruises, and the necessary effect of which is to cause great mental distress to the person against whom they are made." Barnes v. Barnes, supra. We have already quoted from the case last cited to the effect that the answer to the question whether grievous mental suffering has been inflicted by the acts complained of is to be deduced from all the circumstances of each particular case. A court undoubtedly has the right to draw reasonable inferences from the nature of the false charges made, the circumstances under which they were made, the publicity given them, and the other circumstances of the case and the parties, as to the effect of the charges upon the mind of the party against whom they are made, and, if such reasonable inferences are in accord with the party's own testimony as to his mental suffering, there is sufficient corroboration to satisfy the requirements of the law, if corroboration in such a matter be essential. The decision in Haley v. Haley (Cal.) 14 Pac. 92, a later controversy between the same parties as those in Haley v. Haley, 67 Cal. 24, 7 Pac. 3, decides against defendant the exact point made by her in this behalf. The fact that this case was not ordered reported in the official reports cannot be taken to indicate, as claimed by defendant, that this court disapproved the doctrine, announced therein. We are satisfied that the decision there given on this point was correct. The case of Smith v. Smith, 124 Cal. 651, 57 Pac. 573, goes simply to the question of the sufficiency of a complaint, holding that "grievous bodily injury" or "grievous mental suffering" must be alleged.

3. Defendant suggests that it is well settled that in order to secure a divorce on the ground of cruelty, based upon words unaccompanied by violence, it is incumbent upon plaintiff to prove that the charges were malicious and without justifiable or probable cause. As to this, it is sufficient to say that, assuming the law to be as stated, there was sufficient evidence to support the conclusion of the trial court that they were so made in this case.

4. It is further claimed that an action for divorce on the ground of extreme cruelty will not lie for false charges made by one party against another after they have separated and are living apart. In this case the parties were married on December 3, 1902, and lived together as husband and wife only until March 1, 1903. The charges were made on or about March 11, 1903. In Nelson on Divorce and Separation, at section 277, it is said that the fact that the parties are sep-

arated at the time the charges are made does not change the nature of the cruelty, for separation does not relieve the husband of the duty to protect his wife's reputation. In Smith v. Smith, 8 Or. 100, accusations of adultery were made while the parties were living separate and apart. The court, in reply to the contention of counsel that the evidence did not show sufficient ground for divorce, because the accusations were made after the parties had separated and ceased to live together as husband and wife, said: "We think this makes no difference, for neither a husband nor wife can claim a right to continue the marriage relation while falsely charging the other with unchastity." In Haley v. Haley (Cal.) 14 Pac. 92, the divorce was granted for extreme cruelty consisting of a false and scandalous charge made after the parties had separated. While there are one or two opinions from other states which contain expressions tending to give some support to defendant's claim in this behalf, we think the better doctrine is that the mere fact that the parties are living separate and apart when false charges are maliciously made by one spouse against the other does not necessarily prevent them constituting extreme cruelty, and is relevant only in the determination of the question whether they inflicted grievous mental suffering. This was practically held in Valensin v. Valensin, 73 Cal. 106, 14 Pac. 397, where the court, speaking through Mr. Justice Temple, said: "Whether the false and malicious charge made after the actual separation of the parties would be less apt to inflict grievous mental anguish for that reason was for the trial court to determine in view of all the facts."

5. It is alleged that the evidence shows plaintiff to have been so greatly at fault that the court should have denied him relief. The answer contained no allegation by way of recrimination, and it can hardly be claimed that the evidence was such as to compel the conclusion that plaintiff had been guilty of conduct constituting a cause of divorce in favor of the defendant. The evidence of plaintiff shows that the parties quarreled on the day of the separation, and that the plaintiff was angry and left defendant, telling her that she could go home, could go her way, and he would go his. The defendant attributes a little stronger language to plaintiff on this occasion, but it is denied by plaintiff, and, in view of the findings of the trial court, the version most favorable to plaintiff must be adopted here. It cannot be held, in view of the findings, that he believed that she would want, by reason of his absense, for any of the necessities of life. As a matter of fact, it appears that he himself was then without employment and without money, and that he had every reason to believe that her father, who had apparently been most liberal in the way of giving financial assistance during their married life, would furnish her all necessary aid and care. There is nothing to indicate that the father did not do so. The plaintiff further testified that he expected to make up with his wife and return to her until she made these charges against him. Upon the record before us, we cannot hold that the trial court was not warranted in concluding that his conduct was not such as to preclude him from complaining of the act of defendant, and that the making of these charges by defendant was wholly unjustified, and constituted extreme cruelty on her part. To hold otherwise would be, it appears to us, a usurpation of the functions of a trial judge.

6. It is urged finally that there was no satisfactory evidence that the plaintiff was a resident of the city and county of San Francisco, in which the action was commenced, for three months next preceding the commencement of the action, or a resident of the state of California for one year next preceding such commencement. Section 128 of the Civil Code provides that a divorce must not be granted unless these conditions as to residence on the part of plaintiff exist. The evidence given by plaintiff in regard to this matter was plainly to the effect that he was a resident of the city and county of San Francisco for at least one year next preceding the commencement of the action, and it was not contradicted by any other evidence. The real point in this connection appears to be that plaintiff's evidence in this regard was not corroborated. If we assume that, under section 130, Civil Code, corroboration of the plaintiff's testimony on the question of residence was required, we think sufficient corroboration was to be found in the evidence of some of the many witnesses who testified as to his reputation for sobriety and industry and his personal habits. Their evidence strongly tended to strengthen and confirm the statements of plaintiff in regard to such residence, and indicated that he had been a resident of San Francisco for many years preceding the action. See Andrews v. Andrews, 120 Cal. 184, 186, 52 Pac. 298; Avery v. Avery, 148 Cal. 239, 243, 82 Pac. 967. There was not an atom of evidence to indicate, as suggested by defendant, that plaintiff ever resided in Solano county prior to the commencement of this action.

The judgment is affirmed.

We concur: BEATTY, C. J.; SHAW, J.; HENSHAW, J.; MELVIN, J.; LORIGAN, J.

(155 Cal. 683)

GERMAN-AMERICAN SAVINGS BANK v. GOLLMER et al. (L. A. 2,269.)

(Supreme Court of California. June 18, 1909. On Rehearing, July 17, 1909.)

1. Quieting Title (§ 10*)—Nature of Estate—Leasehold—Estate for Years.

Though an estate for years is declared by Civ. Code, § 765, to be only a chattel real and is governed generally by the rules applicable to personal property, it is nevertheless declared by section 761 to be an interest or estate in real property, and is therefore sufficient to sustain an action to quiet title against the adverse claims of the owner of the fee under section 738, Code Civ. Proc., providing that an action may be brought by any person against another who claims an estate or interest in real property adverse to him to determine such adverse claims.

[Ed. Note.—For other cases, see Quieting Title, Dec. Dig. § 10.*]

2. Landlord and Tenant (§ 76*)—Leases—Condition Against Assignment—Waiver—Effect.

Consent of a landlord to an assignment of the lease or a waiver of the condition against assignment while dispensing with that condition in the future, leaving the assignee free to again assign without consent, does not free the estate from other conditions prohibiting the carrying on of other classes of business than that for which the premises were rented, and prohibiting the subletting for such other classes of business.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 76.*]

3. Landlord and Tenant (§ 76*)—Leases—Conditions.

Where conditions in a lease were continuing in their nature, such as covenants to pay rent at stated intervals, and to carry on only certain kinds of business in the demised premises, or against subletting without written consent, the consent to or waiver of a breach does not preclude the lessor from taking advantage of subsequent breaches.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 76.*]

4. Landlord and Tenant (§ 76*)—Leases—Modification—Assignment.

A covenant against assignment of a lease without the lessor's consent and a provision for re-entry in case of breach were not rescinded or affected by supplemental agreements extending the term providing they should inure to and bind the heirs, executors, administrators, successors, and assigns of the several parties, as there could be no "assign" of the lessee, except one who had become such by consent or waiver of the lessor.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 76.*]

5. Landlord and Tenant (§ 76*)—Assignment of Lease—Landlord's Consent—Acceptance of Rent—Knowledge.

In order that a landlord's acceptance of rent from an alleged assignee of the lease should operate as a consent to the assignment or of a waiver of a condition against assignment, the landlord must have had actual knowledge of the assignment; it being insufficient that he might on inquiry have discovered the fact.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 76.*]

6. Landlord and Tenant (§ 76*)—Assignment—Consent of Landlord—Evidence.

Evidence *held* insufficient to sustain a finding that a landlord had consented to an assignment of the lease by an acceptance of rent from the alleged assignee.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 76.*]

Department 1. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by the German-American Savings Bank against Catherine Gollmer and another to quiet defendants' alleged adverse claims to plaintiff's estate for years in certain demised property. Decree for complainant, and defendants appeal. Reversed and remanded.

Rehearing denied; Beatty, C. J., dissenting.

Sharp & Rech, for appellants. Haas, Garrett & Dunnigan, for respondent.

ANGELLOTTI, J. This is an appeal by defendants from a judgment for plaintiff in an action commenced September 7, 1907, by the alleged owner of a leasehold interest in the first or ground floor of a certain building in the city of Los Angeles, against the successors in interest in the demised premises of the lessor, one John Gollmer, to obtain a decree quieting alleged claims of defendants adverse to plaintiff's estate for years.

Plaintiff alleged in its complaint that it is "the successor in interest of the Union Bank of Savings" a corporation, as to said leasehold interest, but did not allege how it succeeded to said interest. The leasehold interest was described as one commencing on May 15, 1898, and ending May 15, 1918, subject only to the payment of a monthly rental of $250, and a covenant for the payment of certain taxes. Defendants by their answer denied these allegations. They further alleged the facts as to the creation of the leasehold interest, and the modification of the original lease by supplemental agreements, as the same were subsequently found by the trial court. It appears from these allegations and findings that by an indenture of lease dated September 24, 1897, John Gollmer, defendants' predecessor in title, demised and let the premises to the Union Bank of Savings, a corporation, for a term commencing May 15, 1898, and ending May 15, 1908, for $250 per month, covenanted to be paid by the lessee. It was stipulated therein that the premises were let for banking business purposes, and that no other business was to be conducted therein without the lessor's consent in writing, but that the lessee might sublet portions of the premises provided that, if any sublease be made for any class of business different from that for which subleases had theretofore been made, the consent in writing of the lessor must first be obtained. The lessee covenanted that it would pay the rent as agreed, "and not to assign this lease without the written consent of the said party of the first part" and at the expiration of the term to surrender the premises in as good state and condition as when received, reasonable use and wear thereof excepted. There was also a covenant for the payment of increased taxes. The other stipulations are immaterial here. On December 16, 1898, a supplemental agreement was made relative to certain improvements to be made by the lessee at its option. This, also, is immaterial. On April 30, 1901, a supplemental agreement was executed by the same parties whereby the lessee was given an option for the renewal of the lease on the same terms for five years from May 15, 1908, it being provided therein that such option must be exercised by notice in writing on or before May 15, 1907. On December 24, 1901, an option was given by said lessor to said lessee for a further period of five years from May 15, 1913, with the same proviso as to the time and manner in which the same must be exercised. Each of these optional agreements contained this provision: "This agreement shall inure to and as well bind the heirs, executors, administrators, successors and assigns of the several parties hereto." It was further alleged in the answer and was found by the trial court that the lessee exercised its option right to renew said lease in manner and form as provided. It was also alleged that neither the lessor nor his successors ever consented to any assignment of the lease, but that said lessee had nevertheless between January 1, 1906, and November 13, 1907, assigned said lease to plaintiff, and that neither of the defendants ever obtained any notice or knowledge of the assignment until about November 13, 1907, whereupon they notified the lessee that they declared said lease forfeited by reason of said assignment, and demanded that possession of the demised premises be delivered to them. The court found that such assignment had been made on January 10, 1906, but that defendants had then and have ever since consented to the same and had waived the breach of the condition against assignment. It further found that defendants had notice of such assignment prior to February 1, 1906, and had up to November 1, 1907, received the stipulated rent from the assignee. By its decree the trial court adjudged that plaintiff was the owner of the leasehold interest described in the complaint, subject only to the payment of said rent and the covenant for the payment of increased taxes, and that such estate for years so owned by it was not subject to any condition, covenant, agreement, or obligation.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

1. It is claimed that an action of this character on the part of the owner of a leasehold interest against the person owning the fee in the demised premises will not lie, and that the demurrer to the complaint should be sustained. The action is somewhat novel, but we see no good reason why it cannot be maintained under our statute. It is said that in view of Jeffers v. Easton, Eldridge & Co., 113 Cal. 345, 45 Pac. 680, and subsequent cases, an estate for years is personal property, and therefore that an action to quiet title will not lie because it has been said by this court that "no action will lie in this state merely to quiet the title to personal property." Fudickar v. East Riverside, etc., Co., 109 Cal. 29, 38, 41 Pac. 1024, 1026. It is true that an estate for years is only a chattel real (Civ. Code, § 765), and governed generally by the rules applicable to personal property (Jeffers v. Easton, Eldridge & Co., supra, 113 Cal. 352, 45 Pac. 680). But it is an interest or estate in real property, and is so expressly declared in section 761, Civ. Code. "An action may be brought by any person against another who claims an estate or interest in real property, adverse to him, for the purpose of determining such adverse claim." Section 738, Code Civ. Proc. It is settled by the decisions that the owner of any estate or interest in land of which the law takes cognizance, is entitled under this statute to have any claim adverse to his interest, such as it is, determined. Pierce v. Felter, 53 Cal. 18; Stoddart v. Burge, 53 Cal. 394, 399; Pennie v. Hildreth, 81 Cal. 127, 130, 22 Pac. 398; Stephenson v. Deuel, 125 Cal. 663, 58 Pac. 258; McKinnie v. Shaffer, 74 Cal. 614, 616, 16 Pac. 509. In the case last cited the court said: "Whatever interest the plaintiff has may be quieted. If a title in fee, such interest may be quieted. If a less interest, the less interest may be likewise quieted." Nothing said in Fudickar v. East Riverside, etc., Co., supra, can be taken as repudiating this well-settled doctrine. In Pierce v. Felter, supra, the right of the owner of a leasehold interest to maintain such an action against parties who claimed some interest in the land, which claim was adverse to his rights as owner of the leasehold, was affirmed. There is no distinction material to the question we are discussing between such an action and the one before us. The defendants here claim to be the owners of the property free of any estate for years in plaintiff, and this claim is certainly adverse to plaintiff's alleged interest in the property. We are further of the opinion that the allegations as to hostile claims by defendants are sufficient as against demurrer. There was no error in overruling the demurrer.

2. Assuming for the moment that all the findings of fact made by the trial court are sufficiently sustained by the evidence, the judgment was nevertheless too broad in its terms, and is not entirely supported by the findings. As we have seen, it is decreed therein that plaintiff is the owner of the leasehold interest described, subject only to the payment of the stipulated rent and the covenant for increased taxes, and free from all other conditions, covenants, agreements and obligations imposed by the instruments constituting the lease. There were obligations imposed on the lessee by these instruments in addition to the obligation not to assign and those specified in the judgment, such as the provision that no business other

than the banking business or some class of business for the carrying on of which a sublease had already been made, should be conducted on the demised premises without the consent in writing of the lessor. The only supposable theory upon which a judgment freeing the lessee from this and other obligations imposed by the lease could rest is the one suggested by plaintiff, viz., that the consent of or waiver by the lessor of the condition against assignment, not only dispensed with and put an end to that condition forever, leaving the assignee free to again assign without consent (Taylor on Landlord and Tenant, § 501; Chipman v. Emeric, 5 Cal. 49, 63 Am. Dec. 80; Randol v. Tatum, 98 Cal. 390, 33 Pac. 433; Murray v. Harway, 56 N. Y. 337, 343), but that it also freed the estate from such other covenants, and especially from those relating to the carrying on of other classes of business and subletting for such other classes of business. This theory cannot be sustained. The case cited by plaintiff to the effect that the covenant against subletting does not attach to the assignee of the lessee (Dougherty v. Mathews, 35 Mo. 520, 88 Am. Dec. 126) does not support its contention, but is simply to the effect that the condition against assignment is not effectual against one to whom the lease has been assigned with the lessor's consent. The assignee of a leasehold estate takes it subject to all the obligations imposed by the lease, except that, where there is a condition against assignment without consent (which is necessarily single in its nature), such condition is wholly discharged by the consent or waiver. Where the conditions are continuing in their nature, such as covenants for the payment of rent at stated intervals, or for the carrying on of only certain kinds of business in the demised premises, or against subletting without written consent, the consent to or waiver of a breach does not preclude the right of the lessor to proceed against the lessee for subsequent breaches. Jones v. Durrer, 96 Cal. 95, 30 Pac. 1027; Seaver v. Colburn, 10 Cush. (Mass.) 324; Taylor on Landlord & Tenant, § 501. No good reason can be assigned for a rule that the consent to or waiver of the breach of some particular condition or covenant in a lease is a consent to or waiver of other independent stipulations, and we find no such rule anywhere declared. It follows that, assuming the findings to be sustained by the evidence, the judgment should have gone no further than to decree the plaintiff to be the owner of the leasehold interest, subject to all the conditions, covenants, obligations, and stipulations contained in the lease, save and except the single condition against assignment. We have said this much as to the form of judgment only for the guidance of the parties in further proceedings in the case, as the judgment must be reversed for another reason.

3. As we have seen, the lease contained a covenant against assignment without the consent of lessor, with a provision for reentry in the event of a breach thereof. These provisions were in no way rescinded or affected by the provisions of the supplemental agreements. The provision in the latter agreements that "this agreement shall inure to and * * * bind the heirs, executors, administrators, successors and assigns of the several parties" were not effectual to make any change in this regard. Consent of the lessor was still essential to any assignment which would be binding upon the lessor, and there could not be any "assign" of the lessee in whose favor the provision would operate, except one who had become such by consent or waiver of the lessor. Assuming that there was an assignment of the lease by the Union Bank of Savings to plaintiff, as was alleged in the answer and found by the court, we are satisfied that the findings to the effect that such assignment was with the consent of the defendants, and also the findings to the effect that said defendants had notice of such assignment and by their conduct waived all right to object thereto, are without sufficient support in the evidence.

The evidence is practically without conflict as to all material facts. On or about January 10, 1906, the Union Bank of Savings and plaintiff merged and consolidated their interests, since which time the business of both corporations has been conducted as one institution under the name of plaintiff and in the demised premises. The directors of the Union Bank of Savings were included in the enlarged list of directors of plaintiff, and Mr. Bartlett, the president of the Union Bank of Savings, has at all times since the consolidation been the president of plaintiff corporation. A general assignment of all the property of the Union Bank of Savings was given to plaintiff, which assignment was never recorded, and as to which no notice appears to have been given to anybody. No specific assignment of the lease was ever executed. The Union Bank of Savings apparently still maintains its corporate organization, and also maintains its office in the demised premises. No consent that the lease should be assigned was ever given or requested. No notice that there had been any assignment of the lease was ever given to either of the defendants by either the Union Bank of Savings or by plaintiff. To the contrary, both these corporations appear to have studiously endeavored to conceal the fact, if there was one. The written notice of the exercise of option given on April 20, 1907, over one year after the change, was primarily given by the Union Bank of Savings, as lessee, by its president and secretary, and was joined in by plaintiff with the statement that it so joined because "said lessee and the German-American Savings Bank, a California corporation, did on or about the 10th day of January, 1906, merge and consolidate their interests, since which time the business of both said corporations has been and now is being conducted as one institution, under the name of the German-American Savings Bank, and, for the purposes of so conducting the said business, is now and has been since the date of said consolidation occupying the premises described in said lease." There was no intimation of an assignment of the lease in this notice, or of the succession by plaintiff to any rights therein. Even in its complaint in this action filed September 7, 1907, plaintiff carefully refrained from specifically alleging any assignment, alleging simply that it "is the successor in interest of the Union Savings Bank." The notices to the public were all simply to the effect that there had been a consolidation, and that the business thereafter would be conducted under the name of plaintiff. There might be a consolidation of the banking business of these two corporations and occupancy of the demised premises by plaintiff without any assignment of the lease. Under the terms of the lease, the Union Bank of Savings had the right, without any consent of the lessor, to permit the occupancy of the demised premises for banking purposes by plaintiff. Everything that was shown to have come to the knowledge of defendants was entirely consistent with the theory that the occupancy of the demised premises by plaintiff was an occupancy under a mere license or sublease, and not under an assignment, and there is in the evidence no basis for any inference that either of the defendants had knowledge that there had been an assignment of the lease. The fact that from July 1, 1906, the monthly receipts for rent, at the request of some one in the office of the two corporations, were made in the name of the plaintiff, shows no such knowledge. This indicated to defendants no more than some arrangement between the corporations under which the plaintiff was to pay the rent, and was not notice of an assignment of the lease. Nor was the mere claim of this plaintiff asserted in its complaint in this action filed September 7, 1907, that it "is the successor in interest of the Union Bank of Savings" notice of the fact of any assignment.

The only ground urged for a conclusion that defendants have consented to an assignment of the lease, or waived a breach of the condition against assignment, is the fact that they have accepted rents accruing since the assignment. It is admitted that, to have this effect, the acceptance of the rent must have been with knowledge of the assignment. It is not enough that a party might upon inquiry have discovered the fact. There must be actual knowledge of the fact. And, unless the evidence is sufficient to warrant the inference that there was such knowledge, there is no consent or waiver. As was said in Murray v. Heinze, 17 Mont. 353, 42 Pac. 1057, 43 Pac. 714, a waiver is the relinquishment of a known right. The rule that such knowledge is essential to make the acceptance of rent a waiver is elementary, and has been applied by this court. See Taylor, Landlord & Tenant, § 497; Jones on Landlord & Tenant, § 497; Wood's Landlord & Tenant, § 320; Silva v. Campbell, 84 Cal. 420, 24 Pac. 316; McGlynn v. Moore, 25 Cal. 384. As there is nothing to show that either of the defendants had any knowledge of any assignment of the lease at the time of the acceptance of rents, there could be no consent or waiver by reason of such acceptance.

We do not desire to be understood as intimating any opinion on the question whether the evidence is such as to compel the conclusion that there has been any assignment of the lease under the condition against assignment contained therein. For all the purposes of this appeal, we have assumed, as we are compelled to do in view of the unassailed finding of the court to that effect based upon an allegation of appellants' answer, that there was such an assignment.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed.

We concur: SHAW, J.; SLOSS, J.

On Rehearing.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing. There was in my opinion abundant evidence to sustain the findings that the defendants consented to the assignment of the lease, not in express terms, but by a course of conduct which warrants the inference of consent.

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155 Cal. 723

In re HEBERLE'S ESTATE. (L. A. 2,368.)

(Supreme Court of California. June 23, 1909.)

1. Perpetuities (§ 6*)—Suspension of Power of Alienation.

A will directed that the trustees therein appointed should, within a reasonable time, convert the remainder of the estate into cash and pay the same to the testator's sister, and, in case of her death, that the same should be divided equally among all her children, with one exception, share and share alike. A subsequent clause directed the trustees to convert the residue into cash within one year after the property was distributed to them, but if loss would ensue by conversion of the property into cash by that time, they should take such further time as may be reasonable, and provided that the trustees should administer the trust under the supervision of the court having jurisdiction of the administration of the estate. The death of the sister occurred prior to that of the testator. *Held*, that the disposition of the residue would not violate Civ. Code, § 715, suspending the power of alienation beyond the continuance of the lives of persons in being.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 4–56; Dec. Dig. § 6.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. Trusts (§ 195*)—Execution of Trust—Sale of Property.

Where trustees appointed by will are directed to sell certain property, it is their duty to take sufficient time to avoid a sacrifice of the property in selling it, even without such a direction in the will, but the discretion of the trustees is not absolute, and the power of the court can be invoked at any time to prevent unreasonable delay.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 250; Dec. Dig. § 195.*]

3. Wills (§ 555*)—Death of Legatee Before Testator—Lapse of Legacy.

Under Civ. Code, § 1343, declaring that the disposition of property in a will shall not fail in case of the death of the legatee before that of the testator, where the will shows an intention to substitute some other person in place of the original legatee, a legacy to testator's sister, with the provision that, in case of her death prior to receiving said legacy, it shall be divided equally among certain of her children, does not lapse on the death of the sister occurring prior to that of the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1199–1202; Dec. Dig. § 555.*]

Department 1. Appeal from Superior Court, Los Angeles County; James C. Rivers, Judge.

In the matter of the estate of George Heberle, deceased, Jacob Heberle appeals from a decree of distribution. Affirmed.

See, also, 153 Cal. 275, 95 Pac. 41.

Milton K. Young and F. R. Willis, for appellant. Lee, Scott & Chase, Murphy & Schmidt, Edward F. Wehrle, F. L. Valentine, William J. Danford, and W. G. Weyse, for respondents.

SHAW, J. This is an appeal from a decree of distribution. The deceased left surviving, as his heirs at law, the appellant, Jacob Heberle, who was his brother, the children of a deceased brother, Martin Heberle, and the children of a deceased sister, Anna Maria Heberle Mootz. He died testate, and the controversy causing this appeal arises over the construction of his will.

The will gave all of the estate to two trustees, with specific directions as to its disposition. After providing for the investment of $12,000, and the payment of the income thereof to Jacob Heberle, or to his use, during his life, and for its disposition after his death, and specifically disposing of a certain lot of land, the following clause appears: "Eighthly—That my said trustees shall, within a reasonable time after the distribution of said estate to them, convert all of the residue and remainder of my said estate into cash and pay the same to my said sister, Anna Maria Heberle Mootz, and in case of her death, prior to her receiving said residue, then that the same shall be divided equally among all of her children, except the said Eva Dickhof, share and share alike." A subsequent clause directed the trustees to convert the residue into cash "if they can do so within one year after the said property is distributed to them, * * * but in case of a low market or where loss might ensue by the conversion of said property into cash, then they may take such further time as may be reasonable—it being my intent and purpose that my said estate shall be made to bring a reasonable amount for distribution to my said sister or her children." It further provided that the trustees should administer the trust under the supervision of the court having jurisdiction of the administration of the estate. The estate was distributed to the trustees to be disposed of by them as provided in the will. Anna Maria Heberle Mootz died prior to the death of the testator. The trustees were directed to pay over the residue, when converted into money, to her children and grandchildren, except Eva Dickhof, the word "children" being construed to include grandchildren. The appellant claims that the trust, as to this residue, is void, and consequently that said property should have been distributed to the heirs at law.

It is urged that the disposition of the residue violates section 715 of the Civil Code forbidding the suspension of the power of alienation beyond the continuance of the lives of persons in being. Under no circumstances possible under the provisions of this will could there have been an unlawful suspension of the power of alienation. If Mrs. Mootz had survived the testator, and the will had been construed to give her a contingent estate in the residue, and to suspend her power to dispose of it until it became vested by payment to her, the deprivation would extend only until she had received it, or until by her death before that event the right had vested absolutely in the children designated as her successors, who would then immediately have power to alienate the same. In either case the period of suspension would not have reached beyond the termination of her life. If that interpretation were given to the will, there would be uncertainty, in case of her survival, as to the ultimate ownership of the residue, until the payment to her, or her death before payment, had made the ownership certain, but such uncertainty would continue only until one of these events occurred, which could not be later than her death. A suspension of the power of alienation during the life of a person in being at the testator's death, and no longer, is not unlawful.

The fact is that she died before the testator and, as she never became entitled to the residue, the right to it vested in the designated children immediately upon the death of the testator, with full power in them to make any disposition thereof they chose. Neither the requirement that it should be converted into money, nor the direction to the trustees, in case of a low market, to take a reasonable time to sell the property, nor the delays necessary for administration and conversion operated to suspend the power of the children to dispose of their right to the residue. Estate of Campbell, 149 Cal. 717, 87 Pac. 573; Estate of Pforr, 144 Cal. 121, 77 Pac. 825; Toland v. Toland, 123 Cal. 143, 55 Pac. 681. It would have been the duty of the trustees, without such direction, to take the reasonable time that might be required to avoid a sacrifice of the property in selling it. The power of the court could be invoked at any time to prevent an unreasonable delay. The discretion of the trustees was not absolute.

There is no merit in the claim that the legacy lapsed by reason of the death of Mrs. Mootz before the testator died. The case falls within the provisions of section 1343 of the Civil Code, declaring that the disposition, in such a case, does not fail when the will shows an intention to substitute some other person in place of the original legatee who dies in the testator's lifetime.

The decree of distribution is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

(155 Cal. 612)

BOIN v. SPRECKELS SUGAR CO. (S. F. 4,977.)

(Supreme Court of California. June 11, 1909. Rehearing Denied July 10, 1909.)

1. NEW TRIAL (§ 157*)—PROCEEDINGS TO PROCURE—STATEMENT OF GROUNDS—BILL OF EXCEPTIONS.

Where a bill of exceptions contained a request for a new trial and a copy of the notice of intention to move for a new trial specifying in full the grounds upon which the motion was based, and stating that the motion would be founded in part on the bill which had been settled by the court and was on file, the court would not be justified in refusing to determine the motion upon its merits because no oral reference was made to the bill, and no grounds orally pointed out.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 157.*]

2. APPEAL AND ERROR (§ 536*)—REVIEW—NEW TRIAL.

Under Code Civ. Proc. § 661, providing that the bill of exceptions used on the hearing of a motion for a new trial shall constitute a part of the record on appeal, a bill of exceptions settled and employed as the record of the proceedings upon which the motion was grounded may be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2402; Dec. Dig. § 536.*]

3. APPEAL AND ERROR (§ 933*)—PRESUMPTIONS—ORDER DENYING NEW TRIAL.

Where a motion for a new trial was overruled, it will be presumed on appeal that the order was made upon its merits, though made upon expressed grounds, which, if correct, might have justified a dismissal rather than the overruling of the motion, since the order simply indicates the court's action, and not the showing upon which such action was based, and statements as to the showing made constitute no part of the order.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3772-3776; Dec. Dig. § 933.*]

4. MASTER AND SERVANT (§ 189*)—VICE PRINCIPAL.

The manager of a department of the master's business who prepared the place in which a servant was to work, and gave him the implements with which to accomplish his task, was a vice principal of the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 427-448; Dec. Dig. § 189.*]

5. MASTER AND SERVANT (§ 288*)—ASSUMPTION OF RISK—QUESTION FOR JURY.

A servant in a beet sugar factory was taken from his usual work in a pressroom, and, without any warning of danger involved, was temporarily put to work in another room, cleaning tubes in a mixing tank containing a caustic solution, which work he had never before done, and was injured by the solution. It appeared that he did not know of the caustic character of the solution, while the master did, and did not know that material which he had been using in the pressroom came from the tank. *Held*, that he could not be presumed to know the manner in which the tank was operated nor the purpose for which it was used, and did not as a matter of law assume the risks incident to the temporary employment, but whether he had knowledge of the special danger of working in the tank was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.*]

6. MASTER AND SERVANT (§ 153*)—DUTY TO WARN SERVANT.

It was the master's duty to warn the servant of the dangers attending the work in the tank, and its failure to do so constituted negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 314-317; Dec. Dig. § 153.*]

7. MASTER AND SERVANT (§ 158*)—FAILURE TO WARN SERVANT OF DANGERS—NEGLIGENCE.

The master having negligently failed to warn the servant of the danger attending his work because of the caustic properties of the solution, its liability would not be affected by the particular manner in which the solution caused the injury, provided the servant was exercising due care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 304; Dec. Dig. § 158.*]

8. MASTER AND SERVANT (§ 262*)—INJURY TO SERVANT—ACTIONS—DEFENSES—PLEADING.

In an action by a servant for injuries, a defense that the injuries resulted from ordinary risks of employment must be specially pleaded.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 855-859; Dec. Dig. § 262.*]

9. MASTER AND SERVANT (§ 293*)—INJURIES TO SERVANT—INSTRUCTIONS.

In an injury action by a servant, where the uncontradicted evidence tended to show that the employment was of a temporary character, a charge that if plaintiff was injured in defendant's employ and in the discharge of his duties, while exercising due care, by the caustic character of a substance upon which he was required by defendant to work in the course of his employment, and if the character of the substance was known to defendant, or could have been known by the exercise of due care, and defendant failed to caution plaintiff of such qualities, and they were not known to plaintiff, and defendant's neglect to warn was the proximate cause of the injury plaintiff should recover, was not erroneous because omitting the qualification that the danger from the caustic properties of the substance was not included in the ordinary risks of the employment.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 293.*]

10. TRIAL (§ 296*) — INSTRUCTIONS — ERROR CURED BY OTHER INSTRUCTIONS.

Even if the instruction was erroneous in that respect, the error was cured by later charges giving the rules with reference to the assumption of usual risks of one's ordinary employment.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705–718; Dec. Dig. § 296.*]

11. MASTER AND SERVANT (§ 293*)—INJURIES TO SERVANT—INSTRUCTIONS.

The work being temporary, perilous, and outside of the ordinary occupation of plaintiff, so that it was defendant's duty to warn him, whether or not his ignorance was known to defendant, and the undisputed facts showing that plaintiff had no opportunity of learning of the character of the solution causing his injury before he went to work with it, the charge was not erroneous because omitting the element that defendant knew, or in the exercise of ordinary care should have known, of plaintiff's alleged ignorance, especially where subsequent charges instructed fully on the subject.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 293.*]

Department 2. Appeal from Superior Court, Monterey County; B. V. Sargent, Judge.

Personal injury action by Manuel Boin against the Spreckels Sugar Company. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Dougherty & Lacey, for appellant. F. P. Feliz and Thos. Renison, for respondent.

MELVIN, J. Plaintiff had been employed in defendant's beet sugar factory in Monterey county. He was assigned first to work in the pressroom where his duty was to shake out of the press some sort of material after it was formed into cakes or slabs. He testified that he did not know what the cakes contained, and that he did not handle them. No one told him, he said, that there was any danger in handling the substance which came from the press, and he testified that he knew absolutely nothing about the caustic properties of the material composing the cakes. After working at the press for about two weeks, plaintiff was ordered by Mr. Hennings, foreman of one of defendant's departments, to clear out the tubes of a mixing tank which had been used to mix syrup, water, and lime before the product of such mixture was pressed into cakes or slabs. He was not informed by Mr. Hennings, or by any of the defendant's agents, of any dangers incident to his new employment, and he did not know nor was he informed that he was working in a tank in which there was a caustic solution containing lime. He was annoyed while working in the tank by the sifting of lime from a bolter above his head, and was advised by Mr. Hennings to wear a handkerchief around his neck and cloths around his wrists. He was furnished with goggles and instructed to wear them. His particular work consisted in boring through the hardened substance which had accumulated within the tubes in the mixing tank, and thus cleaning the tubes so that they might be used again for their intended part in the process of mixing. There was some liquid in the tubes and at the bottom of the tank. After the plaintiff had been employed at this task for two or three days, and when he was about to pull the auger out of one of the tubes, after boring through the hardened substance, some of the liquid from the tube, impelled either by an explosion or by some other force, was blown or splashed into one of his eyes. As a result he lost the sight of the injured eye. Judgment for $5,000 damages was given in behalf of plaintiff. From this, and from the order denying defendant's motion for a new trial, defendant appeals.

Appellant's first contention relates to the denial of its motion for new trial. When that motion came on for hearing in the superior court, all of the parties being present, the said motion was submitted without argument, and was taken under advisement by the court. Nearly a month later the court denied the motion, reciting in the order of denial that "no oral statement whatsoever was made to the court on the grounds or particular points upon which said motion should be or was based, and that the court's attention was not called to any instrument or document on file in said case as containing grounds upon which to base said motion, and that the only action taken by the attorneys for the defendant in said matter upon the hearing of said motion being to state to the court that the same was submitted without argument." The reasons expressed in the above quotation were given by the court as the only bases for the denial of the motion. Appellant's bill of exceptions contained a copy of the notice of intention to move for a new trial, and there was also a request for a new trial contained in the bill of exceptions itself. Under these circumstances, was the court justified in refusing to consider and determine the motion for a new trial upon its merits? An examination of the bill reveals the fact that it contains a very full statement and specification of the asserted insufficiency of the evidence to justify the verdict, and that it also directs the court's special attention to the alleged excessive award of damages. The grounds for the motion for new trial sufficiently appear in the bill of exceptions from the specifications therein contained to enable the court intelligently to pass upon the motion. It is true that no oral reference was made to the bill of exceptions, but it was on file and had been settled by the court and contained a copy of the notice of motion specifying in full the grounds upon which the motion was based and the statement that the motion would be founded, in part, on the settled bill. Section 661 of the Code of Civil Procedure provides that the bill of exceptions "used on the hearing" shall constitute a part of the record on appeal, and it has been held in Nevada that "whenever a statement is prepared and settled it is 'used' within the meaning of the word in the statute." The statute of Nevada upon this subject is practically the same as our section 661 of the Code of Civil Procedure, and, in construing the section of the Nevada law, the Supreme Court of that state says: "When it speaks of the statement being used, it means employed as the record of the proceedings upon which the motion is grounded." State v. Central Pac. Ry. Co., 17 Nev. 259, 30 Pac. 889. In that case the failure of the moving party to appear at the hearing was held not to be an abandonment of the motion for a new trial, and a similar rule was announced in Carder v. Baxter, 28 Cal. 99, and in Chabot v. Tucker, 39 Cal. 434. There is nothing in Williams v. Hawley, 144 Cal. 100, 77 Pac. 762, at variance with the views here expressed. Indeed, that case supports them. While it is true that an oral motion was made in that case, said motion merely directed the court's attention to the bill of exceptions, the notice of motion, and other papers; and, while the notice of motion, not being a part of the record, could not be considered by this court in determining the grounds of the motion which was made in the court below, those grounds did appear with particularity in the bill of exceptions which was a part of the record, and this court was therefore fully apprised of all the grounds stated in the notice of intention. If, in that case, the motion had been submitted without argument, we see no reason why the grounds of appellant's motion, appearing fully in the record as they did, could not have been as fully considered by the trial court and reviewed by the Supreme Court as they were in view of the purely formal oral statement made by appellant's counsel upon submission of the motion without argument or presentation of points of law for the assistance of the court. While in this case the order denying the motion was made upon expressed grounds which, if correct, would have justified perhaps the dismissal rather than the overruling of the motion for a new trial, the fact remains that the motion was denied, and we must assume that the order was made upon its merits. "The order simply indicates the action of the court and not the showing upon which such action was based. Therefore statements or recitals in the order as to the showing made constitute no part of the order." Power v. Fairbanks, 146 Cal. 614, 80 Pac. 1076. The record being before us, we are in a position to pass upon the matters therein presented, and shall do so.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Respondent's attorneys have presented an elaborate argument, in which this court is urged to omit from consideration the question of the alleged insufficiency of the evidence upon the ground that the appeal from the judgment was not taken in time to permit such review. The notice of appeal from the judgment was filed 57 days after the rendition of the judgment and 50 days after section 939 (St. 1907, p. 60, c. 42), of the Code of Civil Procedure had become effective as amended by substituting the word "entry" for the word "rendition." There is no saving clause in the amendment of 1907. Respondent's counsel contend that the former statute was repealed, and at the time of the filing of the notice of appeal there was no statute upon the subject applicable to this case; in other words, that appellant could only take advantage of the old section 939, Code Civ. Proc., by perfecting its appeal between the time of the rendition of judgment and the date upon which the new section 939, Code Civ. Proc., went into effect. It is conceded that this theory is in conflict with that announced in Pignaz v. Burnett, 119 Cal. 157, 51 Pac. 48, and Melde v. Reynolds, 120 Cal. 234, 52 Pac. 491, but respondent regards those cases as opposed to the later decisions. In view of the conclusion we have reached, however, by following here the doctrine of those cases, it becomes unnecessary to pursue the matter further.

There is evidence which justified the conclusion that Mr. Hennings was a vice principal of the defendant corporation. Mr. Hennings had charge of that part of the factory known as the "Steffens Plant" or department. He gave orders to Mr. Clathworthy, plaintiff's immediate superior, and directed the latter to furnish men for work in the tanks. The manager of a department is a vice principal. Mr. Hennings prepared the place in which plaintiff was to work and gave him the implements with which to accomplish his task. In this he was clearly a vice principal representing the corporate defendant. Nixon v. Selby Smelting Co., 102 Cal. 463, 36 Pac. 803. The work being performed by plaintiff at the time of his injury was in its very nature of a temporary character, and was not done by him in the course of his usual and ordinary employment. He was taken from his place at the press by Mr. Hennings, and, as he testified, put at work in the tank without any warning with reference to the dangers involved. Defendant knew of the highly caustic character of the solution in the tank. Of this plaintiff testified he was ignorant, and he did not even know, he said, that the cakes handled by him at the press were composed of material taken from the mixing tank. The tank was in a different room from that in which plaintiff's usual work was done. He could not, therefore, be presumed to know the manner in which the mixing tank was operated nor the purpose for which it was used. He had never been in the tank until Mr. Hennings sent him there, as the tubes had never been clogged before. Under these circumstances, we cannot say that as matter of law he assumed the risks incident to his temporary occupation. Whether he did have knowledge of such special danger or not was a question of fact for the jury. Daubert v. Western Meat Co., 135 Cal. 144, 67 Pac. 133. It was clearly the duty of defendant to warn him of the dangers attending the work in the tank, and the failure to give him such admonition constituted negligence upon the part of the appellant.

Appellant invokes the rule announced in Bone v. Ophir Silver Min. Co., 149 Cal. 294, 86 Pac. 685, that, while a master must inform the servant of latent and extraneous dangers, this applies only to those perils of which the employer has, or by the exercise of ordinary care should have, knowledge. It is urged upon us with much force that, there never having been an explosion in the tank prior to the time of plaintiff's injury, defendant could not be charged with the duty of warning any one against such an explosion. This presupposes an explosion as the means whereby the mordant liquid was projected into Boin's eye, but there is a conflict of evidence upon this point. It really makes no difference what means operated to propel the solution into plaintiff's eye (provided of course, plaintiff was exercising due care and caution), if the defendant was negligent in failing to instruct its employé with reference to the caustic property of the liquid. It may be that the small quantity of lime sifting from the bolter above plaintiff's head became mixed with the liquid in one of the tubes and caused an explosion, or the liquid may have splashed because of the insertion of the auger into the tube or by reason of suction caused by the withdrawal of the hardened substance at the end of the tube. There are several ways in which the fluid may have been set in motion, but the negligence of defendant consisted in its failure to give such warning as would have permitted Boin to exercise the right of consenting or refusing to work in a tank containing a dangerous chemical compound. See Baxter v. Roberts, 44 Cal. 187, 13 Am. Rep. 160.

Certain instructions are attacked by appellant. Instruction numbered 13 is as follows: "If you believe from the preponderance of the evidence in this case that the sight of one of plaintiff's eyes was injured or destroyed on the 8th of October, 1905, while plaintiff was in the employ of the defendant and in the discharge of his duties under such employment, and while in the exercise of due care and caution on his part, and that the same was so injured or destroyed by any substance upon which plaintiff was required by the defendant, or those acting under its authority, to perform labor in the course of his said employment, and it further appears to your satisfaction that such injuries were caused by the caustic or corrosive qualities of such substance, if it had such qualities, and that such qualities were known to the defendant, or could have become known to it by the use and exercise of ordinary care, and that said defendant failed and neglected to warn or caution plaintiff of such qualities, and that the same were not known to the plaintiff or obvious to him, and that the neglect of the defendant to warn or caution plaintiff thereof was the proximate cause of such injuries, then I instruct you that you must render a verdict for the plaintiff."

Appellant's first criticism of this instruction calls attention to the omission of all reference to the danger of explosion. This has been answered, we think, by the discussion in a preceding paragraph. Supposed error in the instruction is next predicated upon the omission of the qualification that the danger from the caustic properties of the substance in the tank was not included in the ordinary risks of the employment. There was no defense based upon the claim that the injuries were due to ordinary risks of employment. Such defense should be specially pleaded. 13 Ency. Pl. & Pr. 914. Besides, all of the evidence on the subject tended to show that the employment was of a temporary character, and there was no contradiction of this point. If such qualification had been necessary, however, the jury was given in later instructions the rules with reference to the assumption of usual risks of one's ordinary employment.

The next criticism of this instruction is that it omits the element that defendant knew, or in the exercise of reasonable care should have known, of the plaintiff's alleged ignorance. Such proviso was unnecessary for several reasons: First, the work being temporary, perilous, and outside of the ordinary occupation of Boin, it was defendant's duty to warn him, whether or not his ignorance was known to defendant; second, the undisputed facts show that plaintiff had no opportunity of learning of the contents of the tank before entering it; and, third, conceding that the omission of this qualification was erroneous, the jurors were subsequently instructed fully on this subject. There are other criticisms of this instruction, but they are either without merit or are met by subsequent declarations, in the charge, of correct rules of law for the guidance of the jury.

There are numerous other specifications of alleged error in the charge to the jury and the court's refusal to give certain proposed instructions. We have carefully examined all these matters, and do not find any substantial error which would justify a reversal of this case.

It follows that the judgment and order should be sustained; and it is so ordered.

We concur: HENSHAW, J.; LORIGAN, J.

155 Cal. 626

In re PATTERSON'S ESTATE.

SMITH v. QUIGLEY et al. (S. F. 5,101.)

(Supreme Court of California. June 15, 1909.
Rehearing Denied July 14, 1909.)

1. Wills (§ 233*)—Destroyed Will—Right to Probate.

Any substantial provision of a destroyed will, complete in itself and independent of other provisions, may, when proved, be admitted to probate, though the other provisions cannot be proved, if the validity and operation of the part proved are unaffected by those parts which cannot be proved.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 564; Dec. Dig. § 233.*]

2. Wills (§ 233*)—Destroyed Wills—Right to Probate—Statutory Provisions.

Code Civ. Proc. § 1339, declaring that no will shall be proved as a destroyed will, unless its provisions are clearly proved by at least two credible witnesses, does not change the rule that any substantial provision of a lost will, complete in itself, may, when proved, be admitted to probate, though the other provisions of the will cannot be proved, if unaffected thereby.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 564; Dec. Dig. § 233.*]

3. Wills (§ 302*)—Destroyed Will—Right to Probate.

On an application to probate a will as a destroyed will, the question whether money was given as part of the residue, as testified by one attesting witness, and as such charged by statute with the debts and specific legacies, or whether it was given as a specific legacy, as testified by the other attesting witness, charged by the will with those burdens, while more a matter of form than substance, is nevertheless a question which materially affects the disposition of the personal estate, and the disposition of the personal estate cannot be held to be distinctly proved by two witnesses, as required by Code Civ. Proc. § 1339, declaring that no will shall be proved as a destroyed will unless its provisions are distinctly proved by at least two witnesses.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 709; Dec. Dig. § 302.*]

4. Wills (§ 170*)—Revocation.

Destruction, without intention to revoke, or by accident, does not operate to revoke a will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 441; Dec. Dig. § 170.*]

5. Constitutional Law (§ 191*)—Retrospective Laws—Rules of Evidence.

The Legislature has full power to alter the rules of evidence and the degree of proof, and make such rules applicable to pending cases.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 191.*]

6. Statutes (§ 236*)—Construction.

Legislation, intended to alleviate the effect of a public calamity, and preserve rights that would otherwise be lost for want of evidence, should be liberally construed to promote the purpose for which designed.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 317, 324, 325; Dec. Dig. § 236.*]

7. Wills (§ 232*)—Destroyed Wills—Right to Probate.

St. 1907, p. 122, c. 100, amending Code Civ. Proc. § 1339, declaring that no will shall be proved as a destroyed will unless in existence at testator's death or fraudulently destroyed in his lifetime, by also permitting a will to be proved as a destroyed will where destroyed by public calamity in testator's lifetime, without his knowledge, applies to the will of a person who died before its enactment.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 232.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Petition by Fannie Smith for the probate of the will of Catherine Patterson, deceased, as a destroyed will. Opposition was made by Ella Quigley, administratrix, theretofore appointed, and J. C. O'Hare, and from an order refusing probate Fannie Smith appeals. Reversed.

Andrew Thorne and Bourdette & Bacon, for appellant. Heller, Powers & Ehrman, R. H. Lloyd, and Percy E. Towne, for respondents.

SHAW, J. This is an appeal from an order refusing to admit a will to probate as a destroyed will. Catherine Patterson executed a will in December, 1904. It was prepared for her by her attorney, George A. Connolly, and was duly attested by him and by one Mary McFaul. It was then given by the testatrix into the custody of Connolly for safe-keeping, and was by him kept in his office in the Parrott building in San Francisco until April 18, 1906, when it was destroyed by fire in the great conflagration in that city following the earthquake of that date. The testatrix died on December 27, 1906. She had not been informed that the will was destroyed, and, so far as appears, she died in ignorance of that fact. Letters of administration upon her estate were issued to Ella Quigley, a respondent herein, on January 24, 1907. On February 5, 1907, Fannie Smith, the appellant, filed a petition for the probate of the alleged will. Opposition was made thereto by said administratrix and also by J. C. O'Hare, a brother of the deceased. Upon the trial the court denied probate upon the ground that its provisions were not proven by two credible witnesses, and that it was not in existence at the time of the death of the testatrix, and had not been fraudulently destroyed in her lifetime. The questions presented are whether or not these two grounds are sustained by the evidence and by the law applicable to the case.

The estate of the testatrix consisted of three parcels of real estate, some $1,500 in money, deposited in bank, and some wearing apparel and household goods of the probable value of $300. The evidence shows that the entire estate was worth only $6,000. The deceased was the widow of James Patterson, and the property was derived from him as the widow's share of his community property. The testatrix had no children and left no family. Patterson, her deceased husband, had three children, who had been brought up by the testatrix, and whom she usually spoke of as her children, namely, Frank Patterson, George Patterson, and the appellant, Catherine Frances Smith, formerly Patterson, usually known as Fannie Smith.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

1. The attorney who drew and attested the will testified that it devised the real estate in equal parts, one-third to Fanny Smith, one-third to Frank Patterson and one-third to the children of George Patterson; that it gave a legacy of $250 to Joseph P. McQuaid; that it gave all the residue, without describing it, to Bridget Quigley, sister of the testatrix; and that it contained a general provision that all her debts should be paid. Mary McFaul, the other attesting witness, testified that she was present while the will was being written in the presence of the testatrix, and that she heard it read by the attorney to the testatrix before its execution. Her account of the disposition of the real property is the same as that of Connolly. As to the personal property, she testified that the will declared that the testatrix possessed $1,500 on deposit in bank; that it gave a legacy of $250 to McQuaid, and provided that after the payment of debts and expenses the residue of the $1,500 should go to Bridget Quigley, and that nothing was said in the will about any other personal property. The respondents contend that Mary McFaul testified, in effect, that the entire $1,500 constituted a specific bequest to Bridget Quigley, subject to reduction only for its proportion of the debts and expenses of administration. We do not think it can be fairly construed as having that effect. Making due allowance for her ignorance of technical terms and forms, her testimony on this point, in effect, was that the McQuaid legacy and also the debts and expenses were to be paid out of the money in bank, the legacy to have preference therein.

When the provisions of law and the character of the estate are considered, the differences in the two accounts are substantial and important only with regard to the respective rights and interests of Bridget Quigley as legatee or heir and her brother, J. C. O'Hare, as an heir. For the payment of debts and general money legacies resort must be had, first, to property expressly appropriated by the will for that purpose; second, to property not disposed of by the will; and, third, to property devised or bequeathed as a residue. Civ. Code. §§ 1359, 1360. Substantially the same rule applies to expenses of administration. If not otherwise provided for, specific devises and legacies are ordinarily exempt therefrom, if there is a sufficient residue, or sufficient property undisposed of. Code Civ. Proc. § 1563. According to Connolly's account the burden of paying the legacy to McQuaid, together with the debts and expenses of administration, would, by the provisions of the law, fall upon the property given to Bridget Quigley, being the entire residue, including the clothing and household goods. According to McFaul, the specific legacy of the $1,500 to Bridget Quigley was charged with the payment of the debts, the expenses, and the McQuaid legacy and the clothing and household goods were not disposed of by the will. If her statement was correct, the legacy to Bridget Quigley would have to bear all these charges, and she, as an heir, would divide the household goods and clothing equally with O'Hare. If Connolly was right, her residuary bequest would have to bear the charges as in the other alternative, but she would get all the household goods and clothing. The only difference the respective alternatives would make to her and O'Hare would be that in the former case O'Hare would get nothing, while in the latter he would get one-half of the property not disposed of. The devises of the land to the descendants of James Patterson would remain unaffected in either case. If Mary McFaul was right, and the $1,500 proved insufficient to pay the charges upon it, the property undisposed of would be next resorted to, and the land devised to the Pattersons would be taken only as a last resort. If Connolly gave the true version, the entire residue would be first taken for the debts, expenses, and specific legacies, leaving the land to the devisees.

The contention of the respondent is that the lost or destroyed will cannot be admitted to probate at all, unless the whole of its provisions are clearly and distinctly proven by two credible witnesses; that if the two witnesses differ as to any provision of the will, the probate thereof must be refused, although the other dispositions would be entirely unaffected by the portion of the will concerning which the witnesses do not agree. The great weight of authority is contrary to this proposition. The prevailing rule, and clearly the most reasonable one, is that stated by Lord Chief Justice Cockburn in Sugden v. Lord St. Leonards, 1 Pro. Div. 144, 230. In that case the estate was very large. There were some small legacies, the particulars of which could not be ascertained, and some limitations, "remote, indeed, and unlikely to come into effect, but which still are undoubtedly omitted from the document for which probate" was granted. Justice Cockburn says: "We have the substantial dispositions brought to our minds, and it would not be right to enable any wrongdoer, or any accident which might happen to a will, and which would prevent the court which had to deal with it from being perfect master of its contents, to prevent the will from being carried into effect so far as the dispositions of the testator had become known. I think there could not be a more mischievous consequence; and, although it may be unfortunate that the will cannot be carried into execution to the full extent of the testamentary dispositions of the testator, I think that of the two evils or two inconveniences it is far better, where the court can see its way to the essentially substantial dispositions made in a will, that it should give effect to them, although possibly some of the intentions of the testator may not be carried into effect."

In Dickinson v. Stidolph, 11 Com. B. (N. S.) 357, the court says: "The apparent testamentary intentions of a testator are not to be disappointed merely because she made other dispositions of her property which are unknown by reason of the testamentary paper which contained them not being forthcoming." The will referred to two prior testamentary memoranda, declaring that both should remain in force, and one of them could not be found. In Steele v. Price, 5 B. Mon. (Ky.) 72, several money legacies were not proven, and as to that money there was intestacy. The court said: "As the principal devises, those in which the testator took the deepest interest, and about which he showed the most solicitude, are sufficiently proved, the failure of proof as to the minor provisions of the will should not defeat the whole by preventing the admission to record of that which is proved, and especially as it does not appear that the establishment of the devises as proved, though it would greatly reduce the fund to be distributed, will affect the relative proportions which the heirs will receive." To the same effect see Offutt v. Offutt, 3 B. Mon. (Ky.) 163, 38 Am. Dec. 183; Skeggs v. Horton, 82 Ala. 355, 2 South. 110; Woodward v. Goulstone, 11 L. R. App. Div. 476; Jackson v. Jackson, 4 Mo. 211; Dickey v. Malechi, 6 Mo. 184, 34 Am. Dec. 130; Burge v. Hamilton, 72 Ga. 568. It is also held that where the only part of a lost will that can be proven is a clause revoking a former will, such clause may be given effect for the purpose of showing a revocation. Wallis v. Wallis, 114 Mass. 510; Nelson v. McGiffert, 3 Barb. Ch. (N. Y.) 164, 49 Am. Dec. 170; Stevens v. Hope, 52 Mich. 65, 17 N. W. 698; In re Cunningham, 38 Minn. 171, 36 N. W. 269, 8 Am. St. Rep. 650; Barksdale v. Hopkins, 23 Ga. 332; Laughton v. Atkins, 1 Pick. (Mass.) 548. Underhill sums up the authorities thus: "Any substantial provision of a lost will, which is complete in itself and independent of the others, may, when proved, be admitted to probate, though the other provisions cannot be proved, if the validity and operation of the part which is proved are not affected by those parts which cannot be proved. This view seems to be consistent with reason and common sense." 1 Underhill on Wills, § 278. See, also, Thornton on Lost Wills, § 111.

This rule is, of course, subject to the statutory provisions of the several states. Our statute on the subject declares that no will shall be proven as a lost or destroyed will unless "its provisions are clearly and distinctly proved by at least two credible witnesses." Code Civ. Proc. § 1339. This does not say that a part which is distinctly proven cannot be given effect if some other part not affecting it in any particular, cannot be satisfactorily established. It would be a rare case in which two witnesses, testifying from memory to the contents of a will, would agree about every detail as to the testamentary dispositions. If it were required that their testimony should coincide in every particular, however minute and unimportant, in order to establish a lost will, the possibility of proving such will would be extremely remote, except where a copy in writing had been preserved and could be produced. If that were the case, the practical effect of our statute would be the same as in those states where the production of a written copy or draft of the lost will is required. We cannot agree to the proposition that the Legislature could have intended such inconsequential results from this statute as would ensue if it were given the construction contended for. We think it was not intended to change the rule above stated.

In the present case, upon the proof made, the bulk of the estate is composed of the land given to the Patterson children as devisees. As to this disposition of the real property there is no discrepancy, and the provisions of the will are clearly and distinctly proven. With regard to the personal property, the question whether the money was given as part of the residue, and as such charged by statute with the debts and specific legacies, or whether it was given as a specific legacy, charged by the will with those burdens, while more a matter of form than substance, is nevertheless a question which materially affects the disposition of the personal estate. It is obvious that, in view of the decision of the court below, we must hold that the part of the will disposing of the personal estate was not clearly or distinctly proven by two witnesses, and it must be declared ineffective as to that property, except with respect to the legacy to Joseph P. McQuaid. Proof of that legacy was clear and distinct, and the testimony of the two witnesses regarding it was the same. Under the rule we have stated the proof was sufficient to authorize the admission to probate of that part of the will devising the real estate and bequeathing the $250 to McQuaid. The consequence is that as to the other personal property Catherine Patterson would be declared to have died intestate. The property undisposed of would be first liable for the debts, expenses of administration, and the McQuaid legacy, the residue, if any, going to the brother and sister as the heirs at law, while the real estate will go intact to the devisees, except in the event that some part of it is required for the payment of debts and expenses of administration.

2. The second question arising and presented is whether or not the amended section 1339 of the Code of Civil Procedure applies to this will. At the time of the death of the testatrix that section read as follows: "No will shall be proved as a lost or destroyed will, unless the same is proved to have been in existence at the time of the death of the testator, or is shown to have been fraudulently destroyed in the life-

time of the testator, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses." On March 6, 1907, after the filing of the written grounds of opposition to the probate of the will, and more than a year prior to the conclusion of the trial of the matter, the section was amended so as to read as follows: "No will shall be proved as a lost or destroyed will, unless the same is proved to have been in existence at the time of the death of the testator, or is shown to have been fraudulently or by public calamity destroyed in the lifetime of the testator, without his knowledge, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses." St. 1907, p. 122, c. 100. The will was not in existence when the testatrix died, and it was not fraudulently destroyed in her lifetime. Consequently it could not be proven as a destroyed will, except by virtue of the amendment of 1907 aforesaid. If that amendment applies to wills of persons who died before it was enacted, it would permit the probate of the will in question. The evidence shows that the will was destroyed by public calamity in her lifetime, without her knowledge, but the court below deemed the fact immaterial, and made no finding to that effect; it being of the opinion that the amendment of 1907 did not apply.

The contention of the contestants is that, under the law as it existed at her death, the will was not merely incapable of proof because of lack of evidence, but that it was absolutely void and constructively nonexistent; that consequently the deceased died intestate; that the estate immediately thereupon vested in the heirs; and that the Legislature could not, by a subsequent law enlarging the classes of destroyed wills admissible to probate, take that estate from them. There can be no doubt of the rule that, if the estate once vested in the heirs, the Legislature had no power thereafter, by a subsequent law, to divest it. And it is a well-settled proposition that, where some essential ceremony in the manner of executing a will has been neglected, so that the will is not lawfully executed, and such essential requisite has been dispensed with by a law enacted after the death of the person attempting to make such will, the law cannot be applied thereto, and the person must be held to have died intestate. McCarty v. Hoffman, 23 Pa. 502; Alter's Appeal, 67 Pa. 344, 5 Am. Rep. 433; Giddings v. Turgeon, 58 Vt. 106, 4 Atl. 711. These cases rest upon the general rule that a will not executed in the prescribed manner is no will, and has no potential existence. One who dies leaving such a testamentary paper only dies intestate, and his property at once vests in his heirs. Estate of McCabe, 68 Cal. 519, 9 Pac. 554; Civ. Code, § 1384. The opinions in the cases above cited do not especially emphasize this proposition, but they are all manifestly based upon it as a postulate.

This rule does not apply to the present case. The will of Catherine Patterson was executed with all the formalities which the Code requires. From the time of its execution in December, 1904, until its destruction in April, 1906, it was in all respects a valid will, having a potential existence as such, and subject to be defeated only by the act of the testatrix wholly or partially revoking or altering it. After its destruction without her knowledge, and until she became aware thereof, we must assume that she still believed it had such existence, and that it would become effectual upon her death. She died in that belief. The essential question involved is: Had this will, after its destruction, a potential existence, subject to defeat only by reason of the impossibility of proof under the law then existing, or did such destruction make it absolutely void in the sense that it was thereafter no will at all? Our statute nowhere declares that such destruction during the lifetime of the testator destroys the status of a will as an executed instrument. The Civil Code provides that any person over the age of 18 years and of sound mind may dispose of all his estate by will, and directs the manner in which wills may be executed and revoked. Civ. Code, §§ 1270, 1276, 1277, 1289, 1292, 1304. The sections concerning the revocation of wills are elaborate and specific. It is expressly declared that a revocation can be made only in the manner and by the means prescribed in that chapter. Civ. Code, § 1292. Destruction, without intention to revoke or by accident, is not a prescribed method of revocation. Under the Code, therefore, such destruction does not operate to revoke a will. These provisions plainly imply that a will, once duly executed, has a recognized legal existence during the lifetime of the testator, if not revoked; that it merely remains in abeyance until his death, and then becomes an effective instrument.

This is in accordance with the rule at common law. "A will is regarded by the courts of England and the United States as a conveyance, and takes effect as a deed, upon proof of its execution, unless there is some statute requiring it to be probated." Castro v. Castro, 6 Cal. 161; Grimes v. Norris, 6 Cal. 625, 65 Am. Dec. 545; Tevis v. Pitcher, 10 Cal. 477; Emeric v. Alvarado, 64 Cal. 565, 2 Pac. 418; Adams v. Norris, 23 U. S. 363, 16 L. Ed. 539. In the cases above cited it was held that wills made by persons who died prior to the passage of the first probate act of this state were not required to be probated, and that they could be proven in the same manner as a deed or other instrument in writing, either by the production of the original, or, after proof of loss, by secondary evidence of its contents.

It has been held by this court that a will cannot be given in evidence as the foundation of a right or title, unless it has been duly probated. McDaniel v. Pattison, 98 Cal.

86, 27 Pac. 651, 32 Pac. 805; Castro v. Richardson, 18 Cal. 480. The amendment of 1895 (St. 1895, p. 72, c. 77) to section 738, Code Civ. Proc., makes an exception to this rule in suits brought under that section. Under our system the probate of the will is made a condition precedent to the introduction of evidence of its contents, in the subsequent settlement and distribution of the estate, and in any collateral matter, except in the cases provided in the amendment aforesaid to section 738. But although the probate of a will is generally necessary to its introduction in evidence, such will is not brought into legal existence by the judgment admitting it to probate. Such probate merely declares in a formal way the existence of facts which have previously occurred, and furnishes official evidence of those facts. In speaking of the title of the executor, under the common law, to the personal estate of the testator Mr. Williams says: "The probate is, however merely operative as the authenticated evidence, and not at all as the foundation, of the executor's title; for he derives all his interest from the will itself, and the property of the deceased vests in him from the moment of the testator's death." 1 Williams, Extrs. (7th Am. Ed.) 354, *243. A devise of lands at common law was considered, "not so much in the nature of a testament, as a conveyance by way of appointment of particular lands to a particular devisee." 1 Williams, Extrs. (7th Am. Ed.) 4. Under our Code the devisees and legatees take at the moment of the testator's death, and their title comes from the will itself, and not from the probate thereof. The probate procedure was established to furnish an exclusive mode for the settlement of all disputes concerning the executions of wills, and to provide conclusive evidence of their contents. It is remedial in its nature. It relates to the remedy, and is not the foundation of the rights of those claiming under the will. "Whatever belongs to the remedy may be altered according to the will of the state." Cooley, Const. Lim. 406, 409, 515.

The testatrix, Mrs. Patterson, had exercised her testamentary power by a duly executed will which would take effect upon her death, but which could not be admitted in evidence against the heirs until after it was probated. In her lifetime, but without her knowledge, it was destroyed in a public calamity. Because of its destruction in her lifetime the probate court, under the law as it existed at her death, could not allow it to be probated, because there could be no legal proof of it. After her death the Legislature removed this impediment by making wills destroyed in a public calamity provable. The heirs had no vested right to have this law forbidding the probate of such wills continued in force. Their right to the estate of the ancestor was given by statute and it was contingent upon the fact of there being no will in existence which could be proved. If a will had been duly executed, and had not been destroyed, but was filed for probate, and could not be probated because of lack of proof of its execution, the heirs would take the estate, and it would be deemed to vest in them at the death of the testatrix, although the right thereto could not be positively known until it was demonstrated by the failure of proof upon the trial of the petition for probate. The statute provides what evidence may be taken in proof of a will upon such a proceeding. Can there be a doubt that if a law were passed after the death of a testator, allowing evidence of execution previously forbidden as hearsay, such proof could not be accepted, and the will established, although but for that evidence the will would be defeated and the estate would go to the heirs? Or, in the case of a lost will, would it be questioned that a law making one witness sufficient would not apply to wills of persons who had died prior to the passage of such law? The Legislature has full power to alter the rules of evidence and the degree of proof, and make such rules applicable to pending cases. Cooley, Const. Lim. 409. It was competent, therefore, for the Legislature to dispense with the requirement that proof should be made that the will was in existence at the death of the testatrix.

It is a mistake to characterize the amendment of section 1339 as a retrospective law. It relates wholly to what shall be done upon the trial of the application for probate, the proof that must be furnished, and the facts which must be established. It applies only to trials which take place after its enactment. It can have no effect whatever upon previous trials or judgments. It is prospective only in its nature. It is remedial in its nature, and is designed to preserve the testamentary right. The public calamity referred to in the amendment is doubtless the great fire of San Francisco in which this will was burned, a calamity which has caused much legislation intended to alleviate its effect and preserve rights that would otherwise be lost for want of evidence. Such laws should be given a liberal construction to promote the purposes for which they are designed. We are of the opinion that section 1339 should apply to all cases subsequently tried, regardless of the time of the testator's death.

The order denying probate of the will is reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.

10 Cal. App. 576

MILLER & LUX, Incorporated, v. KATZ.

(Civ. 577.)

(Court of Appeal, First District, California. May 11, 1909.)

1. Corporations (§ 245*) — Liability of Stockholders for Debts—Persons Liable —Effect of Death of Stockholder.

Under Civ. Code, § 322, providing that each stockholder of a corporation is personally liable for the same proportion of its debts as his stock bears to the total capital stock of the corporation, the estate of a deceased stockholder is liable for a proportionate share of a corporate indebtedness arising after the stockholder's death, although the executrix of the estate never had the actual possession of the stock, and never exercised any act of ownership over it, and did not know of its existence until after the creation of the indebtedness sued upon.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 978; Dec. Dig. § 245.*]

2. Executors and Administrators (§ 224*)— Necessity for Presentation of Claim — Liability as Stockholder.

The liability of a stockholder to pay such a proportion of the corporate debts as his share bears to the capital stock is a claim against the estate of a deceased stockholder, where the liability arises after the stockholder's death, which need not be presented for allowance.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 224.*]

3. Executors and Administrators (§ 438*)— Actions—Parties—Joinder of Heirs.

Under Code Civ. Proc. § 1582, providing that "all actions founded upon contracts may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates," an action may be brought against an executrix without joining the heirs to enforce a liability for debts of a corporation in which testator held stock, as such liability is contractual.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1765, 1772, 1781; Dec. Dig. § 438;* Parties, Cent. Dig. § 25.]

4. Courts (§ 475*)—Probate Courts—Actions—Jurisdiction.

The superior court has jurisdiction of an action against an executrix to enforce a liability for corporate debts by virtue of the ownership of stock by the estate, although probate proceedings are pending.

[Ed. Note.—For other cases, see Courts, Cent Dig. § 1232; Dec. Dig. § 475.*]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Miller & Lux, incorporated, against Virginia S. Katz, as executrix of the last will of Alfred F. Katz, deceased. Judgment for plaintiff, and defendant appeals. Affirmed.

Tum Suden & Tum Suden, for appellant. Edward F. Treadwell, for respondent.

KERRIGAN, J. This action is brought against the executrix of the estate of a deceased person to enforce a stockholder's liability upon an indebtedness incurred by the corporation during the ownership by the estate of shares of stock in such corporation. Plaintiff obtained judgment, and defendant appeals from the judgment and from an order denying her motion for a new trial.

The facts of the case are, briefly, that one Alfred Katz, the appellant's testator, at the time of his death in 1900, was the owner of one-fourth of the capital stock of Katz & Sons, a corporation. About five years thereafter, to wit, in April, 1906, and while the estate of Alfred Katz was still the owner of said shares of stock, the corporation Katz & Sons became indebted to the plaintiff to the amount of $15,309.99; and it is to recover one-fourth of this sum (the proportion for which the estate is alleged to be liable) that the action is brought. It is objected by the executrix that she never had the actual or physical possession of the stock, and never exercised any act of ownership over it, and did not even know of its existence until after the creation of the indebtedness sued upon herein. It is undisputed, however, that decedent owned the stock at the time of his death; and we think, under the provisions of section 322, Civ. Code, and upon general principles of law, it became the property of the estate, and that the estate is liable as a stockholder. In this jurisdiction the law has recognized estates as stockholders in several ways. Thus in the case of Market St. Ry. Co. v. Hellman, 109 Cal. 571, 590, 42 Pac. 225, 231, it is said that: "In case of the death of a stockholder, his administrator becomes, by operation of law, vested with the legal title to the stock, and is entitled to vote it at all elections without a transfer upon the stock book." In the case of Ashton v. Zeila Mining Co., 134 Cal. 408, 66 Pac. 494, the executors were permitted to recover dividends on stock not registered in their names, and the court there said: "Thereupon—as was ruled in the case cited—the executor was entitled to recover the stock, which was, in effect, to hold that the title of the executors, if not the complete legal title, was in its legal consequences equivalent to it."

The question, moreover, has several times been directly adjudicated. The case of Bailey v. Hollister, 26 N. Y. 115, was an action brought to recover from an executor out of the funds of the estate the individual liability imposed by the New York statute for a debt contracted while "the estate of the intestate was a stockholder." The court said: "It will be conceded that, when a stockholder in any corporation dies, his estate succeeds him in the title to, and the rights in, the stock he held. Of necessity it must take that title and those rights subject to any liability then existing upon them; and so long as the estate is, by operation of law, the holder of such stock, the estate must become responsible for any obligation accruing during that time which the law may impose upon any holder of the stock as such.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Such liability proceeds not from any new contract made by or on behalf of the estate, but is inherent in the property itself. To avoid it, the estate must part from the property, must cease to be the holder of the stock. Or, calling it a contract liability, it arises out of a contract made by the stockholder, and binding his personal representatives, as it bound him, as long as the relation of stockholder existed." To the same effect, see Matteson v. Dent, 176 U. S. 521, 20 Sup. Ct. 419, 44 L. Ed. 571; Manville v. Edgar, 8 Mo. App. 325; Gianella v. Bigelow, 96 Wis. 185, 71 N. W. 111; Cook on Corporations (5th Ed.) § 248; Wickham v. Hull (C. C.) 60 Fed. 326.

Appellant claims that the complaint fails to state a cause of action, in that it does not show that any claim for plaintiff's demand was ever presented to the executrix for allowance. This contention is untenable. The liability here arose after the testator's death, and therefore did not constitute a claim against the estate which was required to be presented for allowance. People v. Olvera, 43 Cal. 492; Hancock v. Whittemore, 50 Cal. 522; 18 Cyc. 462, 887. In the case of People v. Olvera, supra, it is said: "Whatever may be the rule when taxes are assessed during the lifetime of the decedent, * * * it is clear that taxes assessed against the property of an estate, pending administration, and while it is in the possession and under the management and control of an administrator, are not 'claims' against the estate which must be presented, supported by an affidavit, and allowed or rejected, under the provisions of sections 130 and 131 of the probate act. The undivided property of deceased persons may be listed to administrators, and the taxes assessed are charges upon the property, which should be paid as all necessary expenses in the care, management, and settlement of the estate are paid." In Hancock v. Whittemore, supra, it was said: "The assessment (for street improvements) was issued after the death of H. M. Whittemore. The tax thus assessed did not constitute a claim against the estate of H. M. Whittemore which was required to be presented for allowance." Eustace v. Jahns, 38 Cal. 3, supports the contention of defendant; but what is there said on this subject was unnecessary to the decision, and the case has never been cited or approved and is directly contrary to later decisions.

There is no force in the suggestion of appellant that this action cannot be maintained against the executrix without the presence of the heirs. We can see no more reason for joining the heirs in this action as parties defendant than there would be in an action on an ordinary claim arising before the death of the testator. In the absence of an affirmative claim by an heir or devisee, an action may be maintained against an executor in all cases where a liability is to be enforced against the estate. Section 1582, Code Civ. Proc., however, provides as follows: "Actions for the recovery of any property, real or personal, or for the possession thereof, or to quiet title thereto, or to determine any adverse claim thereon, and all actions founded upon contracts, may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates." Hence, if the liability sued upon be one "founded upon contract" within the meaning of this section, then the suit could be maintained against the executrix without joining the heirs or devisees. That the liability in its nature is contractual is well established in this state. Dennis v. Superior Court, 91 Cal. 548, 27 Pac. 1031. Kennedy v. Cal. Sav. Bank, 97 Cal. 93, 31 Pac. 846, 33 Am. St. Rep. 163; Kirtley v. Holmes, 107 Fed. 1, 46 C. C. A. 102, 52 L. R. A. 738; Whitman v. National Bank, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. Ed. 587; 10 Cyc. 666.

There is no merit in the suggestion that the trial court lacked jurisdiction in this matter because of the pending of the probate proceedings (People v. Olvera, supra; Wickham v. Hull, supra); and the evidence is sufficient to sustain the decision of the trial court.

No other point discussed in the briefs calls for special mention.

The judgment and order are affirmed.

We concur: COOPER, P. J.; HALL, J.

10 Cal. App. 596

SKINNER v. KNICKREHM et al.

(Civ. 560.)

(Court of Appeal, Second District, California. May 15, 1909. Rehearing Denied by Supreme Court July 14, 1909.)

1. HIGHWAYS (§ 172*)—CARE REQUIRED IN USE OF HIGHWAY.

A traveler upon a public highway is not an insurer against accident, but is bound to exercise ordinary care in the management of his vehicle, so that others using the highway, may not suffer injury.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 459, 460; Dec. Dig. § 172.*]

2. HIGHWAYS (§ 174*)—USE OF HIGHWAY—CARE AS TO CHILDREN.

The driver of a vehicle must exercise ordinary care to prevent injury to children incapable of appreciating and avoiding danger.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 459, 460; Dec. Dig. § 174.*]

3. NEGLIGENCE (§ 23*)—THINGS ATTRACTIVE TO CHILDREN—WAGON ATTACHED TO HOUSE BEING MOVED THROUGH STREET.

A complaint averring that defendants attached a wagon to the rear of a house being moved through the streets, and left such wagon unguarded and unattended, and that by reason of its slow movement, and the absence of any frame or bed, is was attractive to children who might desire to ride thereon, and that plaintiff, an infant, wholly unable to appreciate the danger, was attracted to the wagon, and, being thereon, was thrown off and injured, sets forth a cause of action.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 33; Dec. Dig. § 23.*]

4. Negligence (§ 109*) — Pleading — Inconsistent Allegations.

An allegation that a wagon attached to the rear of a house being moved through the streets, and upon which a child climbed and was injured in being thrown therefrom, was left unguarded and unattended, is not inconsistent with an allegation that the vehicle was in defendant's charge, for personal property may be in the general charge of one, though he may not at the time be in immediate supervision thereof.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 176; Dec. Dig. § 109.*]

5. Negligence (§ 134*)—Things Attractive to Children—Actions for Injuries—Sufficiency of Evidence.

Evidence in an action for injury to a child who was thrown from a wagon upon which he had climbed attached to the rear of a house being moved through the streets, and alleged to be a thing attractive to children, *held* to warrant a finding that the wagon was unguarded and unattended.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 267; Dec. Dig. § 134.*]

6. Infants (§ 82*)—Actions—Guardian Ad Litem.

The authority of a guardian ad litem continues, though there was a change of parties owing to the award of a nonsuit as to the party against whom the guardian was authorized to bring the action.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 230; Dec. Dig. § 82.*]

7. Appeal and Error (§ 1053*)—Harmless Error—Admission of Evidence.

In an action for injury to an infant, there was no prejudicial error in permitting his mother to testify that she was in a delicate condition at the time of the injury, and had no hired help, where it was expressly stated that such condition should not be considered as affecting the damages.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4182; Dec. Dig. § 1053.*]

8. Pleading (§ 236*)—Amendment—Discretion of Court.

Leave to amend a pleading is addressed to the discretion of the court.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 601; Dec. Dig. § 236.*]

Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

Action by Ervin Liell Skinner, an infant, by Warren S. Skinner, his guardian ad litem, against W. Knickrehm and the William Knickrehm Company. Plaintiff was nonsuited as to defendant W. Knickrehm, but recovered a judgment against the William Knickrehm Company, and, from the judgment and an order denying a new trial, it appeals. Affirmed.

Trusten P. Dyer (W. C. Batcheller, of counsel), for appellant. Morton, Pruitt & Goodrich, for respondent.

ALLEN, P. J. This is an appeal by defendant Wm. Knickrehm Company from a judgment and an order denying a new trial, the action being one by an infant on account of personal injuries.

It is averred in the complaint that defendants, who were engaged in moving a house through the streets of Los Angeles, attached to the rear of such house so being moved a wagon with heavy wheels, upon which was rested neither bed nor frame; that such house and the wagon so attached and under the charge of defendants were being moved through the streets very slowly, and that defendants left the wagon unguarded and unattended; that by reason of its slow movement, and on account of the absence of any frame or bed, such wagon became and was attractive to children who might desire to climb and ride thereon; that plaintiff, an infant of the age of four years, wholly unable to appreciate or guard or protect himself against dangerous appliances, was attracted to said wagon, and by the negligence of defendants invited to get upon the same and ride thereon, and being thereon was, by the negligence and carelessness of the defendants and their servants, and without any fault on his part, caused to be jolted or thrown off of said wagon and the wheels ran up and against his head and injured him. It is insisted that from these facts no obligation or duty of defendants toward plaintiff is shown to have been undischarged or unfulfilled, and therefore it follows that no negligence is made to appear. It may be conceded that one traveling upon a public highway, using ordinary care in the management and control of a vehicle under his charge, is not an insurer against accident, nor liable for damages even to children of immature years who, playing upon such public highway, shall be injured in an attempt to ride thereon, without acquiescence or invitation on the part of the party in charge of such vehicle. There rests, however, upon every one so using a public thoroughfare the duty of exercising ordinary care in the management and control of vehicles under his charge, to the end that others using such public places, exercising like care, or who, by reason of tender years, are unable to appreciate or guard against danger, may not suffer injury, from the operation of such vehicles, and it is the duty of the one so operating such a vehicle to at all times retain such control over the same as may be requisite in averting, if possible, injury even to those not exercising such care or unable to appreciate the danger connected therewith. The complaint avers facts which show defendants' omission of duty in the regard above stated, for it is admitted that the vehicle, unguarded and unattended, was being propelled through the streets by defendants. Nor is there anything inconsistent with such statement when used in connection with the allegation that the vehicle was in the charge of the defendants. Personal property may be in the general charge of one notwithstanding one may be at the time not in the immediate supervision of the same, and we perceive no inconsistency in the statement that property so in charge was permitted to be unattended and unguarded. "It has been held in numerous cases to be an act of negligence to leave unguarded and exposed to the observation of little children dangerous and attractive machinery which they would naturally be tempted to go about or upon, and against the danger of which action their immature judgment opposes no warning or defense." Cahill v. Stone & Co., 153 Cal. 574, 96 Pac. 86. The allegation of the complaint that the child was too young and inexperienced to foresee the danger removes from consideration, in considering the complaint, any question of contributory negligence which would be suggested were a child so injured shown to be sufficiently mature to appreciate or understand the danger and in law be held by his acts to have contributed thereto.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It is further contended by appellant that the allegations of the complaint in relation to defendants' negligence are not established by the proof. The evidence with relation to the unguarded and unattended character of the wagon was to a degree conflicting. There was, however, evidence of witnesses to the effect that none of defendants' employés nor any one connected with the operations of the housemoving were in such a position that they were able to see the wagon so attached, or the children playing thereon; that the driver of the wagon upon which the house was loaded, by reason of the intervening house, was unable to see the wagon or anything occurring in the rear of the house, and that only one other man was connected with the moving and that he was a long distance ahead of the driver attending to other duties; that these children were permitted to, or at least were not by any one forbidden to, play upon the wagon, and did so for a long space of time and while the house was being moved for a large portion of a block. We think the jury were warranted in finding that the wagon was, in fact, unguarded and unattended, and that the defendants did not exercise usual and ordinary care in its management and control. It is true that witnesses upon the part of defendants testified to having been around the wagon, to have driven the children therefrom, and to have used all reasonable precautions to avoid danger; but it was for the jury to determine from the evidence the facts presented to them, and by their verdict they seem to have accepted as true the testimony of plaintiff's witnesses.

Error is specified by reason of the admission of parol evidence as to the appointment of the guardian ad litem to bring the action; such appointment being alleged in the complaint and denied by the answer. The court in overruling the objection to the admission of such evidence said that the appointment was a matter of record, and no time would be taken up in its proof. While it is true, as appellant urges that the best evidence of such appointment and that which should have been introduced was the order appointing the guardian ad litem, yet such appointment in this state is held not to be a jurisdictional matter, and a failure of appointment does not render the judgment void. Notwithstanding this, it is said in Johnston v. S. P. Co., 150 Cal. 540, 89 Pac. 348, that when the attention of the court is called to the defect, and no steps taken to cure the same, a reversal of the judgment upon appeal is proper. This upon the theory that the judgment rendered would lack mutuality of obligation, in that there being no authority for the guardian ad litem to act the infant could refuse to abide by the judgment at any time before attaining majority. However, in the case just cited, and in Childs v. Lanterman, 103 Cal. 387, 37 Pac. 382, 42 Am. St. Rep. 121, the Supreme Court determined that, when facts were shown to exist which would preclude the infant from disaffirming the judgment, the same would not be reversed on account of a failure to have a guardian ad litem appointed. In this case it is conceded by respondent in his brief that as a matter of fact an order had been entered before the bringing of the action authorizing the guardian ad litem to bring an action against William Knickrehm alone on account of the injuries sustained. This being conceded, the right to bring the action on account of the injuries existed, and the fact that during the progress of the proceedings another party was brought in against whom a judgment was rendered would not be of consequence, even though the record discloses a nonsuit was awarded as against the individual originally named in the order. The cause of action was on account of the injury received, and for which the guardian ad litem was authorized to prosecute an action. The bringing in of a new party did not change the cause of action or destroy the right theretofore conferred upon the guardian ad litem under the order. "The only authority of the guardian to appear is by virtue of the appointment, and the appointment limits the effect of the appearance to the subject-matter of the suit." Waterman v. Lawrence, 19 Cal. 218, 79 Am. Dec. 212. The subject-matter of the suit, which was a cause of action on account of the injury, being embraced within the order, the authority of the guardian ad litem continues, even though there be a change in the parties connected with the subject-matter of the suit, and, the order having been made, the infant would be bound by the judgment; and the reasons given why a judgment should be reversed where no order in fact was made are therefore wanting.

We see no prejudicial error in the action of the court permitting the mother of the child to testify to the fact that she was in a delicate condition at the time of the injury and had no hired help. While the condition of the mother was in no sense material, it was expressly stated at the time the testimony was offered that such condition should not be considered as affecting the damages resulting from the accident, and we can see no prejudice resulting either from the admission of such evidence, or that in relation to the fact that no hired help was employed.

We are unable from the record to determine what amendment to the answer was, in fact, suggested, or how defendant could be prejudiced by a refusal to grant the request. In any event, it was a matter resting within the discretion of the court, and no reason is apparent why the judgment should be reversed on account of such ruling.

We see no prejudicial error in the record, and the judgment and order are affirmed.

We concur: SHAW, J.; TAGGART, J.

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10 Cal. App. 590

HOOPER et al. v. YOUNG et al. (Civ. 580.)

(Court of Appeal, First District, California. May 15, 1909. Rehearing Denied by Supreme Court July 14, 1909.)

1. MORTGAGES (§ 5*) — DISTINGUISHED FROM CONTRACT OF SALE.

M. desiring to purchase a tract of land, S. purchased the same and took a deed to himself, M. giving him a note for the amount paid, and S. agreeing to convey the land to M. on the payment of the amount and interest. Subsequently another note was given in place of the first one, and another contract similar to the first entered into. M. never paid the amount of his indebtedness, and the second note became outlawed. *Held*, that the rights of M. and his successors in interest were only those of a purchaser under a contract for the sale of land, and that the relations of M. and S. were not those of mortgagor and mortgagee, and the outlawing of the note and the transfer of the property by S. did not affect the relations of the parties.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 4; Dec. Dig. § 5;* Vendor and Purchaser, Cent. Dig. § 3.]

2. ADVERSE POSSESSION (§ 63*)—NATURE AND REQUISITES—HOSTILE CHARACTER OF POSSESSION — POSSESSION UNDER CONTRACT TO PURCHASE.

M. desired to purchase a tract of land, and the tract was bought by S., who took title in his own name, and contracted to transfer the property to M. on payment of a note given by M. for the purchase price. *Held*, that possession by M. of the property was not hostile to the rights of S. while he held the legal title.

[Ed. Note.— For other cases, see Adverse Possession, Dec. Dig. § 63.*]

3. VENDOR AND PURCHASER (§ 86*)—REPUDIATION OF CONTRACT—ACTION IN EJECTMENT.

Where M., desiring to purchase a tract of land, agrees with S. that the latter shall buy the land and take the title and convey to M. on payment by M. of a note given for the purchase price, and M. never pays the note, but allows it to become outlawed, an action brought by M.'s successor in interest in ejectment on an adverse title is equivalent to an abandonment of the original contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 86.*]

Appeal from Superior Court, City and County of San Francisco; Hall, Judge.

Action by C. A. Hooper and others against A. Young and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

See, also, 140 Cal. 274, 74 Pac. 140, 98 Am. St. Rep. 56.

Titus & Creed and Drown, Leicester & Drown, for appellants. Haskell & Denny and C. S. Farquar, for respondents.

HALL, J. This is an appeal from an order granting defendants a new trial. The action is in ejectment for the recovery of a tract of land containing about 40 acres, situated in the city and county of San Francisco. The original plaintiffs were C. A. Hooper and T. M. Osmont, but, Osmont having died since the trial, the other plaintiffs were substituted. Defendant Young is simply a tenant of defendant Webber. This is the second appeal in this case. Upon the first appeal plaintiffs claimed title under a patent to one Wagner, which was held void, while defendants claimed title under a patent to one Weaver. Hooper v. Young, 140 Cal. 274, 74 Pac. 140, 98 Am. St. Rep. 56. The Weaver title on the 14th day of January, 1873, was vested in one J. W. Shanklin, who on that day conveyed, for the named consideration of $1,500, to Wm. B. Swain. This deed was duly recorded on the same day. Swain conveyed to Webber by gift of deed dated and duly recorded December 22, 1892. On the first trial plaintiffs also claimed that the deed from Shanklin to Swain was a mortgage to secure $700, loaned by Swain to Meeks, with which to in part purchase the property, and that as the debt had long since outlawed, defendants could claim nothing under such deed. The court did not pass upon this claim that the deed to Swain was a mortgage, but held "that as the admissions and presumptions in the case, even on plaintiff's theory that the deed to Swain was a mortgage, show that the defendant Webber, as successor to all the rights of Swain, is in possession of the premises as mortgagee, the finding of the court that the plaintiffs were entitled to the possession of said premises is not sustained, but is contrary to the evidence."

The controlling facts in the case are as follows: On January 14, 1873, J. W. Shanklin was seised in fee of the premises in suit, and one Meeks desired to purchase the same. Swain paid $700 to Shanklin, and took a deed for the premises. Whether the other $800 was paid by Meeks does not clearly appear. Swain took a promissory note from Meeks for the $700, and interest at 2 per cent. per month, and executed to Meeks an instrument whereby he agreed to convey the land to Meeks on the payment of the $700 and interest, in accordance with said note.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The note by its terms was due July 14, 1873. July 7, 1877, Meeks gave to Swain a new note for the principal and interest then due, amounting to $1,075.50, payable January 7, 1878. This note bore interest at 1¼ per cent. per month, compounded monthly. At the same time Swain executed to Meeks a new agreement to convey upon payment of $1,075.50 and interest, according to the terms of said note, and any outlay that Swain might make for the protection of the property. Nothing has ever been paid on either of said notes save interest on the first note to August, 1874. Meeks has received no deed from Swain or Webber. Plaintiffs deraign title from Meeks. The second note is long since outlawed; and appellant's contention seems to be that the deed from Shanklin to Swain was a mortgage given to secure the payment of the $700, and as this debt is long since outlawed neither Swain nor his grantee is entitled to hold the land. We think the case of Woodard v. Hennegan, 128 Cal. 293, 60 Pac. 769, effectually answers the claim of plaintiffs.

In Woodard v. Hennegan, Woodard advanced the purchase price of two parcels of land for Hennegan, and took conveyances from the vendors, and gave a bond to Hennegan for a deed. Hennegan repaid Woodard $3,000 of the purchase price, and at the time of the purchase took possession, and so continued in possession till suit was brought by Woodard's executrix to recover possession and to quiet title. Defendant set up title by adverse possession.

It was held that such a transaction was more than a mortgage; that in such a case the grantee holds a double relation to the actual purchaser, both as his trustee of the legal title, and as mortgagee for the money advanced for its purchase; that the rights of the grantee in such a case will be regarded the same as if the grantee of the legal title in trust as security had been the original owner of the legal title, and had made an executory contract of sale to the intending purchaser, retaining the title as security for the purchase money. Upon this point the court said: "We think Woodard possessed the same rights as would have been possessed by Lowe and Merkeley" (the original owners) "if they had made the agreement to convey to defendant. To allow him all the right that Lowe and Merkeley would have had cannot do defendant any injustice. After Woodard had, at defendant's request, furnished the money, and given defendant every opportunity to repay him, to deprive him or his representative of the same protection that would have been given to Lowe and Merkeley would be a gross injustice. It would be to allow the defendant, like the viper in the fable, to turn and sting the one who had been his friend. Therefore it will be assumed that plaintiff, as the legal representative of Woodard, possesses the same rights as if Woodard had been the owner of the land at the time the contract of sale was made with defendant. The legal title remained in Woodard. * * * The defendant having by his answer repudiated the contract, and having refused to pay the balance due, the plaintiff can maintain the present action to recover possession." Under the doctrine of the case just cited, the rights of Swain and his grantee Webber are the same as if Swain had owned the land, and had agreed to sell to Meeks, giving a bond to convey upon payment of the balance of the agreed price. It is difficult to see any plausible reason why Swain should not be entitled to the same protection he would receive if he had been the owner, and had made a contract to convey upon payment of the balance of the purchase price. The deed from Shanklin to Swain conveyed to Swain the entire legal title held by Shanklin. Of this title Swain and his grantee Webber have never been divested. The outlawing of the Meeks note did not divest Swain of his title or transfer such title to Meeks. Only on payment of the debt would Meeks or his grantees be entitled to a conveyance of such title. Under the rule laid down in Woodard v. Hennegan, supra, Swain, as a grantee, who had advanced the money for the purchase price, and given a bond to Meeks for a deed to be executed on repayment of such money, stood in the position of a vendor under a contract to convey upon payment of the purchase price. A vendee under a contract to sell does not obtain title by the outlawing of his contract to purchase, or of his promise to pay the purchase price.

We do not understand appellants to contend that plaintiffs have obtained any title by adverse possession. At any rate, there is nothing in the record to support any such theory. There was nothing in the contract between Swain and Meeks about possession. Whatever possession Meeks took, if any, it is certain that he was not holding adversely to Swain up to the execution of the second agreement and note in 1877; and there is no pretense in the evidence that plaintiffs or Meeks ever paid any taxes on the premises save for two years. The evidence upon the question of possession by the various lessees of the parties is only important upon the theory that Swain's rights are to be measured by those of a mortgagee only. They are not to be so measured, however. He had the rights of a vendor who had retained the legal title till payment of the purchase price. Plaintiffs, as the successors in interest of Meeks, have clearly repudiated the only contract under which Meeks might have any equities. This they did by bringing this action in ejectment, without offering to perform the conditions under which Meeks might originally have been entitled to a deed and the title, but setting up an adverse title under the Wagner patent. What was said upon this subject in Woodard v. Hennegan, supra, exactly covers this phase of this case. "The defendant having by his answer repudiated the contract, and having refused to pay the balance due, the plaintiff can maintain the present action to recover possession. 2 Warvelle on Vendors, 892; 1 Sugden on Vendors, 312; Love v. Watkins, 40 Cal. 567, 6 Am. Rep. 624; Thorne v. Hammond, 46 Cal. 531; Whittier v. Stege, 61 Cal. 241. In the latter case it is said: 'When, therefore, the defendants, after they had obtained possession lawfully, substituted repudiation of the contract and refusal to comply with its terms, for performance or willingness to perform, they divested themselves by their wrongful act of the equitable estate which they acquired under the contract, and became trespassers or tenants at will, against whom their repudiated vendors could maintain ejectment. The vendors were remitted to their legal title, and in an action upon it the defendants could not invoke as a defense to it a contract of sale which they repudiated and refused to perform.'" Woodard v. Hennegan, supra. As the rights of Swain (Webber's grantor) were those of a vendor, holding the legal title, the rights of Meeks were those of a vendee, entitled to a conveyance of the title on payment of the balance of the purchase price.

The only title or equity that plaintiffs have or now claim is as grantees of Meeks under his contract with Swain. This contract has not been performed on the part of Meeks or plaintiffs, but plaintiffs have repudiated its obligations. They have no equities that ought to prevail against the legal title.

The order is affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

10 Cal. App. 544

SILVA v. HAWN. (Civ. 531.)

(Court of Appeal, Third District, California. May 7, 1909.)

1. EASEMENTS (§ 36*)—SUFFICIENCY OF EVIDENCE—ADVERSE CHARACTER OF POSSESSION.

In an action to restrain defendant from obstructing the flow of water in an irrigation ditch, and plaintiff's use thereof, evidence *held* to show that plaintiff's use of the ditch included all the elements of adverse possession, in that it was open, notorious, under claim of right, adverse to defendant, and with his knowledge and acquiescence.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 93; Dec. Dig. § 36.*]

2. EASEMENTS (§ 8*)—PRESCRIPTION—KNOWLEDGE OF ADVERSE USER—IMPUTED KNOWLEDGE.

Though defendant did not have actual notice of plaintiff's open and adverse use of an irrigation ditch across defendant's land, if such use was sufficiently notorious to put defendant upon inquiry, it was sufficient.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 23; Dec. Dig. § 8.*]

3. EASEMENTS (§ 8*) — PRESCRIPTION — ELEMENTS—EXCLUSIVE USER.

It was not necessary, in order to make plaintiff's adverse use of an irrigation ditch across defendant's land exclusive, that all other persons were prevented from using the ditch, so long as plaintiff's use thereof was not disturbed.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 33; Dec. Dig. § 8.*]

4. EASEMENTS (§ 7*)—PRESCRIPTION—PERIOD.

In order to claim the use of an irrigation ditch across defendant's land by adverse user, plaintiff's use thereof must have been continuous and uninterrupted for five years prior to the commencement of his action to enjoin the obstruction of his user.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 17; Dec. Dig. § 7.*]

5. EASEMENTS (§ 7*)—PRESCRIPTION—CONTINUITY OF POSSESSION—"CONTINUOUS ADVERSE USER."

An adverse use of an irrigation ditch during the cropping season only constitutes a "continuous adverse user," as its nonuser when the water is not needed does not interfere with the continuity of use.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 17; Dec. Dig. § 7.*]

6. EASEMENTS (§ 5*)—PRESCRIPTION—NECESSITY OF PAYING TAXES.

Where an irrigation ditch across defendant's land which plaintiff claimed the use of by adverse user was not assessed apart from the land, or at all, payment of taxes by plaintiff was not necessary to establish adverse user.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 13; Dec. Dig. § 5.*]

7. TAXATION (§ 66*)—PROPERTY TAXABLE—EASEMENT.

An easement need not be assessed apart from the land.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 151; Dec. Dig. § 66.*]

8. EASEMENTS (§ 36*) — PRESCRIPTION — ACTIONS TO PROTECT RIGHTS—INJUNCTION—BURDEN OF PROOF.

In a suit to enjoin interference with an irrigation ditch across defendant's land, which plaintiff claimed the right to use by adverse user, since an easement need not be assessed apart from the land, the burden was on defendant to show that the ditch was so assessed if he claimed that payment of taxes thereon by plaintiff was necessary to establish adverse user.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 89; Dec. Dig. § 36.*]

9. EASEMENTS (§ 8*)—PRESCRIPTION—KNOWLEDGE AND ACQUIESCENCE—"ACQUIESCENCE."

In order to establish a right to use an irrigation ditch by prescription, the right must have been asserted with the knowledge and acquiescence of the landowner, but "acquiescence," which commonly means an affirmative permission or consent, in addition to knowledge of the hostile claim, need not be shown independently of knowledge; and, if the owner has knowledge thereof which the law imputed to him, and takes no steps to prevent the adverse claimant from his continuous enjoyment of the right, he is deemed to have acquiesced in such use.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 23, 24; Dec. Dig. § 8.*

For other definitions, see Words and Phrases, vol. 1, pp. 110–112.]

10. APPEAL AND ERROR (§ 843*)—REVIEW—QUESTIONS DECIDED—QUESTIONS UNNECESSARY TO DECISION.

In an action to enjoin defendant from obstructing an irrigation ditch across defendant's land and land now owned by plaintiff, whether defendant, in constructing the ditch, is estopped to deny that it did not become appurtenant to plaintiff's land need not be determined on appeal, where plaintiff was held entitled to use the ditch by adverse possession.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331, 3341; Dec. Dig. § 843.*]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Frank V. Silva against C. H. Hawn. From a decree for plaintiff, defendant appeals. Affirmed.

E. D. Edwards and M. K. Harris, for appellant. Sutherland & Barbour, for respondent.

CHIPMAN, P. J. This is an action to restrain defendant from obstructing the flow of water in an irrigating ditch, and plaintiff's use thereof, and to have the court decree that the said ditch is appurtenant to plaintiff's land. Plaintiff had judgment, from which defendant appeals on bill of exceptions.

Plaintiff is the owner of sections 17 and 20 in township 13 S., range 19 E., in Fresno county, and defendant is the owner of the N. ½ of the N. E. ¼ of section 16 in said township. It will thus be seen that defendant's land lies northeast from plaintiff's land, and one-half mile from the east line of section 17. Adjoining section 16 on the north is section 9. Plaintiff claims an easement by prescriptive right over defendant's land, as appurtenant to plaintiff's land, for an irrigating ditch which receives its water from the Fresno Canal & Irrigation Company at a point in section 9, thence crossing defendant's land and the intermediate land in section 16, running in a southwesterly direction to sections 17 and 20.

The court made the following findings: (1) That plaintiff has been the owner of sections 17 and 20 above described for more than 5 years last past. (2) That said land is irrigated from the canal of the Fresno Canal & Irrigation Company on the S. E. ¼ of section 9 (above mentioned) through and over the N. ½ of the N. E. ¼ of section 16 (above mentioned). (3) That said ditch was constructed more than 10 years prior to the commencement of this action by a predecessor in title of plaintiff, for the purpose of irrigating the land now owned by plaintiff, and ever since its construction said ditch has been used by the plaintiff and his predecessor in title for the purpose of irrigating alfalfa, trees, and vines and other growth upon the said land. (4) "That such user of said ditch by plaintiff was open, notorious; was hostile to the title of the defendant and the predecessor in title of defendant; was under claim of right by the plaintiff, as an appurtenance to the said sections 17 and 20; and was continuous and uninterrupted for a period of more than 5 years prior to the commencement of this action, and immediately prior to the month of August, 1907." (5) That during the month of August, 1907, defendant was the owner and in possession of said N. ½ of the N. E. ¼ of said section 16, "and that while so the owner and in possession, and during said month of August, the defendant erected an obstruction in said ditch by reason of which obstruction water was prevented, for a period of one week, from passing through said ditch to the said sections 17 and 20," by reason whereof plaintiff "was deprived of all water necessary to irrigate certain alfalfa, trees, and vines then growing on said sections 17 and 20, and that the defendant (plaintiff?) was damaged thereby in the sum of one dollar." The court by its decree adjudged that said ditch is an appurtenance to said sections 17 and 20, and that plaintiff has the right to the uninterrupted flow of water from the said main canal of the Fresno Canal & Irrigation Company, through the same, and that defendant be forever enjoined from interfering therewith. Defendant challenges the sufficiency of the evidence to support findings 2, 3, 4, and 5, above stated. No question arises as to plaintiff's right to water. Defendant objects to his use of the ditch to get it. This case presents the not unfamiliar, and sometimes perplexing, difficulty of determining whether there is a substantial conflict in material portions of the testimony. We have examined the record with sufficient care to convince us that such conflict exists here. We are also satisfied that the findings have support in the evidence.

There was evidence tending to show that plaintiff went into possession as tenant of sections 17 and 20 in November, 1900, and continued to occupy the land as such tenant until October, 1902, when he became the purchaser of the land, and was at the commencement of the action its owner; that when he took possession the ditch in question was constructed, and was in use to bring water to the land for irrigation purposes thereon, and that he continued to so use it from year to year without obstruction until August, 1907, when defendant placed a dam in said ditch on his land in section 16, whereupon plaintiff brought this action. There is evidence that the ditch was originally constructed by the superintendent of the Fresno Canal & Irrigation Company, and he so testified, from the main canal over the land now owned by defendant (the ownership then not appearing) and to the east line of sections 17 and 20, and that it was for the purpose of supplying water to those sections for irrigation. This was about the year 1893. This witness also testified that the ditch was used to carry water to these sections, and was so used continuously while he remained with the company, which was up to the year 1902. He testified: "I never followed the ditch through since it was built. Up to five years ago [the trial was in December, 1907], the flow of the water ditch was continuous so far as I know. I passed there every few days. That ditch always had its share. It has always demanded water." Witness Emery testified that he was ditch tender for the Fresno Canal & Irrigation Company. He testified: "I am acquainted with this ditch. It was there before I went there 8 years ago. I go over it one or two times a week at the head. It has been running water for 8 years that I know of, off and on. Sometimes they would turn it off, for there ain't much irrigated in that ditch, and when they wanted it they would go and get the water. Previous to the 9th of last August [he was testifying in December] there was no obstruction in that ditch while I was on the ditch. That ditch irrigates part of section 16. There is a water right on that, and about all of 17 and 20, and then some south of there. The ditch must be close on to four miles. It forks in the center of 17, one running straight southwest, and the other turning the other way. I went there in 1904, I believe it was, and cleaned the ditch from one end to the other. I did this work for the Fresno Canal & Irrigation Company." He testified on cross-examination that he was on defendant's land in section 16 in 1899 or 1900, and Clark, defendant's son-in-law, was there. He told witness "he would not allow any water turned on. He didn't say who he was there for. He said nobody should turn water through there." He was asked how this conversation came about, and answered: "Mr. Silva asked me for water, and I am supposed to turn the water on. Generally I turned the water out, and let it go. He told me this, and the water was still going along through just the same. I don't ask a man whether I can turn water through the ditch or not. I turn the water on at the head, and let it go itself. Clark turned it off; I turned it on again several times. That was 1899 or 1900. He said he didn't want any water to run through to Mr. Silva. I represented the water company."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Witness Murray testified that since December, 1903, he has been in possession of land in section 30, a mile south of plaintiff's land, and that water was then running in this ditch to plaintiff's land, and that witness built a ditch to his land connecting with the ditch in question in 1904, and has used this ditch continuously ever since to irrigate his land, and never had any difficulty in getting water from the ditch. He testified that in 1904 he was at the headgate several times, and no one was using the ditch above Silva's land, that he was on Silva's place in 1902, in July, and that "there was water on Silva's place at the time coming through the ditch, but didn't know whether it was being used for irrigation or not." Plaintiff testified that he irrigated alfalfa and grain, and every year after he took possession of the land, and in later years some trees and vines and grain. That his use of the ditch was open, notorious, under claim of right and with the knowledge of defendant and adversely to him we think may be inferred from the circumstances and facts appearing in the case.

It appeared that defendant was, some years before plaintiff took possession of sections 17 and 20, himself a tenant of this land under its then owner. His testimony was that he built the ditch throughout its entire length to this land for irrigating purposes, and so used it during his tenancy. That he did build that part running over sections 17 and 20 is not contradicted, but his testimony that he built from the main canal to this land was in conflict with Church's testimony, and the court accepted that of the latter witness. However, defendant afterwards, about the year 1899, took possession of the land in section 16 under lease, and by himself or by his son-in-law, Clark, remained in control up to 1904 or 1905, when Clark left the place, and defendant purchased the land in June, 1907. Defendant was absent from the county after 1900, but Clark had control of the land in section 16, and was defendant's agent. The ditch, as first constructed by Church, and extended over sections 17 and 20 by defendant, was never abandoned, and was in use by a tenant who succeeded defendant, and also when plaintiff took possession, and was by him thenceforward used for irrigating purposes. This fact is also much contested on which, as elsewhere, the evidence is in conflict. Bearing upon this point, defendant introduced witnesses to show that Clark, representing him, placed a dam in the ditch, on section 16, in the year 1902 or 1903, which completely obstructed the flow of water, and that if plaintiff got any water after that, it was only seepage water. But here again the evidence was in conflict, both as to there being a dam sufficient to materially interrupt the flow of water, and as to the quantity of water. It was not shown that seepage in the alleged dam would at all account for the water flowing through to plaintiff's land, and further south to other land; and plaintiff testified that there was no obstruction in the ditch such as claimed until in 1907, which gave rise to this suit.

There was evidence that plaintiff spoke to Clark about purchasing a right to use the ditch, which it is claimed was an admission by plaintiff of defendant's right, and that plaintiff was not claiming any right in himself. Plaintiff testified to this as follows: "I had that talk with Clark one time about 1903. I had that talk with Clark one time when I came up the ditch to take water down; and I asked him to write to Hawn, and see what Hawn would sell me an interest in the ditch for. Afterwards Clark reported that Hawn wanted $500. I told him I would not give him anything. * * * After he wrote and said he wanted $500, I told him I wouldn't give him anything. Just because Hawn used to claim the ditch I told him I did not want to have any trouble; I would buy a little interest if he owned it. * * * After I had this talk with Mr. Clark about paying for water in the ditch, I used it just as I did before." This episode by no means establishes a conclusive recognition of defendant's right on the part of plaintiff. It seems rather to have been an attempt by plaintiff to avoid trouble by purchasing his peace, which came to nothing, and tended to show that plaintiff rested upon his own right in the end.

The elements essential to the establishment of a prescriptive right will be briefly noticed. They are as claimed by appellant, and are well settled.

The user by plaintiff, during the irrigation season, was actual, open, notorious, and not clandestine. This appears clearly by the testimony of plaintiff's witnesses and the use was so open that defendant, or his agent, Clark, could not have failed to note the fact, and, if not, was such as to put him upon inquiry, which was enough. De Frieze v. Quint, 94 Cal. 653, 30 Pac. 1, 28 Am. St. Rep. 151.

The element of hostility appears, not only from plaintiff's evidence, but from that of Clark, who testified for the defendant. The case of Strong v. Baldwin, 137 Cal. 438, 70 Pac. 288, relied on by appellant, is in many respects similar in its facts to those here, and is an instructive case. It differs in this: That the adverse claimant in that case paid to the owner of the land through which the ditch passed an annual rental for the privilege of using the ditch. The element of hostility was held to have been fully rebutted by this fact.

Plaintiff's claim of title was as his own, and exclusive of any other right. This requirement does not mean that all other persons were excluded from the use of the ditch, so long as plaintiff's right was not taken from him. Strong v. Baldwin, supra. Plaintiff claimed the right to use the ditch for irrigating his own land, and it is immaterial that others also had a right to use it.

It was also requisite that the use should be continuous and uninterrupted for 5 years prior to the commencement of the action. The evidence was that plaintiff used the water whenever he needed it for irrigating purposes, and among these uses was that of watering alfalfa, grain, trees, and vines. "The adverse user of an irrigating ditch through the lands of the owner only during the cropping season, the ditch not being needed at other times, constitutes a continuous adverse user, as the omission to use when not needed, does not break the continuity of use." Hesperia, etc., Co. v. Rogers, 83 Cal. 10, 23 Pac. 196, 17 Am. St. Rep. 209.

Nothing appeared in the case to show that the ditch was assessed for taxation separate from the land, or at all. It was not, therefore, necessary to show payment of taxes. Harvey v. Meyer, 117 Cal. 60, 48 Pac. 1014. The law does not require an easement to be assessed, and the burden was on defendant to show that it had been assessed. Oneto v. Restano, 78 Cal. 374, 379, 20 Pac. 743.

The right must have been asserted under claim of title with the knowledge and acquiescence of the owner of the land. Plaintiff's claim of right clearly appeared. Defendant's knowledge and acquiescence of plaintiff's claim may well have been inferred from the facts. This was a matter "for the court to determine as a fact in the light of the relations between the parties and of the surrounding circumstances." Franz v. Mendonca, 131 Cal. 205, 63 Pac. 361; Id., 146 Cal. 640, 80 Pac. 1078. I do not understand that the element of "acquiescence" is to be shown independently of knowledge, in the common acceptation of that term; i. e., that an affirmative permission or consent be given in addition to knowledge of the hostile claim of right. If the owner has the knowledge which the law requires shall be imputed to him, and takes no steps to prevent the adverse claimant from his continuous enjoyment of the right claimed by him, such owner will be deemed to have acquiesced in such use. This court had occasion in a recent case to consider the point, in which the rule was stated. It was there said: "No particular act, or series of acts, is necessary to be done in order that the possession may be notorious, but any visible act which clearly demonstrates an intention to claim ownership and possession will be sufficient to establish claim of adverse possession. Such claim may be made out by visible acts, without any assertions by word of mouth. When the use is not secret or clandestine, but open, visible, and notorious, the presumption of knowledge follows. The burden is in the first instance upon the plaintiff to prove his title by prescription. After showing the continuous occupancy and use of the water, as though he were the owner, for more than 5 years, he establishes a prima facie case. It then devolves upon the defendant to show that the use was permissive, or without the knowledge of the defendant." Gurnsey v. Antelope Creek, etc., Co., 6 Cal. App. 387, 92 Pac. 328.

We have thus taken up the several elements claimed by appellant to be requisite to a good prescriptive right. We think they are shown to have been sufficiently established by the evidence as found by the trial court.

The testimony of defendant was that he constructed the ditch at least over sections 17 and 20 to irrigate that land. He testified also that he built it along its entire length, and, if true, it is claimed by plaintiff (so far as defendant can now deny) that he did so presumably with the consent of intervening landowners. The court found that water has flowed continuously in the ditch since its construction. In this state of facts plaintiff now claims that "defendant cannot, without strengthening plaintiff's claim of adverse user, deny that in constructing this ditch he did so with the consent of the owners of the land traversed by the ditch; and, having as plaintiff's predecessor in title, constructed the ditch for the benefit of sections 17 and 20, he is estopped now, as between himself and the owner of that land, to contend that the ditch did not thereby become an appurtenance." We are not prepared to say that in this contention plaintiff is not correct. It is not necessary, however, to decide the question.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

10 Cal. App. 553

COX v. HUGHES et al. (Civ. 585.)

(Court of Appeal, Third District, California. May 7, 1909.)

1. Assignments (§ 13*)—Future Earnings—Existing Contracts.

An assignment of wages to be earned under an existing employment is valid, though the assignor is hired for no specified time and is removable at will, but a present employment will not support an assignment of earnings from a different and future employment.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 21; Dec. Dig. § 13.*]

2. Principal and Agent (§ 34*)—Revocation of Power of Attorney — Power Coupled with Interest.

A power of attorney authorizing another to assign future earnings from an existing employment which declared that the power was coupled with an interest and was irrevocable could not be revoked while the employment continued until the debt was discharged, but could be revoked as to earnings from a future employment, since the assignor himself then had no interest therein.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 55; Dec. Dig. § 34.*]

3. Equity (§ 66*)—Maxims—One Seeking Equity Must do Equity.

Plaintiff executed to defendant a power of attorney, coupled with an interest and irrevocable, authorizing defendant to assign future earnings from plaintiff's existing employment and from any future employment that he might procure until money which defendant advanced to plaintiff in good faith had been paid. *Held* that, though the power of attorney was invalid at law in so far as it attempted to assign earnings from a future employment, the maxim that he who seeks equity must do equity will be applied, and plaintiff cannot enjoin the exercise of the power unless he pays defendant the money due him.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 188–190; Dec. Dig. § 66.*]

4. Assignments (§ 11*) — Validity — Public Policy — Assignment of Future Earnings.

A contract by which future earnings from existing and future employments are assigned is not void as against public policy.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 19–23; Dec. Dig. § 11.*]

5. Contracts (§ 108*)—Validity—Contrary to Public Policy.

Courts should declare contracts void as contravening public policy only when the question is free from doubt, and a contract, not wrong in itself, should not be held void on that ground unless the benefit to the public is substantial, and not merely theoretical or problematical.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 498; Dec. Dig. § 108.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Albert W. Cox against A. S. Hughes and others. From a judgment for plaintiff, defendants appeal. Reversed.

Berry & Brady, for appellants. Albert A. Rosenheim, for respondent.

BURNETT, J. The complaint alleges that on or about the 2d day of January, 1906, plaintiff executed a certain written instrument, which is set forth in the complaint, and which is designated and in fact is a power of attorney. Therein the defendant A. S. Hughes was authorized, among other things, "to fill in, execute, or complete, any sale or assignment of wages or salary, claim, or demand now due or to become due me from any future employer, person, firm or corporation, to the extent of my indebtedness to the said Star Loan Company, which said sale or assignment may date from the time of my said new employment, in case I should engage my services to other than my present employer; to execute, alter, change, fill in or complete, any form as he may see fit, any contract, sale or assignment of wages, drafts, orders, bills of exchange, executed by me to, with, or for the Star Loan Company to which I am indebted, upon any person, firm or corporation, in whose service I now am or shall at any time be engaged for any amount that I shall at any time be indebted to the said Star Loan Company. * * * It being distinctly understood and agreed that this power of attorney shall be irrevocable, the same being coupled with an interest while I shall in any wise be and remain indebted to the Star Loan Company or its assigns, on any contract, and I hereby grant to my said attorney full power of substitution hereby ratifying for myself and representatives whatever my said attorney shall do by virtue of the powers and privileges granted by these presents."

It is further alleged: That at said time plaintiff signed a large number of blank instruments purporting to be assignments to defendant the Star Loan Company as well as powers of attorney; the instruments so signed being set out in the complaint. That defendant Hughes did on August 1, 1907, change, alter, and fill in one of the said assignments by inserting in the blanks therein the name of the employer, "Newman & Levinson, Sutter and Van Ness avenue, City," the term of employment, "the weeks ending August 3d, 10th, 17th, 24th, and 31st,

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

1907," and, in addition thereto, inserted and filled in "August 1st, 1907." The instrument so filled in is set out in full in the complaint. That on said January 2, 1906, plaintiff was in the employ of the Emporium and entered the employment of Newman & Levinson on the 5th day of October, 1906, where he was working at the time the defendant Hughes filled in the blank instrument and at the time the complaint was filed. That on the 15th day of August, 1907, plaintiff revoked the power of attorney and filed the revocation in the county recorder's office. That defendant Hughes refuses to recognize the revocation. Plaintiff therefore prays for an order restraining defendant Hughes from exercising any power under said power of attorney, directing that said instrument be canceled, and that the Star Loan Company be restrained from acting under any of the said assignments. Defendants demurred to the complaint, and their demurrer was overruled. They filed an answer in which they alleged that, at the time of the execution of said power of attorney from plaintiff to Hughes, the said plaintiff executed and delivered to defendant the Star Loan Company two promissory notes, one for $120, the other for $207. That thereafter he executed two other notes. That the aggregate amount due on those notes is $336 and interest, and that since the execution of said power of attorney plaintiff has been continuously indebted to the Star Loan Company on said notes. That defendant Hughes is and was at all times mentioned in the complaint the general manager of said company in the state of California, and that the power of attorney and assignments were given by plaintiff to secure the payment of the notes. Plaintiff demurred to this answer upon the ground that it failed to state facts sufficient to constitute a defense. The demurrer was sustained, and judgment was entered for plaintiff as prayed for, from which judgment the appeal is taken.

The main points of controversy may be presented as follows: Respondent, in the first place, insists that we are dealing with a power of attorney which attempts to assign wages and salary to become due from any future employer by virtue of contracts of employment not in existence at the date of the execution of the alleged power of attorney, and that such an attempt is illegal and void as against public policy. Appellants admit that an assignment of wages to be earned in the future where there is no existing contract of employment is invalid because the assignor has no present interest, but they claim that there was an existing contract, and therefore that the possibility of obtaining such future earnings, though contingent and liable to be defeated, was coupled with an interest, and hence it was a vested right.

Among the cases cited by respondent in support of his contention, which may be taken as fairly illustrative of all, is Lehigh V. R. Co. v. Woodring, 116 Pa. 522, 9 Atl. 61, wherein it is said: "The attempt was to assign that which had no existence, either substantial or incipient. There was no foundation or contract on which an indebtedness might arise. It was the mere possibility of a subsequent acquisition of property. This is too vague and uncertain. It cannot be sustained as a valid assignment and transfer of property." The case was an action at law brought by the creditor to recover on the assignment; and, as the assignment did not transfer the mere possibility, it was rightly held that there was no sufficient basis for the suit. On the contrary, when there is an existing employment, the rule is as stated in 2 Am. & Eng. Ency. of Law, p. 1031: "An assignment of wages or salary to be earned under an existing employment made in good faith and for a valuable consideration is valid. It is immaterial in such a case that the assignor works from day to day, and is hired for no specified time, or that he works by the piece, and his wages per month vary, or that he is removable at any time." Indeed, we have the same principle enunciated in the provisions of the Civil Code. Section 1044 provides that "property of any kind may be transferred, except as otherwise provided by this article." And section 1045: "A mere possibility, not coupled with an interest, cannot be transferred." The chance that A. may be employed some time in the future by B., and thereby earn wages, is, of course, a mere possibility not coupled with an interest, and it does not possess the element of negotiability. But, if the employment already exists, the wages to be earned from such employment, although a mere possibility, is coupled with an interest in A., and therefore assignable under the Code and the authorities. The proposition is so obvious as to require no further exposition.

In the light of the foregoing, it is clear that at the time of the execution of the said power of attorney by plaintiff he had no assignable interest in the wages or salary that he might thereafter earn from his employment by Newman & Levinson. Appellants are entirely mistaken in their contention that an existing employment by the Emporium changes the rule as to Newman & Levinson. It is the wages or salary that may be earned from the existing employment that can be assigned for the reason stated. But an existing employment can be no support for the assignment of what may possibly be earned from some other employment. If plaintiff could not legally assign the wages to accrue from a possible employment by Newman & Levinson, it must follow that he could not authorize any one else to make such assignment. This will not be disputed. Hence, if we were only concerned with the question of the legal sufficiency on said January 2, 1906, of the assignment or of the power of attorney attempting to authorize said assignment of said wages, the conclusion would be irresistible that respondent's position must be upheld.

Some other questions, however, demand attention. The revocation of said power of attorney is said also by respondent to justify the court's conclusion. Herein is a sharp issue between the parties involving the power of revocation. It is agreed that as a general rule the principal may revoke the authority of his agent so far as it relates to things concerning which the agency has not been executed, but that an exception exists where, as provided in section 2356 of the Civil Code, the power of the agent is coupled with an interest in the subject of the agency. As to the meaning of "a power coupled with an interest" Chief Justice Marshall has this to say in Hunt v. Rousmanier's Administrators, 21 U. S. 174, 5 L. Ed. 589: "A power coupled with an interest must be an interest in the thing itself. The power must be ingrafted on an estate in the thing. The power and interest are united in the same person. The interest or title in the thing being vested in the person who gives the power remains in him unless it be conveyed with the power and can pass out of him only by a regular act in his own name." In Norton v. Whitehead, 84 Cal. 270, 24 Pac. 156, 18 Am. St. Rep. 172, it is said: "The power of attorney also provides that it is irrevocable; and, although this is not conclusive, it nevertheless tends to prove that plaintiff had an interest in the subject-matter upon which it was to operate." Here the plaintiff declared the power to be coupled with an interest and irrevocable, and it was given as security for the payment of an indebtedness. The appellants had an interest in what was the subject-matter at the time of its execution, to wit, the wages to be earned from the existing employment. It is therefore clear that the power could not be revoked while that employment existed unless the debt were discharged. But, as we have already seen, plaintiff himself had no legal interest in the wages to be received from Newman & Levinson until the beginning of said employment. Prior to that time, therefore, he could not legally invest any one with an interest in said wages. Hence, up to the time of the second employment appellants' power of attorney, as far as the wages due from Newman & Levinson are concerned, was not coupled with an interest in the subject of the agency, and, in the absence of other circumstances, could be revoked. But, when the attempt was made to revoke it, the second employment had begun, and the agent had made an assignment while said employment was in existence. It may be that the door was thereby opened for the operation of the principle of ratification or estoppel, or of the application of section 2356, Civ. Code, that would preclude the attempted revocation from affecting the assignments already made, but we need not decide this minor phase of the question at issue as at any rate a comprehensive view of the nature of the original transaction and the character of the present action in the light of the principles of equity compels the conclusion, we think, that the judgment is erroneous.

The facts disclosed either expressly or by implication in the pleadings are that defendants advanced money to plaintiff upon the faith and assurance based upon a solemn promise in writing that defendants should be allowed to appropriate as they deemed advisable the future earnings of plaintiff until the debt was satisfied. Confiding in plaintiff's plighted honor, defendants advanced more money to respondent. We must assume that no advantage was taken of plaintiff, that there was no overreaching, no misrepresentation, no concealment, nothing unconscionable in the transaction; in other words, no infraction whatever of the principles of honesty and fair dealing. Indeed, it must have been a great accommodation to plaintiff for defendants to advance the money upon such uncertain security and without exacting excessive interest. After receiving the benefit of the confidence reposed in his fidelity, a court of equity will not aid plaintiff in the repudiation of his agreement, and will not unqualifiedly decree the cancellation of the written evidence of his moral obligation. Admitting the legal invalidity of the transaction to the extent that we have noted, and that defendants could not in an action at law recover the wages due from the Newman & Levinson employment, still, under the facts disclosed, plaintiff is entitled to no relief in this equitable action unless he is willing to pay defendants what is due. This follows from the familiar maxim of equity jurisprudence that he who seeks equity must do equity.

How does the matter appear in the light of the authorities? In Pomeroy's Eq. Jur. § 1285, it is said: "Neither the English nor the American statutes allow the legal assignment of mere naked possibilities or expectations not coupled with an interest. The jurisdiction of equity continues to be exclusive over all other assignments of contingent, future, expectant interests and possibilities not embraced within this legislation"; and in section 1287: "And furthermore, possibilities not coupled with an interest—mere possibilities or expectancies—which are not embraced within these statutes are, according to the general course of decision, assignable in equity for a valuable consideration; and equity will enforce the assignment when the possibility or expectancy has changed into a vested interest or possession." Section 1288: "A particular instance of this doctrine is that which deals with the assignment of property to be acquired in the future. * * * A sale, assignment or mortgage, for a valuable consideration, of chattels or other personal property to be acquired at a future time, operates as an equitable assignment, and vests an equitable ownership of the chattels in the purchaser or mortgagee as soon as they are acquired by the vendor or mortgagor, without any further act on the part of either; and this ownership a court of equity will protect and maintain at the suit of the equitable assignee." It is further held that the doctrine of equitable assignment of property to be acquired in future is much broader than the jurisdiction to compel the specific performance of contracts. Section 1297 is also instructive as to the enforcement of certain contracts in equity.

Again, the same learned author interprets the maxim to which we have adverted to mean "that whatever be the nature of the controversy between two definite parties, and whatever be the nature of the remedy demanded, the court will not confer its equitable relief upon the party seeking its interposition and aid unless he has acknowledged and conceded, or will admit and provide for, all the equitable rights, claims and demands justly belonging to the adversary party, and growing out of or necessarily involved in the subject-matter of the controversy." Section 385. Among the illustrations of the doctrine is the following: "Under statutes against usury, which make void all usurious debts and obligations, the debtor may maintain a suit in equity for the purpose of procuring the usurious bond or other security to be surrendered up and canceled; but this relief will only be granted upon the condition that the plaintiff does equity by repaying to his creditor the amount which was actually loaned upon the security." It is properly declared that the principle pervades the entire equity jurisprudence so far as it is concerned with the administration of equitable remedies. In Ency. of Law, supra, p. 1032, it is declared that "there can be no valid assignment of future wages where they constitute a mere possibility coupled with no interest. * * * But, speaking generally, it may be said that such assignments are valid in equity when the consideration is meritorious and no rights of third parties intervene." Judge Story states the rule in section 1040 of his work on Equity Jurisprudence as follows: "But courts of equity will support assignments not only of choses in action and of contingent interests and expectancies, but also of things which have no present actual or potential existence, but rest in mere possibility; not, indeed, as a present positive transfer operative in præsenti, for that can only be of a thing in esse, but as a present contract—to take effect and attach as soon as the thing comes in esse." In Field v. Mayor, etc., of New York, 6 N. Y. 179, 57 Am. Dec. 435, it is held that "the assignment of money to be earned by performance of a contract for work and materials, although a mere possibility, cannot operate immediately, but it becomes operative in equity when the subject-matter becomes existent or due." In Edwards v. Peterson, 80 Me. 367, 14 Atl. 936, 6 Am. St. Rep. 207, it is held that an assignment of wages expected to be earned in the future in a specified employment, though not under an existing employment or contract, is valid in equity. The same principle is announced in the case of In re Garcelon, 104 Cal. 584, 38 Pac. 417, 32 L. R. A. 595, 42 Am. St. Rep. 134, where reference is made to sections 700 and 1045 of the Civil Code, and it is declared that: "These sections simply state the well-settled and well-understood rule of the common law upon the subject to which they relate. At common law a mere possibility, such as the expectancy of an heir, was not regarded as such an existing interest as to be the subject of a sale or capable of passing by assignment; but in equity the rule was different, and agreements for the sale or release of expectancies, if fairly made and for an adequate consideration, were enforced upon the death of the ancestor, and in our opinion it was not the intention of the Legislature in enacting the sections of the Code just referred to to make any change in the rule by which courts of equity were heretofore governed in dealing with this class of contracts." The only possible answer to the foregoing is that a contract to assign future wages or salary is against public policy, and therefore void. But this position cannot be maintained. There is a marked difference in the case of a public official for the reason that the assignment of his salary to be earned tends to impair the efficiency of the public service, and therefore it is generally held to be void in law and equity as being against public policy. In the case of Smith v. Atkins, 18 Vt. 461, it is said: "It is argued that such contracts are so much against public policy that they ought not to be supported, but we think they are rather beneficial and enable the poor man to obtain credit when he could not otherwise do it, and that without detriment to the creditors." In Mallin v. Wenham, 209 Ill. 258, 70 N. E. 566, 65 L. R. A. 602, 101 Am. St. Rep. 233, it is said: "We cannot see that there is anything intrinsically vicious in an assignment of wages. The assignor in such case simply draws upon his future prospects to supply present needs, which may be of the most urgent and pressing character. There is no law in this state to prevent a poor person from mortgaging or pledging any or every article of property he possesses, as security for his debts, and such a privilege may be of great value." A person has the same right to assign his wages as he has to mortgage his homestead or to mortgage personal property that is exempt from execution. If he does not choose to avail himself of the liberal exemptions which the statute provides, the courts cannot interfere in his behalf. It is universally held, as stated by Greenhood on Public Policy, that: "The power of the courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power. and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt." Before a court should declare a contract not malum in se opposed to sound public policy, it must be entirely satisfied that the public will be substantially benefited, and that such advantage is not merely theoretical or problematical.

Of course, if there was any element of fraud in the transaction by which defendants secured the power of attorney and assignments in controversy, the plaintiff should be permitted to amend his complaint and so allege, but. as the record shows, he has come into a court of equity relying upon his naked legal right without tendering or offering to pay what is justly due appellants, and not showing himself entitled to the generous aid of this comprehensive jurisdiction that looks to the morality and good faith of the transaction, and therefore we are satisfied the court erred in overruling the demurrer to the complaint and sustaining the demurrer to the answer.

The judgment is reversed.

We concur: CHIPMAN, P. J.; HART, J.

10 Cal. App. 637

KERN COUNTY BRICK & CONTRACT CO. v. ENGLISH. (Civ. 619.)

(Court of Appeal, Second District, California. May 24, 1909.)

1. PARTNERSHIP (§ 217*) — ACTION AGAINST PARTNER—EVIDENCE.

In an action for the price of goods, evidence *held* to sustain a finding that the goods were sold to a firm consisting of defendant and another, and not to defendant individually.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 217.*]

2. PARTNERSHIP (§ 219*)—ACTION AGAINST PARTNER—JUDGMENT AGAINST FIRM.

Where plaintiff elected to sue defendant as an individual for supplies furnished a firm of which defendant was a member, and objected to the filing of an amendment to the answer, pleading that the materials were sold to the firm, and not to defendant, plaintiff could not be compelled to take judgment against the firm on service on defendant as an individual.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 429–445; Dec. Dig. § 219.*]

Appeal from Superior Court, Kern County; Paul W. Bennett, Judge.

Action by the Kern County Brick & Contract Company against John P. English. From a judgment for defendant, and from an order denying plaintiff's motion for a new trial, it appeals. Affirmed.

Rowen Irwin, for appellant. W. W. Kaye, for respondent.

ALLEN, P. J. This is an appeal from a judgment rendered in defendant's favor and against plaintiff, and from an order denying a new trial. The action was brought by plaintiff against defendant, English, to recover the price and value of certain brick and other building material alleged to have been sold and delivered by plaintiff to defendant between December, 1903, and June, 1904. Defendant denied the sale and delivery to him of said material, or that he ever agreed to pay therefor the price named or any sum. Upon the trial of the action the court found the allegations of the complaint to be untrue and the allegations of the answer to be true. In addition to this, the court found that, at the time the goods mentioned in the complaint were sold and delivered, a partnership existed between the defendant and one Farnum, during the existence of which partnership said Farnum was the managing agent of the corporation plaintiff; that the materials set out in the complaint were furnished to such partnership through Farnum, the managing agent of plaintiff, and that, without the knowledge or consent of the defendant, Farnum had wrongfully caused the materials and supplies to be charged on the books of plaintiff to the defendant; that prior to the commencement of the action the partnership had paid to plaintiff the price and value of all goods received, other than the value of certain goods returned, and that there was no sum due from said partnership to plaintiff, and judgment was accordingly rendered in defendant's favor for costs.

Upon this appeal the only question presented by the briefs relates to the sufficiency of the evidence to support the findings. The general finding that defendant, English, never individually purchased the materials mentioned in the complaint, received the same, nor promised to pay for the same, has ample support from the evidence. There is evidence in the record to the effect that, before the sale or delivery of any of the goods mentioned in the complaint, defendant, English, and Farnum engaged in the contracting business under an agreement through which Farnum was to furnish all the materials, and defendant, English, who was a brick mason, was to receive $6 a day for his labor, and that, if any profits remained after the materials and labor were paid for, the same should be equally divided; that Farnum, when he entered into this arrangement, was the general manager of plaintiff, and his arrangement and agreement with English was known to the president of plaintiff. It further appears that after this agreement was entered into Farnum, as such general manager, shipped from the yards of plaintiff the materials set out in the complaint to the various points where the partnership was engaged in work; that Farnum made the contracts for the work to be performed by the partnership, and collected practically all the money due on account of the materials so furnished, as well as for the labor performed, defendant, English, collecting an amount insufficient to pay for his labor. English never ordered any of the goods or materials which were used in the contracting work, nor had he any notice or knowledge of the fact that Farnum was using plaintiff's materials in the prosecution of the work until after the supplies had been delivered and used in the work. As a fact, Farnum caused the goods supplied by him under his agreement to be charged to defendant, English, upon plaintiff's books, but this was all without the knowledge or consent of defendant, English, who repudiated the same promptly upon information being brought home to him. If it were to be assumed that the court might in a proper case, of its own motion, direct that a member of a partnership not made a party to the action be brought in, and perhaps in some cases must do so, rather than that a mistrial may result (Harrison v. McCormick, 69 Cal. 620, 11 Pac. 456), this is not true of a case such as we have here under consideration. The plaintiff having elected to bring its action against English as an individual, and having objected to the filing of an amendment to the answer setting up that the materials were sold to the partnership, and not to English, cannot be compelled to take judgment against a partnership based upon the service of summons on English as an individual. It was entitled to and did litigate the issue presented as to whether English individually was indebted to it or not, and the court held that he was not. The finding that the debt was the debt of the partnership was but incidental to the finding that it was not the debt of English.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The judgment and order are affirmed.

We concur: SHAW, J.; TAGGART, J.

10 Cal. App. 619

STULL v. BENEDICT et al. (CHAPMAN, Intervener). (Civ. 511.)

(Court of Appeal, Second District, California. May 19, 1909.)

1. Guardian and Ward (§ 45*)—Guardian De Son Tort—Rights of Guardian.

The mother and natural guardian of a minor who had no general guardian loaned $2,400 of his money, taking a note therefor, together with a mortgage and note for $3,000 as collateral. Subsequently she pledged the two notes and the mortgage as collateral to secure $1,500 borrowed on her own account from a third person who obtained a judgment directing a delivery of the papers to the mother on her paying the $1,500 note within a specified time after notice of entry of judgment. No notice of entry of judgment was given. The $2,400 and $3,000 notes were subsequently assigned to the infant, who sued to foreclose the mortgage. *Held*, that a judgment foreclosing the mortgage and directing that the third person should receive $1,500 with interest from the proceeds of the sale, and that the residue should be paid to the infant, was proper as against the mother.

[Ed. Note.—For other cases, see Guardian and Ward, Dec. Dig. § 45.*]

2. Guardian and Ward (§ 138*)—Guardian De Son Tort—Rights of Guardian.

A guardian de son tort is not entitled as a matter of right to an accounting where the interests of the beneficiary are in the judgment of a court of equity better subserved by specific relief as to the particular fund or property over which authority has been assumed by the person acting as such guardian.

[Ed. Note.—For other cases, see Guardian and Ward, Dec. Dig. § 138.*]

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by Gertrude Stull against Charles E. Benedict and another, in which Wm. Chapman intervenes. From a judgment for defendants and intervener, plaintiff appeals. Affirmed.

Tanner, Taft & Odell and Gertrude Stull, for appellant. C. Lantz, Earle & Creede, O. P. Widaman, J. L. Fleming, and R. A. Odell, for respondents.

TAGGART, J. Appeal from judgment foreclosing a mortgage. Plaintiff being the mother and natural guardian of the defendant Schiedt, now Tracey, a minor, without a general guardian, held the sum of $2,400 belonging to said minor, which she, plaintiff, loaned to the defendant Holway, taking his promissory note for that amount and an assignment of the mortgage foreclosed in this action and the note secured thereby for the sum of $3,000, as collateral. She thereupon hypothecated both the $3,000 note and mortgage given to secure it and the $2,400 note to the intervener, Chapman, to secure the payment of $1,500 which she borrowed from him through his agent Lantz on her own account, and made and delivered a written assignment of the mortgage to Chapman. The interest on the $3,000 note being in default, Chapman brought an action in the superior court of Los Angeles county to foreclose the mortgage in accordance with the terms thereof. Plaintiff here (Gertrude Stull) intervened in that action, and judgment was entered therein directing Chapman to deliver up and surrender to the said Gertrude Stull all the papers held by him as security for the payment of said $1,500 note upon payment or tender of payment to him of said sum of $1,500; the judgment expressly reciting that it was made without prejudice to the right of said Stull to bring another action to foreclose said mortgage. Chapman appealed from that judgment to the Supreme Court, and, the cause being transferred to this court for hearing and determination, the judgment was modified so that it was provided therein that if the intervener, Stull, should fail to pay to Chapman within 10 days after notice of entry of judgment the said sum of $1,500, her complaint in intervention should be dismissed, and plaintiff have leave to proceed with the action to foreclose the mortgage against the original parties. The judgment as so modified was affirmed. No notice of entry of judgment was ever given by Chapman, and the plaintiff Stull (intervener in the other action) brings this action to foreclose the mortgage, and Chapman intervenes.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The court in this action found that since the former action was tried the Holway note of $2,400 and the $3,000 note held as collateral security have been assigned to said defendant Tracey, who is now the owner and holder thereof, and that she is entitled to foreclose the said mortgage, and that, upon the sale of the mortgaged premises, the intervener, Chapman, is entitled to receive the sum of $1,500, with interest thereon from the date of the judgment of this court on the former appeal, out of the proceeds of such sale, the residue thereof to be paid to the defendant Tracey. The purpose of the appeal taken by the plaintiff in propria persona, as stated in the page and a half brief filed by her (which is the only brief filed in the case), is that "the judgment may be modified to follow plaintiff's complaint and for the usual findings in foreclosure cases." The points made are, "first, intervener had no further cause against plaintiff and appellant" than the one on the $1,500 note; "second, the pleadings of defendant Tracey show her only right against plaintiff and appellant was one for accounting under a trust which in this action the court could not consider.' The answer to the first point is that the judgment of intervener against the appellant is limited to the $1,500. To the second, that a guardian de son tort is not entitled as a matter of right to have an accounting if the interests of the beneficiary are in the judgment of a court of equity better subserved by specific relief in respect to the particular fund or property over which authority has been assumed by the person acting as the guardian without appointment by the court.

We find nothing in the record to warrant any modification of the judgment at the instance of plaintiff, the appellant. Judgmen affirmed.

We concur: ALLEN, P. J.; SHAW,

10 Cal. App. 623

STEWART v. BURBRIDGE et al. (Civ. 574.

(Court of Appeal, Second District, California. May 20, 1909. Rehearing Denied June 18, 1909.)

TRIAL (§ 404*)—FINDINGS—CONCLUSIONS—NONPAYMENT.

A finding of the court that there was "due and owing" from defendants to plaintiff a certain sum was a sufficient finding of nonpayment.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 404.*]

Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by C. P. Stewart against O. H. Burbridge and another. From a judgment for plaintiff, defendants appeal. Affirmed.

See, also, 101 Pac. 419.

Oscar A. Trippet, Arthur M. Ellis, and Alfred Siemon, for appellants. Woodruff & McClure, for respondent.

TAGGART, J. The appeal in this case is from the judgment and from an order denying a new trial. The only error urged is that in finding of fact 4, which reads as follows: "That the said plaintiff has prior to the beginning of said action demanded of and from said defendants, and each of them, his proportion of said $5,000, to wit, $\$1{,}666^{2}/_{3}$ as a commission for making said sale, but that said defendants, and each of them, having failed, neglected, and refused, and still fails, neglects and refuses to pay said plaintiff the said sum of $\$1{,}666^{2}/_{3}$ or any part thereof, and there now remains due and owing from the said defendants to the said plaintiff the sum of $\$1{,}666^{2}/_{3}$ over and above all counter charges and offsets"—the words "due and owing" state a conclusion of law, and not a finding of fact. That the finding as so worded does not dispose of the issue of nonpayment essential to a judgment, and therefore the judgment lacks this finding of fact necessary to its support.

It is a matter of some surprise that counsel should ask this court to reverse a judgment upon this ground alone on the record in this case and upon the authority of Penrose v. Winter, 135 Cal. 289, 67 Pac. 772, and Ward v. Clay, 82 Cal. 502, 23 Pac. 50, 227. In the latter case the court says that the finding that a sum was "due and owing" implied that the sum remained "unpaid" and this was held to be a sufficient finding of nonpayment. In the former case, Beatty, C. J., writing the opinion, in considering the case of Ryan v. Holliday, 110 Cal. 337, 42 Pac. 892, in which an allegation in a pleading that "there is now due and owing" was held to be a mere conclusion of law, and fatally defective when attacked on appeal from a judgment by default without a demurrer to the pleading having been interposed, says: "My opinion is that we should recede, not from the doctrine of that case—that in a suit upon a promise to pay an allegation of nonpayment is essential—but from what I conceive to have been a misapplication of a sound rule of pleading to a case it did not fit. There was not in that case, any more than there is here, a total failure to allege nonpayment. It is true that the allegation was made in the form of a legal conclusion, in which the material fact was merely implied; but, in the absence of any demurrer, such faults of pleading are cured by the judgment." Penrose v. Winter is recognized as of full weight and authority in the respect above quoted in the later cases of Knox v.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Buckman Co., 139 Cal. 598, 73 Pac. 428, and Arnold v. American Ins. Co., 148 Cal. 660, 84 Pac. 182. No other point being urged, and the one discussed being without merit, the judgment should be affirmed.

The appeal from the order having heretofore been dismissed by this court, the judgment is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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10 Cal. App. 614

ANDREWS v. WHEELER et al. (Civ. 520.)

(Court of Appeal, Second District, California. Oct. 24, 1908. On Rehearing, May 19, 1909. Denied by Supreme Court July 17, 1909.)

1. BOUNDARIES (§ 3*)—SURVEYS—MARKS ON THE GROUND.

Marks on the ground constitute the survey, and courses and distances are only evidence thereof.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 18; Dec. Dig. § 3.*]

2. BOUNDARIES (§ 3*)—FIXING BOUNDARIES—MONUMENTS—COURSES AND DISTANCES.

Though under Code Civ. Proc. § 2077, monuments control distances, where there is an inconsistency between the two as given in a deed, yet where no monuments were set, or if set have disappeared, and their location cannot be established, resort may be had to courses and distances to fix corners and boundary lines.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 18; Dec. Dig. § 3.*]

3. BOUNDARIES (§ 7*)—CORNERS—LOCATION.

Where the call in a deed was to a corner as shown by a designated map, without referring to any other map or survey, and there were no data connected with the designated map showing that the surveyor in making the survey set any monuments marking lines or corners, on the ground, the fact that the surveyor, when making the survey for the map, set monuments fixing corners and lines could be established by parol, but, where such monuments were not set, the corner and division lines must be established by the description on the face of the map; field notes not being shown.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 58; Dec. Dig. § 7.*]

4. BOUNDARIES (§ 35*)—EVIDENCE.

Where the call in a deed was merely to a corner as shown by designated map, evidence referring to stakes set by others in making surveys of adjoining lands was inadmissible, as it did not identify monuments set by the surveyor in making the survey for the map, and it could not establish the boundary lines contrary to those called for by courses and distances shown on the map.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 178; Dec. Dig. § 35.*]

5. BOUNDARIES (§ 3*)—ELEMENTS—RELATIVE IMPORTANCE.

Where a map of two lots shows that one lot contains a specified number of acres, without otherwise describing it, and that the other lot is defined by distances, the latter in view of Code Civ. Proc. § 2077, takes precedence in location in case of conflict, in the absence of a showing of priority as to title, or field notes or monuments of the survey.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 22; Dec. Dig. § 3.*]

6. BOUNDARIES (§ 53*)—SURVEYS.

Where parties claim land according to a plat made by a surveyor from an actual survey on the ground, a survey not made on the ground is not entitled to consideration in determining the boundaries.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 264; Dec. Dig. § 53.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

7. Boundaries (§ 55*) — Establishment — Surveys.

Where by actual measurement over the surface of lots from boundaries as fixed by a surveyor, who made an actual survey on the ground, there is an excess in distance over that specified in the map and called for in deeds conveying the land according to the map, the excess in the absence of any marking on the ground of the division line between the lots must be apportioned thereto in proportion to their respective lengths.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 278; Dec. Dig. § 55.*]

8. Adverse Possession (§ 90*)—Payment of Taxes—Effect.

The fact that for five years one paid taxes on the premises described in his deed cannot be construed as a payment of taxes on lands other than those described therein.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 517-519; Dec. Dig. § 90.*]

On Rehearing.

9. Boundaries (§ 3*)—Monuments.

Where a surveyor at the time of making an actual survey marks the division lines on the ground by monuments, the lines so established control the calls and distances indicated on the map of the surveyor, and in deeds conveying the land according to the map.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 28; Dec. Dig. § 3.*]

10. Boundaries (§ 35*)—Evidence.

Where a map, made by a surveyor, who made an actual survey on the ground, gave distances from streets referred to on the map, and the streets were not at the time of the survey located or used as indicated by the map, and there was no evidence of ascertained monuments of the survey on which the map was predicated, the court could receive the best evidence obtainable, and might ascertain the location of such stakes as were commonly recognized, accepted, and used in lieu of the lost or destroyed original ones, and in the absence of more certain evidence, such stakes established the boundary.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 153; Dec. Dig. § 35.*]

11. Appeal and Error (§ 1050*)—Harmless Error—Admission of Evidence.

The mere fact that a surveyor, in testifying as to the result of the survey made by him, states his conclusion as to the effect of his survey is not alone sufficient to entitle the aggrieved party to a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4153; Dec. Dig. § 1050.*]

12. Appeal and Error (§ 340*)—Time for Proceedings—Questions Reviewable.

Under the express provisions of Code Civ. Proc. § 939, subd. 1, the court, on an appeal not taken within 60 days after the rendition of the judgment, cannot review the sufficiency of the evidence, but is confined to its competency and admissibility.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1888; Dec. Dig. § 340.*]

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by Lewis W. Andrews against Fred F. Wheeler and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Haas, Garrett & Dunnigan, for appellant. Bernard Potter and Frank James, for respondents.

SHAW, J. Action to quiet title, the purpose thereof, in fact, being to establish the division line between division A of lot 6 in block 26 of the canal and reservoir lands of the city of Los Angeles, as designated upon a map thereof made by William Moore in 1870, which said land is owned by plaintiff, and a tract of land lying immediately north thereof and adjoining, part of which is owned by defendants, and designated upon said map as division A of lot 3 of said block 26. Said divisions of said lots 6 and 3 extend from the south line of First street to the north line of Sixth street in said city of Los Angeles. The land in controversy consists of a strip about 16 feet in width, as to which each party, one by his complaint and the other by cross-complaint, prays that his title thereto be quieted against the other. The trial court rendered judgment for defendants, from which plaintiff appeals upon a bill of exceptions. In 1870 William Moore made a plat of these lands, which plat, it is stipulated, is the official map of the canal and reservoir lands, under and in accordance with which both parties deraign their title from the city of Los Angeles. Appended to this map, which was received in evidence, is the following certificate: "I hereby certify this above to be a true and correct map of the lands of the L. A. Canal & Reservoir Company as surveyed and subdivided by me in accordance with the respective deeds and city ordinances. Los Angeles City, Dec. 3, 1870. William Moore, Surveyor."

Division A of said lot 6 is an irregular shaped tract, due to the fact that the western boundary line of the city intersects and extends across what otherwise would be the southwest corner thereof. The dimensions of this tract are indicated in figures upon said map. The length of the east boundary line thereof, extending from the north line of Sixth street to the division line between said lots 3 and 6, is designated as being 23.97 chains. These dimensions must be regarded as set out in the deed as though therein written. No length of the lines of division A of said lot 3 is indicated on the map, the only thing appearing thereon being the area, 17.50 acres, but the deed under which defendants deraign title calls for a distance of 18.72 chains from the northwest corner of said lot 3, which is conceded to be the south boundary line of First street, to the southwest corner of said lot; thence easterly at right angles (the location of which line is the one in controversy) 9.36 chains to the southeast corner thereof; thence 18.72 chains northerly to the south boundary line of First street. The east boundary line of division A of said lot 3 is in line with, and an extension of, the east boundary line of division A of said lot 6, and extends from the south boundary line of First street to the north boundary line of Sixth street. The total length of this line, as called for in the deeds under which the parties deraigned title, is 42.69 chains, or 2,817.54 feet, or 4.96 feet in excess of that called for in the deeds. Notwithstanding this fact, defendants contend that, by reason of the call in their deed being to the southwest corner of lot 3, they are not limited to the distance call of 18.72 chains; that said southwest corner, as they locate it, constitutes a monument marking the division line between the respective tracts of land, and to which their land extends, without regard to the fact that in thus establishing the division line it gives them more land than that called for by the dimensions given in their deed, and gives plaintiff correspondingly less.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The general rule that monuments control distances where there is an inconsistency between the two as given in a deed is too well settled to require the citation of authorities. Section 2077, Code Civ. Proc. "It has ever been held that the marks on the ground constitute the survey; that the courses and distances are only evidence of the survey." Hall v. Tanner, 4 Pa. 244, 45 Am. Dec. 686; Gordon v. Booker, 97 Cal. 586, 32 Pac. 593. If, however, no monuments were erected, or, if erected, have disappeared, and their location cannot be established, then resort may be had to courses and distances for the purpose of fixing the corners and boundary lines. Chadbourne v. Mason, 48 Me. 389; Bradford v. Hill, 2 N. C. 22, 1 Am. Dec. 546. The call in defendants' deed is not to a stake or monument, but to the southwest corner of lot 3, of the canal and reservoir lands of the city of Los Angeles, as shown by Moore's map thereof. No reference is made in the deed to any other map or survey. There is no data connected with Moore's map showing that he, in making his survey, set any stakes or erected any monuments, designating upon the ground any lines or corners. We must look to the record for parol evidence of the fact, if it be a fact, that he did, at the time of making the survey for this map, place a monument or stake upon the ground designating and fixing the southwest corner and division line in question, and, unless the fact is established that he did set such stake or monument, then such corner and division line must be established by the data or description appearing upon the face of the map; it not being shown there were any field notes of his survey. There is no evidence contained in the record that Moore established any monuments. Indeed it is not claimed that he erected any, and hence no effort made to identify the location of any claimed to have been lost or destroyed. Respondents in their brief contend that the survey of the tract in question was originally made on paper by Henry Hancock, and that no stakes were placed marking the corners or division lines, and that the actual survey was not made until long after the filing of this map, when different surveyors, attempting to lay the plat on the ground, found there were numerous inaccuracies and errors. They further argue that the division line as found by the court, and which is termed the "monumented line," was presumably established by Moore, who made the surveys of this property in the field, and that said line is indicated by certain stakes inferentially placed there by Moore.

A line of evidence was introduced, over plaintiff's objection, not tending to establish the fact that Moore in any way designated by stakes or monuments any lines or corners, but tending to show where, in the opinion of the witness, the line in question should be located. In so locating the line some of the witnesses had reference to, and were guided by, what was known as the Hancock chamber or theoretical survey made in 1850, in the making of which it is conceded that no lines were run nor monuments established. Mr. Metcalf, who at one time owned said lot 6, testifies that in 1877 there was an old monument, consisting of "a hole in the ground with some rocks piled around it," at the northeast corner of said lot, but does not claim or attempt to identify it as a monument established by Moore. Mr. Severance, who surveyed this lot for Metcalf in 1891, says that at the time, in gathering data for the purpose of establishing the north line of lot 6 (which is the line in dispute), he took the notes of a survey made by Pillsbury and Cleveland of the Diamond tract adjoining, and following this, together with notes of surveys made by the city engineer, he found a 4 by 4 redwood stake, which he judged to be at least 10 years old, which he assumes to have been a Hancock stake. He further states: "I did not entirely base my survey of this property from the lines of the Diamond street tract, but also based it in connection with the old, so-called Hancock corner." He was asked the question: "Where did you locate the north line of lot 6 with reference to the Hancock stake?" to which, over plaintiff's objection, he answered: "I located the line between the 6 by 6 post, at the so-called Hancock corner and the south line of the Diamond tract, as defined by a 3 by 3 stake at the center of Reno street, on the south boundary of Diamond street tract, and distances brought south from other subdivision stakes in the Diamond tract." The character of this evidence, as well as other testimony to which appellant specifically calls our attention, did not tend to identify monuments established by Moore, but clearly refers to stakes set by other parties in making surveys of adjoining lands. There appears to us no theory of the case under which the testimony in question would be admissible as establishing the division line contrary to that called for by the courses and distances shown on the Moore map.

The map, which by the stipulation in the record is made controlling in this matter, shows division A of lot 3 to contain 17.50 acres, and gives no other description of the tract. Subdivision A of lot 6, being defined on the map by distances—the east boundary line running from the line of Sixth street and the westerly line from the west line of the city, being given in chains—is entitled to precedence in location in case of conflict, because the kind of measurement indicated is one which the statute makes paramount to that given in connection with subdivision A of lot 3. Angles are paramount to surfaces, and lines are paramount to both. Section 2077, Code Civ. Proc. If the distance from First to Sixth street be not sufficient to give to the defendants their 17.50 acres, and to the plaintiff his tract as shown by the lines on the map, the former must give way to the latter, there being no priority shown in respect to the title derived from the city, and no field notes or monuments of the Moore survey.

Respondents contend that it appears from the evidence that the north line of Sixth street as it now exists is some 12 or 14 feet farther north than as shown by the Hancock theoretical survey. Stocker testifies that "the course of Sixth street varies from the course of the monumented line between Mr. Wheeler and Mr. Andrews, and the monumented line [found by the court to be the true line] is, on the true course as shown on the original map, theoretical survey." But the parties do not hold or claim under the theoretical survey, but according to a plat made by Moore from an actual survey upon the ground. There is no evidence, as disclosed by this record, which entitles the so-called Hancock survey to any weight in the consideration of the case. If by actual measurement over the surface of the said lots from First street to Sixth street, as the lines thereof were fixed by Moore, there is an excess in distance over that specified on the map or called for in the deeds, such excess, in the absence of any designation on the ground of the division line between said lots, should be apportioned thereto in proportion to their respective lengths. It appears to be admitted that the width of this lot is correctly stated in the deed to Wheeler, and, if the latter be given all that the map shows was contained in division A of lot 3, his southern line would be at practically the same distance from First street that is indicated by his deed, 1,235.52 feet. And if in fact the north line of Sixth street, which constitutes the south line of lot 6, was thereafter shifted north from the line as designated by Moore, then said lot 6 should be reduced in length by the width of the distance to which said line was in fact thrown north from the line thereof as established by Moore.

There is no merit in respondents' claim of title by adverse possession. The fact that for five years they paid the taxes on the premises described in the deed cannot be construed as a payment of taxes on lands other than those described therein.

The evidence is likewise insufficient to constitute an estoppel against plaintiff, even had it been pleaded as a defense, which it was not. McKeen v. Naughton, 88 Cal. 462, 26 Pac. 354; Etcheborne v. Auzerais et al., 45 Cal. 121.

The judgment is reversed.

We concur: ALLEN, P. J.; TAGGART, J.

On Rehearing.

SHAW, J. Plaintiff appeals upon bill of exceptions from a judgment in favor of defendants and cross-complainants. An opinion reversing the decision of the trial court was filed on October 24, 1908. Thereafter, upon petition of respondents, a rehearing was granted.

In form the action is one to quiet title. The controversy grows out of conflicting claims as to the true location of the division line between subdivision A, lot 6, in block 26, of the canal and reservoir lands of the city of Los Angeles, as designated upon a map thereof made by William Moore in 1870, recorded in Book 2, Miscellaneous Records, pp. 210, 211, which subdivision is owned by plaintiff, and a tract of land lying immediately north thereof and adjoining, designated on said map as division A, lot 3, of said block 26, all of which, so far as it affects this case, is owned by defendants. These divisions A of said lots 6 and 3 of block 26, as designated upon the Moore map, extend from the south line of First street to the north line of Sixth street in the city of Los Angeles, and the land in dispute consists of a strip about 16 feet in width, depending as to its ownership upon the ascertainment of the true location of the division line between said lots 6 and 3. Reference to the map discloses that division A of lot 3 is marked thereon as containing 17.50 acres, but the length of said lot extending north and south is not indicated. At the trial however, it was stipulated that defendants held their title to the tract of land by mesne conveyances from the city of Los Angeles, which described the same as having a length or depth of 18.72 chains, or 1,235.52 feet; the call in the deed being to the southwest corner of said lot 3 according to said map. It was also stipulated that plaintiff's title to division A of lot 6, block 26, as per said map, was derived from the city of Los Angeles by like mesne conveyance, which described the tract by lot and block as delineated upon said map. The length of this lot is indicated upon the map in figures as being 23.97 chains, equal to 1,582.02 feet. It thus appears that, taking the length of lot 3 as called for in defendants' deed and the length of lot 6 as indicated upon the map, and thus giving to each lot the full depth called for by such data, it makes a total distance between First and Sixth streets of 2,817.54 feet. The actual distance, however, between the south line of First street and the north line of Sixth street, as shown by the uncontradicted evidence, is 2,822.50 feet, or 4.96 feet, in excess of the total length called for by the deeds.

The contention of plaintiff is that the division line is as indicated upon said map, namely, 1,582.02 feet north of the north line of Sixth street, whereas defendants and cross-complainants contend that at the time of making the survey for said map Moore established the division line upon the ground some 16 feet or less south of that as shown by said map, and designated such line by setting stakes and erecting monuments thereon. The trial court sustained this contention, the effect of which was to increase the length or depth of lot 3 over that called for in defendants' deed, and to correspondingly reduce the depth of lot 6 as indicated upon the map.

Appellant concedes that, if Moore did in fact designate the division line between said tracts upon the ground, and marked the same by stakes and monuments, such line so established controls the calls and distances indicated upon the map and in the deeds. There are no field notes or other data connected with the map showing that Moore in making the survey set any stakes or erected any monuments designating upon the ground any lines or corners. There is not a scintilla of direct evidence, parol or documentary, in the record which tends to show that he set a stake or erected a monument for any purpose whatever. In effect, the evidence is as follows: That in 1887, some 17 years after the making of the survey, H. H. Metcalf, a former owner of lot 6, had the tract surveyed for the purpose of ascertaining the boundaries thereof, at which time he found an old monument, consisting of a hole in the ground with some rocks piled around it, at a point which, according to defendants' claim, constitutes the corner common to the southeast corner of lot 3 and the northeast corner of lot 6. Thos. W. Bulpin, a city surveyor, called on behalf of defendants, testified that in 1897 he made a survey for Occidental boulevard from First to Sixth street; that in making this survey it was necessary to tie to the adjoining property stakes, fences, or other indications, as he found them; that he found an old 4x4 stake with a mound of rocks around it, which he had known for nearly 10 years before in connection with previous surveys, and which he had considered an original Hancock stake, but there was no certainty of the matter; that he tied to this stake, merely presuming it to be the corner common to lots 3 and 6; that he assumed that this stake was at the northeast corner of division A of lot 6, but did not attempt to verify it as a fact. Edwin D. Severance, a surveyor, testified on behalf of defendants that he made a survey of lot 6 in 1890 or 1891, at which time he found an old redwood stake at a point called for as the northeast corner in the city engineer's field notes. He says: "It was a stake I should judge at least 10 years old at that time." He further says: "In making surveys here in the city the last 13 years I have had occasion to retrace a great many of those Hancock corners. There were a few of them left, and that was one of the last to go." There was other evidence of like character, and evidence tending to show that stakes were found on a line east and west from this 4x4 stake assumed to mark the northeast corner of lot 6. All of which tended in some degree to prove that some 17 years after Moore made his survey, certain unmarked stakes were found on the line 16 feet south of the division line called for in the map, conceding the streets delineated on the map to have been located at the time of the Moore survey at the same place they were when these witnesses made their respective surveys, and that the distances given on the map are to be accepted as conclusive.

There was evidence, however, that neither of the streets referred to on the map are now, or were at the times of the surveys made by the several witnesses who testified in relation thereto, located, opened, or used upon the same lines, or were even running upon the same course, as indicated by the map; so that there was no certain base from which even the measurements on the map could be used if the court had adopted them in making its findings. The uncertainty in locating the boundary line by reason of these conditions did not relieve the court from the duty of finding where it was located as a matter of fact. In the absence of any evidence of fixed or ascertained monuments of the survey upon which the map was predicated, it was proper for the court to receive the best evidence obtainable. In doing this it might inquire, and it would be important to ascertain, the location of such stakes and monuments as were commonly recognized, accepted, and used in lieu of the lost or destroyed original ones. In the absence of more certain evidence, these would be sufficient to support a finding. Orena v. Santa Barbara, 91 Cal. 621, 628, 28 Pac. 268.

In considering the admissibility of evidence of this character this case is to be distinguished from one in which an attempt is made to dispute or contradict a line or measurement having a fixed or definite and ascertained point from which to run, by a monument movable and uncertain in its character. Payne v. English, 79 Cal. 540, 546, 21 Pac. 952. Even in a case of the kind mentioned, it is competent to show the location of the monument (a street) made subsequent to the deed, the description in which is being construed by the court, and to show user and recognition of it thereafter with a view to determining its location. Payne v. English, 101 Cal. 10, 35 Pac. 348.

While it is true that the rule is that witnesses can testify only as to the existence and condition on the ground of what is called for in the writing, and it is improper to admit their opinions, speculations, or conjectures as to the location of the lines (Newell on Ejectment, p. 537), the mere fact that a surveyor, in testifying as to the result of a survey made by him, states his conclusion in respect to the effect of his survey is not alone sufficient to entitle the aggrieved party to a reversal of the judgment. Tognazzini v. Morganti, 84 Cal. 159, 163, 23 Pac. 1085. Neither will the giving of an opinion as to the matter in controversy, where the opinion is a conclusion from facts stated fully in the other part of the testimony, always result in the granting of a new trial. Costa v. Silva, 127 Cal. 351, 355, 59 Pac. 695. Nor will a new trial be granted where the answers to the questions under consideration constituted no more than a mere summary, in the form of a conclusion or opinion of the previous testimony of the witness, and could have added nothing to the effect thereof in the mind of the trial judge. Jersey Island Co. v. Whitney, 149 Cal. 269, 86 Pac. 691, 692.

Measured by the rule and exceptions as stated, we are unable to see how the questions addressed to the witnesses Fred F. Wheeler, H. V. Wheeler, and Edwin D. Severance, which were objected to on the ground that they called for the conclusions of the respective witnesses, were prejudicial, even if it be conceded they were erroneous.

The appeal not having been taken within 60 days after the rendition of the judgment (section 939, subd. 1, Code Civ. Proc.), the case is not before us on the sufficiency of the evidence, but on its competency and admissibility alone. We find no error in this regard justifying a reversal of the judgment. Judgment affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

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10 Cal. App. 681

STIAVETTI v. UNSWORTH. (Civ. 666.)

(Court of Appeal, First District, California. May 27, 1909.)

APPEAL AND ERROR (§ 799*)—FAILURE TO FILE TRANSCRIPT—MOTION TO DISMISS APPEAL—RECORD.

The certificate required by Court Rule 6 (78 Pac. ix), providing that on motion to dismiss an appeal for failure to file the transcript there shall be presented a certificate of the clerk below, etc., is merely evidence of facts, and it is unnecessary to file or present it before the hearing of the motion, and a copy thereof need not be served on appellant.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 799.*]

Appeal from Superior Court, City and County of San Francisco.

Action by A. Stiavetti against G. G. Unsworth. From a judgment for plaintiff, defendant appeals. Motion to dismiss appeal granted.

F. W. Sawyer, for appellant. Devoto & Richardson, for respondent.

KERRIGAN, J. This is a motion to dismiss an appeal. No transcript on appeal from the judgment was served or filed within the 40 days prescribed by rule 2 (78 Pac. vii) of this court, and consequently the appeal must be dismissed, unless respondent, in making this motion, has himself failed to comply with the rules. Appellant contends that according to rule 6 (78 Pac. ix) of this court the certificate of the clerk of the trial court, required to be presented on the motion, is a moving paper, and that a copy of it should have been served upon the appellant with the notice of the motion. The point, however, has been decided contrary to appellant's contention in the case of Pio v. Aigeltinger, 97 Cal. 81, 83, 31 Pac. 895, and the rule is precisely the same now as it was when that case was decided. 64 Cal. 639 and 144 Cal. xliii, xliv, 78 Pac. ix. The court there held that the certificate was merely evidence of facts, and that it was unnecessary to file or present it before the hearing.

Upon the authority of that case we hold that the objection to the hearing of the motion is untenable; and that, as the transcript was not filed within the prescribed time, the motion to dismiss should be granted, and it is so ordered.

We concur: COOPER, P. J.; HALL, J.

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10 Cal. App. 714

MOORE v. GROFTHOLDT et al. (Civ. 628.)

(Court of Appeal, Second District, California. May 28, 1909.)

1. APPEAL AND ERROR (§ 1011*)—FINDINGS—CONCLUSIVENESS.

The findings of the trial court on conflicting evidence conclusively establish the facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3989; Dec. Dig. § 1011.*]

2. PUBLIC LANDS (§ 37*)—RELINQUISHMENT OF RIGHTS TO DESERT LANDS—VALIDITY.

One in possession of desert land open to filing under the desert land act may surrender the possession to another, and file a relinquishment of his right to file thereon, and the latter taking possession may file thereon, and obtain a patent on complying with the law.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 81; Dec. Dig. § 37.*]

3. COURTS (§ 121*)—JURISDICTION—AMOUNT INVOLVED—ACTIONS—REMEDIES.

A complaint, alleging a contract between the parties for the exchange of plaintiff's cattle for defendant's land, and averring that plaintiff surrendered the possession of the cattle to defendant, and loaned a specified sum to defendant, and that defendant failed to transfer the real estate or to repay the loan, and praying for a recovery of the cattle or the value thereof, and damages for their detention, and the amount of the loan, states a cause of action on contract, and defendant may have all the differences arising out of the transaction adjusted, so that the court has jurisdiction to settle all such differences regardless of the amount involved.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 121.*]

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Edmund B. Moore against Nelson Groftholdt and another. From a judgment for defendants, plaintiff appeals. Affirmed.

F. P. Willard and James I. Shepherd, for appellant. Eshleman & Swing, for respondents.

ALLEN, P. J. In the action instituted by plaintiff against defendants the complaint filed set out a certain contract and agreement between plaintiff and defendants, under which it was claimed that defendants obtained possession of a certain band of cattle the ownership and right of possession to which was in plaintiff. It is alleged that under this agreement defendants undertook to transfer certain real property to plaintiff, in consideration of which plaintiff agreed to deliver the band of cattle mentioned, and to pay defendants $250 in addition; that plaintiff surrendered possession of the cattle under an agreement that the title thereto should remain in plaintiff until the transfer of said real estate; that at the same time plaintiff loaned to defendants $100. And it is averred that defendants failed to transfer said real estate, or to repay said $100 so loaned, upon demand. Judgment is accordingly sought for the recovery of the personal property; or, in case restitution cannot be had, that plaintiff have judgment for the value thereof, to wit, $450, and also $250 damages for the wrongful detention, and $100, the amount of the loan.

Defendants admit the contract set out in the complaint, but allege that they never agreed to transfer any real estate, or to do any act other than to refrain from exercising a preference right to enter and file on certain described real estate, and allege that they performed all the conditions of said contract on defendants' part to be performed; deny that they borrowed the sum of $100, or ever promised or agreed to deliver over the personal property, or to pay said $100. By way of further answer and counterclaim defendants set forth an agreement wherein defendants agreed to refrain from the exercise of a preference right to file on the tract of land described, in consideration of which the cattle were delivered, and the promise to pay $250 was made, and that the sum of $100 was part payment of the sum of $250; that the sum of $150 remains unpaid, which they have demanded, and allege that they performed all of the conditions upon their part to be performed. They pray judgment for the restitution of the property, or for $450, the value, judgment for $150, the amount unpaid on the contract, and $250 for the wrongful detention of the property. It also appears that plaintiff under the proceedings obtained possession of the cattle, and held such possession at the time of the trial of the action.

The court finds as a fact that the agreement between the parties was that defendants were to transfer all their right and interest, and all right and interest which they might subsequently acquire, to a certain piece of property to plaintiff; that they acquired a preference right to file upon such land, and refrained from exercising the preference right, which waiver was accepted by plaintiff as in performance of the agreement to transfer an interest in the property, and that upon the receipt whereof plaintiff paid the $100 and delivered the personal property; that there is unpaid $150, the balance of the $250 agreed to be paid; that at the commencement of the action defendants were the owners of the cattle, and that they were of the value of $450; that by reason of their taking and detention under the claim and delivery by plaintiff, defendants have been damaged in the sum of $100. And the court thereupon rendered a judgment in favor of defendants for the restitution of the property the subject of the claim and delivery, or, in case delivery cannot be had, judgment for $450, the value thereof, $100 as damages for the wrongful taking and detaining same, and for $150, the balance due upon the contract between the parties. From this judgment plaintiff appeals.

The appeal is taken under the alternative method, and the reporter's transcript of the testimony is on file in this court. From this it is seen the relinquishment of the right to file on the land mentioned in the pleadings and findings of the court was the relinquishment of a right by defendants to file upon certain desert land then in their possession, which they had undertaken to reclaim under Desert Land Act (Act March 3, 1877, c. 107, 19 Stat. 377 [U. S. Comp. St. 1901, p. 1548]), and under which act they were entitled to make a filing; that plaintiff desired to file thereon, and that defendants formally executed a written relinquishment of their right and delivered the same to plaintiff, who caused the same to be filed with the register and receiver of the United States land office at Los Angeles. The court finds, and there is some evidence in its support, that the execution of such a relinquishment was intended and agreed by the parties to be the full consideration to be paid for the delivery of the cattle in controversy. The testimony was very conflicting, but it was for the trial court to determine the facts; and, as it found them, they must be regarded as established. We do not understand that there was anything in this agreement to relinquish the preference right of filing violative of any law of the United States, or rule of the land department, in connection with these desert land entries; that it is permissible for one in possession of desert land open to filing under the desert land act to surrender the possession to another, and file a relinquishment of any rights to file thereon, to the end that the parties so taking possession may themselves file upon said land, and, after compliance with the act of Congress, obtain a patent thereto.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The action as brought by plaintiff, while ostensibly one in the nature of claim and delivery, was nevertheless an action based upon a contract between the parties, and the relief asked for by plaintiff was concerning such contract, and the affirmative relief sought by defendants through their counterclaim depended upon the contract and transaction upon which the action was brought. Under the authority of Sullivan v. California Realty Co., 142 Cal. 206, 75 Pac. 767, we feel warranted in holding that, regardless of the amount involved in the counterclaim, the defendants were entitled to have all differences adjusted, and that jurisdiction attached in the trial court to make such appropriate findings and judgment as would effectually settle and adjust such differences. There is very little in the record by way of evidence tending to show the damages occasioned by the wrongful taking of the property by plaintiff, but, it being shown that among the cattle were a large number of milch cows, and that the use of such cows per week was a fixed sum, which fact, taken in connection with the lapse of time after such taking, is sufficient to sustain the finding of the court in relation to the $100 damages for the wrongful detention of the property. The value of the property is set out in all the pleadings by both parties, and it is conceded to be $450.

We see no error in the action of the court in awarding judgment in defendants' favor for the restitution of the property, or, if the same cannot be had, for $450, the value thereof, and $100 damages, together with an additional judgment for the amount found to be due and unpaid to defendants under the contract and as set out in the counterclaim.

Judgment affirmed.

We concur: SHAW, J.; TAGGART, J.

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10 Cal. App. 625

WILLIAMS et al. v. PRATT et al. (Civ. 591.)

(Court of Appeal, Third District, California. May 20, 1909. On Rehearing, June 19, 1909; Denied by Supreme Court July 19, 1909.)

1. Appeal and Error (§ 864*)—Appeal from Judgment—Scope of Review—Material Issues—Failure to Find.

Failure to find on a material issue may be reviewed on appeal from the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1765–1767, 3456–3461; Dec. Dig. § 864.*]

2. Trial (§ 391*) — Issues — Finding — Conflicting Evidence.

A conflict of evidence does not deprive a party of the right to have a finding on a material issue.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 914; Dec. Dig. § 391.*]

3. Trial (§ 397*)—Findings—Materiality—Failure to Find.

Where the right of an original owner of real estate to a surplus, on foreclosure of a trust deed, depended on whether an agreement to reconvey the property to her was in effect a mortgage, and whether she had, in fact, complied with its terms, the issue as to such compliance was material, and the court's failure to find thereon fatal error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 940–945; Dec. Dig. § 397.*]

4. Mortgages (§ 567*) — Foreclosure—Proceeds.

Claimant conveyed certain real estate to F. to raise money thereon, receiving from him an agreement to reconvey on her paying a specified sum, with monthly installments of interest, and declaring that, should claimant fail to make any payment of interest within 60 days, she should forfeit all her rights under such instrument. F. mortgaged the property by deed of trust, under which it was sold, leaving a surplus, which was also claimed by F.'s grantees. *Held* that, the property having been converted into money, and claimant not denying the rights of lien creditors to reimbursement out of the fund, her claim to the surplus was not destroyed by her alleged breach of the defeasance agreement, under the rule that, where a penalty or forfeiture is to secure the payment of a debt only, equity will relieve against the forfeiture by awarding compensation instead thereof, proportionate to the damages actually resulting from nonpayment according to the stipulations of the agreement.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1632–1638; Dec. Dig. § 567.*]

5. Appeal and Error (§ 172*)—Presentation of Question Below—Waiver.

Failure to raise an objection by motion for judgment on the pleadings or by demurrer is not a waiver, where the judgment rendered is directly opposed to the pleading and admission of the prevailing party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1070–1078; Dec. Dig. § 172.*]

On Rehearing.

6. Mortgages (§ 415*)—Right to Foreclose—Default in Interest—Set-Off of Cross-Demand Against Mortgagee.

Where claimant was bound to make certain payments of interest to F. under a contract for reconveyance of real estate, conveyed as security for a debt, and F. owed claimant $180, which, if applied on her contract liability, would prevent a default, the two demands could be set off, and, so far as they equaled each

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other, would compensate each other, under Code Civ. Proc. § 440, declaring that, when cross-demands exist between persons under such circumstances that, if one had sued the other, a counterclaim could have been maintained, the two demands would be deemed compensated.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1223; Dec. Dig. § 415.*]

Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by H. G. Williams and others against A. H. Pratt and others. From a decree for the distribution of a surplus on mortgage foreclosure proceedings, Anna Maria Raymond appeals. Reversed.

J. B. Richardson and W. H. H. Hart (Aylett R. Cotton, of counsel), for appellant. A. P. Leach, for respondents Williams and Dalzier. F. W. Sawyer, for respondents Pratt, Robinson, and Faw.

BURNETT, J. Three different actions were consolidated and tried together. In each of them was involved the question of the ownership of a fund of nearly $4,000, in the hands of plaintiffs as trustees under a trust deed of certain real property held by them as security for the payment of an indebtedness of $8,000 due to one Robert Dalziel, Sr.

On the 29th day of April, 1904, George E. Faw and his wife made to said Dalziel a promissory note for $8,000, payable one year after date, bearing interest at 8 per cent. per annum, payable monthly, containing a stipulation that, if the interest was not paid within two months after due, the principal and interest should forthwith become due at the option of the holder of the note. The note was secured by the trust deed aforesaid, and, by the terms of the latter, upon default of payment of principal or interest, the trustees, on demand of said Dalziel, were authorized to sell the property, after publishing a certain notice. Default was made in the payment of interest, and in accordance with the terms of said deed the property was sold, and after the payment of the expenses and of said indebtedness, a surplus of $3,786.60 remained. Faw and his wife disclaimed any interest in this surplus. They conveyed said real property, and assigned whatever interest they might have in said surplus to A. H. Pratt, and said Pratt conveyed one-half to J. T. Robinson, and the controversy is between Pratt and Robinson on the one hand, and said Anna Maria Raymond on the other. The latter's claim is based upon the contention that on the said 29th day of April, 1904, she was the owner and in possession of said real property, and that she informed said Faw that she desired to borrow $9,500. Thereupon he informed her that he could secure $8,000 of said fund from said Dalziel, provided he could secure him by a deed of trust, and that he (Faw) and A. H. Pratt would loan to her the further sum of $1,500, taking said property as security for said sums. Thereupon, relying upon the statements and representations of Faw, she borrowed from him and Pratt the $1,500, and as security therefor she executed and delivered to said Faw an instrument in the form of an ordinary deed. That the only purpose and consideration for said deed was to secure the payment of said indebtedness, and in pursuance of said purpose said Faw executed and delivered to said Anna Maria Raymond an instrument, intended as a defeasance, in the form of an agreement to sell and convey to said Raymond said property on the payment of $9,500 within one year from date, with interest at 8½ per cent. per annum, payable monthly, with a provision that "should the said party fail to comply with the terms thereof and fail to make any payment of interest for sixty days after the same shall become due, the said party of the first part shall be released from all obligations in law or equity to convey said property and said party of the second part shall forfeit all right thereto." It was further agreed therein that said Raymond "shall have immediate and continued possession of the premises heretofore described."

It is the contention of Pratt and Robinson that said deed from Raymond to Faw was an absolute conveyance, and not as security for the payment of any sum of money, and Pratt avers in his pleading that "the said Faw did make, execute, and deliver to the said plaintiff said instrument, and that the same was executed and delivered solely as a contract to sell to said plaintiff Anna Maria Raymond the said property under the terms, time given, and conditions as set forth therein, and that the same was not made as a defeasance, nor as a part of any security for the payment of any sum of money, or otherwise." He also claims to have been an innocent purchaser for value, without notice of any interest of said Raymond, except what is disclosed by the record. Robinson's claim admittedly depends upon the validity of that of Pratt. Therefore it is necessary to consider only the controversy between the latter and the said Anna Maria Raymond.

Among the points made by appellant is that the court failed to find upon certain material issues. One of these presented by appellant's cross-complaint is that she paid and tendered all the interest that was due under said agreement of purchase. Respondents contend that the question cannot be considered on appeal from the judgment, but must be reviewed, if at all, on an appeal from the order denying the motion for a new trial, under proper specifications, which are not shown by the record herein. But it has been held by the Supreme Court in various decisions that the error may be reviewed on an appeal from the judgment, as well as from said order. Knight v. Roche, 56 Cal. 17; Kusel v. Kusel, 147 Cal. 52, 81 Pac. 297. In the latter decision it is stated: "It is well settled that, where the court fails to find upon a material issue, the judgment is unsupported, and will be reversed on appeal." It is also argued that these issues are immaterial because the findings actually made support the judgment, and therefore any additional findings could not affect the result. Robinson v. Muir, 151 Cal. 124, 90 Pac. 521. But whatever may be true as to action 22,888, in which said Raymond was not a party, in the other two actions, in one of which she was plaintiff and in the other defendant and cross-complainant, the question of her compliance with the terms of the said purported agreement to purchase is obviously the foundation of her claim to the surplus. It is true that she claimed the transaction amounted to a mortgage, and the court found that Pratt was an innocent purchaser, without notice that the transaction amounted to anything more than what was shown by the record. The court also found expressly that it was not a mortgage, and that "on the same day [April 29, 1904] an agreement was executed between said Anna Maria Raymond and said George E. Faw, which agreement is correctly set forth in paragraph 3 of the complaint," which was acknowledged and recorded "before the execution by said George E. Faw to said A. H. Pratt of the deed hereinbefore referred to conveying said land to said Pratt." We have, therefore, the judgment in favor of Pratt resting upon the finding of a deed from the owner, who had, within the knowledge of Pratt and, as he avers, agreed to convey the land to appellant upon certain terms. In other words, without any finding of facts showing whether the claim of appellant has become extinguished or has ripened into the right to a conveyance, and, therefore, to the surplus, it appears that Pratt purchased this land subject to this equitable interest of Raymond. If she made the payments as provided in said agreement, it is clear that she is in equity the owner of the surplus, although she is mistaken in her contention that the transaction amounted to a mortgage. We think there can be no doubt, therefore, that the issue as to the payment by her was material, and should have been determined. If there had been no evidence of said payment, the omission to find thereon would be without prejudice, but there was testimony to the effect that appellant made the payments as required; and, although there was evidence to the contrary, ve cannot say which the court would have followed. It will not be disputed that a conflict of evidence does not deprive a party of the right to have a finding upon a material issue.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Respondents further contend that a former judgment is a bar to appellant's claim. It appears that an action was brought by appellant against Faw and Pratt to recover the surplus in the hands of the trustees, but Faw disclaimed any interest, and recovered his costs, while a nonsuit was granted as to Pratt. Herein in reference to this judgment the court found that it was upon the merits as to Faw, but not as to Pratt, "but as to him the judgment in said action is not a bar to the action numbered 22,684 as aforesaid, brought by said Anna Maria Raymond against said Pratt and others." As this finding cannot be questioned by respondents, it answers their contention.

Another point made by appellant is that "upon the pleadings in this case, even if the relation of Faw and Mrs. Raymond was that of vendor and vendee, and if she had made default for more than 60 days in payment of interest, she would in equity be regarded as the owner of the real property at the time it was sold under the deed of trust, and entitled to the proceeds remaining after paying Dalziel and what continued due Faw and Pratt for the money paid to Dalziel and for interest." In support of the position, among the authorities cited is 1 Pom. Eq. (3d Ed.) § 433, wherein it is said: "Where a penalty or forfeiture is used merely to secure the payment of a debt, or the performance of some act, or the enjoyment of some right or benefit, equity, considering the payment or performance, or enjoyment, to be the real thing intended by the agreement, and the penalty or forfeiture to be only an accessory, will relieve against such penalty or forfeiture by awarding compensation instead thereof, proportionate to the damages actually resulting from the nonpayment, or nonperformance, according to the stipulations of the agreement. The test which determines whether equity will or will not interfere in such cases is the fact whether compensation can or cannot be adequately made for a breach of the obligation which is thus secured. If the penalty is to secure the mere payment of money, compensation can always be made, and a court of equity will relieve the debtor party upon his paying the principal and interest." Here there is no doubt compensation can be made, since the real estate has been converted into money; and, as the property was sold within the year in consequence of no fault of appellant, and as she does not question the right of respondents to be reimbursed for their outlay, including interest, the contention that, granting her failure to pay the interest as agreed, she is in equity entitled to the residue is at least entitled to serious consideration. However, respondents content themselves with the declaration that the court will not consider the point because it is the first time it has been raised; no motion having been made for a judgment upon the pleadings, and the question not having been presented by a demurrer in the court below. But, assuming the position of appellant to be well taken, it is not a case where the point is deemed to have been waived, as the judgment would be directly opposed to the pleading and admission of the prevailing party, and therefore not supported. Traverso v. Tate, 82 Cal. 170, 22 Pac. 1082. We are disinclined, though, to pass upon the point without furthur argument, but we are of the opinion that appellant should at least be reimbursed for the amount actually paid by her under said agreement with Faw.

As they may not arise again, we consider it unnecessary to consider other points made by appellant, some of which have received no attention from respondents in their brief.

Appellant declares that "it is rarely that so much treachery and iniquity appear in a case as in this, and it is evident that from the very beginning Faw and Pratt were scheming to thwart the appellant and Mrs. Roberts in their efforts to save the home." We cannot say, however, that the court below was not entirely justified in finding that Pratt acted in perfect good faith; but, for the reason stated, we think there should be a new trial.

The judgment and order are therefore reversed.

We concur: CHIPMAN, P. J.; HART, J.

On Rehearing.

BURNETT, J. Respondents in their petition for rehearing invite our attention to several points that were not mentioned in their brief or suggested in the oral argument. These suggestions, however, have received careful attention, but they have not shaken our confidence in the correctness of our former conclusion.

As to the contention that a certain $180 could not be applied to the payment of the interest due, and therefore that appellant was in default according to her own showing, it is sufficient to refer to the testimony of Mrs. Roberts that "Mr. Faw said we would have an interest, interest in the $200, until that comes back to my sister-in-law, and until that is paid back, or if it is not paid back, it can go in the end to help pay up the difference that may be necessary to come from you, your sister-in-law." She afterwards testified that $20 of it were handed back to her by Mr. Faw, leaving a balance due from Faw of $180. Giving full credit to her testimony, then the situation is that appellant was required to make certain payments of interest to Faw in order to be entitled to a conveyance of the property. Faw owed her $180, which, if applied on said contract of sale, would prevent a default. It would certainly be a reproach to the law if one debt could not be set off against the other. Indeed, the two demands, as far as they equal each other, are deemed compensated. Section 440, Code Civ. Proc.; Freeman v. Seitz, 126 Cal. 293, 58 Pac. 690.

The petition is denied.

We concur: CHIPMAN, P. J.; HART, J.

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10 Cal. App. 612

RALPH ROGERS CO. v. WORKMAN, Treasurer, et al. (Civ. 575.)

(Court of Appeal, Second District, California. May 18, 1909. Rehearing Denied by Supreme Court July 15, 1909.)

1. MUNICIPAL CORPORATIONS (§ 339*)—PUBLIC IMPROVEMENTS — CONTRACTS — REQUISITES.

Though the provisions of Street Improvement Law (St. 1885, p. 149, c. 153) § 5, fixing the time within which a contract for street improvements shall be executed, is mandatory, the contract may be executed after the expiration of the time specified, if the delay is not caused by the fault of the contractor.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 339.*]

2. MUNICIPAL CORPORATIONS (§ 339*)—PUBLIC IMPROVEMENTS — CONTRACTS — REQUISITES.

A contract for a street improvement, executed about three months after the expiration of the time specified in Street Improvement Law (St. 1885, p. 149, c. 153) § 5, but within the time allowed by the Governor's proclamation of April 19, 1906, by which that day and each day thereafter to June 2d were proclaimed legal holidays, and Act June 3, 1906 (St. 1906, p. 8, c. 5), extending the time for performing legal acts, is valid; the proclamation being sufficient to excuse the contractor's delay.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 339.*]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by the Ralph Rogers Company against W. H. Workman, Treasurer of the City of Los Angeles, and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Lucius M. Fall, for appellant. E. T. Sherer (F. C. Valentine, of counsel), for respondents.

ALLEN, P. J. This action was brought to enjoin the city treasurer from selling certain premises by reason of default in the payment of bonds theretofore issued on account of street improvements, and to quiet title to such premises.

It is stipulated that all of the proceedings leading up to the award of the contract for the work of the street improvement were regular and in conformity to the law; the only part of the proceedings questioned being as to the validity of the contract under which the work was done, and that infirmity is claimed to exist only by reason of the fact that the award of contract was first published April 13, 1906, and the contract was not entered into until July 13, 1906. Section 5 of the act under which the street improvement was ordered (St. 1885, p. 149, c. 153) provides that the owners of a majority of the frontage may, within 10 days after posting notice of award of the contract, elect to take said work and enter into a contract, etc. Should such owners fail to so elect, it is the duty of the street superintendent to enter into a contract with the original bidder, but if the original bidder fails or refuses for 15 days after the first publication of notice of award to enter into the contract, the city council shall readvertise, etc. The provisions of this section are said to be mandatory, notwithstanding, however, the contract may be signed after the expiration of the time specified, if it is shown that the delay is not caused by the fault of the contractor. Perine v. Forbush, 97 Cal. 308, 32 Pac. 226. It is conceded here that a long delay ensued, but it is stipulated that the Governor of the state proclaimed the 19th day of April, 1906, and each and every other day thereafter, up to and including June 2, 1906, legal holidays. An act of the Legislature, approved June 3, 1906 (St. 1906, p. 8, c. 5), provides that "any act or proceeding appointed, required, or limited by or in pursuance of law to be performed or taken on any day, or within any time in the month of June, 1906, prior to the last day of said month, may be performed or taken on any day not later than the tenth day of July, A. D. 1906, with the same effect as if it had been performed or taken on the day or within the time wherein such act or proceeding was so appointed, required, or limited to be performed." It will be thus seen that, assuming the power of the Governor to proclaim as special holidays the days named in the stipulation, under the act last mentioned the time for the owners of the property to enter into the contract did not expire until July 10, 1906. This being established, the street law gives to the original bidder five days within which to execute his contract after the expiration of the time allowed the owners within which to signify their election. Whatever may be said as to the legal effect of the proclamation referred to, the allegations of the cross-complaint of defendant Clark, under which the decree appealed from was rendered, setting up, as it did, the stipulated facts with reference to the proclaimed holidays, may be said to be statements of fact sufficient to excuse the delay upon the part of the contractor, and as allegations of fact showing that the delay was not occasioned by his fault or neglect. The delay, then, not being occasioned by the fault or neglect of the contractor, under the doctrine of the case above cited, the contract executed on the date set out in the cross-complaint was a valid one.

The judgment should therefore be affirmed, and it is so ordered.

We concur: SHAW, J.; TAGGART, J.

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10 Cal. App. 609

STONE v. GRAY et al. (Civ. 596.)

(Court of Appeal, First District, California. May 17, 1909. Rehearing Denied by Supreme Court July 14, 1909.)

1. BANKS AND BANKING (§ 118*)—ASSIGNMENT—AUTHORITY OF OFFICERS—EVIDENCE.

Evidence *held* sufficient to show that the vice president and cashier of the bank had authority to execute an assignment of a note.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 118.*]

2. LOST INSTRUMENTS (§ 18*) — INDEMNITY BOND.

Under Civ. Code, § 3137, providing that if the instrument be lost or destroyed, the holder shall give a bond, executed by himself and two sureties, to indemnify against any lawful claim thereon, a bond was sufficient whereby the principal and two sureties jointly and severally agreed to indemnify defendant against any lawful claim on a note sued on.

[Ed. Note.—For other cases, see Lost Instruments, Cent. Dig. § 44; Dec. Dig. § 18.*]

3. LOST INSTRUMENTS (§ 18*) — INDEMNITY BOND.

In an action on a lost note the indemnity bond may be given by the holder, and it is not necessary that the original payee give bond.

[Ed. Note.—For other cases, see Lost Instruments, Cent. Dig. § 44; Dec. Dig. § 18.*]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by W. I. Stone against George F. Gray and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Ames & Manning, for appellants. Cushing, Grant & Cushing, for respondent.

HALL, J. This is an appeal from a judgment in favor of plaintiff for the sum of $1,236.54. The complaint is in two counts. The first count charges upon a promissory note executed by defendants to plaintiff's assignor, Union Machine Company (a corporation), for the principal sum of $1,000, with interest at 7 per cent. per annum from its date January 28, 1906. Prior to the conflagration of April, 1906, the note had been transferred to, and left with, the Germania National Bank for collection only, for account of the Union Machine Company, and was destroyed by said conflagration while in possession of the bank. Plaintiff, over the objection and exception of defendant, put in evidence an assignment of said note from said bank to the Union Machine Company. This assignment was under the seal of the corporation bank, and was signed by the vice president and cashier. The objection to its introduction was that it was not shown that the officers signing on behalf of the bank had authority to assign the note. This objection was utterly without merit. The vice president of the bank testified, without objection, that he and the cashier had such authority; and the seal of the corporation was itself prima facie evidence that the officers executing the instrument were duly authorized, and the execution thereof the act of the corporation. 10 Cyc. 944; Bullen v. Milwaukee Trading Co., 109 Wis. 41, 85 N. W. 115; McCracken v. City and County of San Francisco, 16 Cal. 639; Gutzeil v. Pennie, 95 Cal. 598, 30 Pac. 836; Angell & Ames on Corp. § 224.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The only other point relates to the sufficiency of the indemnity bond offered by plaintiff, the holder of the note. This instrument was executed by plaintiff and two sureties, who were admitted to be financially good. The only objection to the bond is that it did not fix a penal sum. The principal and the two sureties in said bond jointly and severally agreed to indemnify defendants against any lawful claims upon said note. This fully complied with the statute. Section 3137, Civ. Code. Under this bond the parties executing it would be liable in any amount, and in this respect the bond was more favorable to the defendants than would have been a bond in which the liability could not exceed the amount fixed as the penal sum. The statute does not give the form of the bond. It simply provides that: "If the instrument be lost or destroyed, then that the holder give to him a bond, executed by himself and two sufficient sureties, to indemnify him against any lawful claim thereon." The bond in question fully met the requirements of the statute. It was given by the holder of the note, with two sufficient sureties. The objection that the original payee gave no bond is without merit. The statute does not require the original payee to give a bond unless he be the holder at the time of payment.

No other errors are claimed, and the findings are in no respect challenged.

The judgment is affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

10 Cal. App. 712

HOWSE v. NORWICH UNION FIRE INS. SOCIETY OF NORWICH AND LONDON, ENGLAND. (Civ. 626.)

(Court of Appeal, First District, California. May 28, 1909. Rehearing Denied by Supreme Court July 27, 1909.)

APPEAL AND ERROR (§ 799*) — DISMISSAL — FAILURE TO FILE TRANSCRIPT — PENDENCY OF PROCEEDINGS TO SETTLE BILL OF EXCEPTIONS—EVIDENCE.

As against a motion, supported by affidavits that no bill of exceptions had ever been filed, to dismiss appeal for noncompliance with Court of Appeal rule 2 (78 Pac. vii), requiring the transcript to be filed within 40 days after perfection of appeal, unless there is pending a proceeding for settlement of a bill of exceptions, appellant's affidavit, not that a bill of exceptions was ever left with the clerk or judge, as the law requires, but that on a certain day (before which its right to a settlement of bill of exceptions was lost, unless the bill was presented theretofore, or the right to settlement kept alive by consent) it served a notice of motion to restore to the records of the court its proposed bill of exceptions, and for a settlement thereof, and that the motion was denied, and an appeal taken from the denial, is not evidence of pendency of a proceeding for settlement of a bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 799.*]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Louisa S. Howse against the Norwich Union Fire Insurance Society of Norwich and London, England. From an adverse judgment, defendant appealed. Dismissed.

T. C. Van Ness, for appellant. Joseph Hutchinson, for respondent.

HALL, J. This is a motion to dismiss an appeal taken by defendant from a judgment against it. The notice of motion was served and filed December 18, 1908, and states that the motion will be made on the ground that no transcript on appeal has been filed in this court, though more than five months have elapsed since the perfecting of the appeal. Rule 2 (78 Pac. vii) of this court requires that such transcript be filed within 40 days after the perfecting of the appeal, unless there is pending a proceeding for the settlement of a bill of exceptions, or a statement which may be used in support of such appeal. Respondent served with his notice of this motion an affidavit of his attorney, showing that appellant, on June 15, 1908, served on him its proposed bill of exceptions, to which respondent proposed and served on appellant within 5 days thereafter amendments thereto, and "that more than six months have elapsed since said proposed amendments were served, as above, upon defendant's attorney, and defendant's attorney has not during all said period had said bill of exceptions, or any bill of exceptions, settled or allowed, or filed the same with the court or with the clerk of the court for settlement or allowance, or given plaintiff, or plaintiff's attorney of record, any notice of proceedings for the settlement of said or any bill of exceptions." Respondent also served a copy of the certificate of the clerk, showing, among other things, that no bill of exceptions had ever been filed or allowed.

The only attempt by appellant to meet the statement of fact that no bill of exceptions has ever been filed with the clerk or the court is contained in an affidavit presented at the hearing on this motion, which utterly fails to directly affirm that any bill of exceptions was ever left either with the clerk, or the judge of the court. It does allege that on the 9th day of January, 1909, defendant served and filed a notice of motion to restore to the records of said court its proposed bill of exceptions, and for a settlement thereof, and that said motion was subsequently denied, and an appeal taken from the order of denial. It may be said arguendo that this motion to restore to the records a bill of exceptions presupposes that there was in the records at some time a bill of exceptions. It, however, is certainly not a statement that such bill was ever left either with the clerk or the judge of the court, as the law requires. In the face of the evidence contained in the affidavit and certificate presented on behalf of respondent, to the effect that no bill has ever been filed, we do not think the evasive statement in the affidavit presented on behalf of appellant should be given any probative force to show the pendency of a proceeding for the settlement of any bill of exceptions. Unless the bill was presented before July, 1908, or the right to settlement kept alive by consent, the right to a settlement was lost before the notice of January 9, 1909, was given. See Moultrie v. Tarpio, 147 Cal. 376, 81 Pac. 1112.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The appeal is therefore dismissed.

We concur: COOPER, P. J.; KERRIGAN, J.

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10 Cal. App. 648

LUCAS v. GOBBI et al. (Civ. 563.)

(Court of Appeal, Third District, California. May 25, 1909. Rehearing Denied by Supreme Court July 24, 1909.)

1. Mechanics' Liens (§ 271*)—Subcontractors — Materialman — Void Contract — Amount Due.

Where a materialman sued to enforce a lien on the theory that the building contract was void for want of record, an objection that the complaint was fatally defective for failure to allege that, at the time of filing notice of lien, any sum was due from the owner to the contractor was unsustainable; it being sufficient, under such circumstances, to allege that the material was furnished the owner through the contractor as his agent, as authorized by Code Civ. Proc. § 1183.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 499, 504–506; Dec. Dig. § 271.*]

2. Mechanics' Liens (§ 277*)—Foreclosure —Variance.

Where a complaint to foreclose a materialman's lien alleged that the material was furnished to three persons named as the owners of the property, and the answer did not deny such allegation, while one of them testified that he was the owner as alleged in the claim of lien, until the building was completed, when he conveyed the property to his mother, and that he acted as his mother's agent throughout the entire transaction, the variance as to ownership was not fatal.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 546–554; Dec. Dig. § 277.*]

3. Mechanics' Liens (§ 157*) — Claim of Lien—Owner of Property.

Since the statute requires a statement of the name of the owner, or reputed owner, of property in a claim for a mechanic's lien only in case the name is known, the validity of a materialman's lien is not affected by a mistake in the name of the owner.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 268; Dec. Dig. § 157.*]

4. Mechanics' Liens (§ 157*) —Materialman's Lien—Claims—Amount.

A materialman's lien was not defeated because the notice of lien overstated the amount due by $50.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 270; Dec. Dig. § 157.*]

5. Mechanics' Liens (§ 277*)—Materialman's Lien—Dwelling.

Where complaint to foreclose a materialman's lien alleged that the material was furnished for the construction of a dwelling, it was not defeated by evidence that a small amount of the material was used in constructing a woodshed on the same lot; the woodshed being a part of the dwelling.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 546–554; Dec. Dig. § 277.*]

6. Mechanics' Liens (§ 277*)—Complaint—Notice—Variance.

A materialman's lien was not defeated because the evidence in support of an action to foreclose showed that there was no agreement to pay any definite amount, while the complaint and notice of lien alleged an express contract.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 546–554; Dec. Dig. § 277.*]

7. Mechanics' Liens (§ 132*)—Notice of Lien—Filing.

Since, under Code Civ. Proc. § 1187, a mechanic's lien claimant is entitled to 90 days to file a notice of lien, in the absence of notice of the completion of the building a notice of lien filed December 28, 1906, on a building completed November 27th, but found by the court to have been completed on November 28th, was not premature; no notice of completion having been given.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 190–207; Dec. Dig. § 132.*]

8. Mechanics' Liens (§ 290*)—Foreclosure —Findings—Evidence.

Where a finding recited that a building was completed November 28, 1906, while the evidence showed it was completed November 27th, the discrepancy was immaterial in a suit to foreclose a materialman's lien; it not being attacked on that ground.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 593, 594; Dec. Dig. § 290.*]

9. Mechanics' Liens (§ 281*)—Foreclosure —Evidence—Finding.

In a suit to foreclose a materialman's lien, evidence *held* to sustain a finding that the original contract for the improvement exceeded $1,000.

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 281.*]

10. Mechanics' Liens (§ 291*)—Material—Excess—Segregation.

In a suit to foreclose a materialman's lien, the value of material capable of being segregated, not actually used in the building, may be deducted from the claim.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 603; Dec. Dig. § 291.*]

11. Partnership (§ 213*) — Allegations — Sufficiency.

A complaint to foreclose a materialman's lien alleged "that on or about September 7, 1906, R. R. Lucas and T. A. Lucas, composing the firm of Lucas Bros.," entered into an agreement, etc., and the notice of lien, expressly made a part of the claim, recited that "R. R. Lucas and T. A. Lucas, copartners under the firm name and style of Lucas Bros.," claimed a lien. *Held* that, in the absence of special demurrer, the complaint sufficiently charged the existence of a partnership.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 408; Dec. Dig. § 213.*]

12. PLEADING (§ 377*)—MATTERS TO BE PROVED—MATTERS NOT DENIED.

Where an allegation of a partnership in the complaint was not denied in the answer, proof thereof was not required.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1228–1231; Dec. Dig. § 377.*]

13. MECHANICS' LIENS (§ 277*)—MATERIALMAN'S LIEN—FORECLOSURE—DEFENSES.

Where, in a suit to foreclose a materialman's lien, there was no uncertainty as to who furnished the material, and it was shown that the materialmen had assigned their claim to plaintiff, whether plaintiff's assignors constituted a partnership or not as alleged was immaterial.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 546–554; Dec. Dig. § 277.*]

14. MECHANICS' LIENS (§ 290*)—MATERIALMAN'S LIEN—FINDING.

Where no extra charge was made for labor in the delivery of material for which a materialman's lien was sought to be foreclosed, it was not material that the complaint alleged the amount to be due for "lumber and material," while the finding was that the amount due was for lumber and material including the labor performed in the delivery thereof.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 591–598; Dec. Dig. § 290.*]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by R. R. Lucas against Leander Gobbi and others to foreclose a materialman's lien. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

J. C. Ruddock, for appellants. J. W. Preston, for respondent.

BURNETT, J. This is an appeal from the judgment and an order denying the motion for a new trial in an action for the foreclosure of a "materialman's" lien.

1. The first point made by appellants is that the complaint is fatally defective, inasmuch as "there is no allegation that, at the time of filing the notice of lien, any sum was due from the owner to the contractor, nor any necessary fact giving the materialman a lien against the property of the owner." But the plaintiff proceeded upon the theory that the building contract was void, since, being for more than $1,000, it was not recorded. In such a case the material is deemed to have been furnished at the instance of the owner, and it is sufficient to allege that it was thus furnished through the contractor as the agent of said owner. Code Civ. Proc. § 1183; Yancy v. Morton, 94 Cal. 560, 29 Pac. 1111.

2. A variance is claimed in several particulars. The claim of lien sets forth: "That the name of the owner and reputed owner of said building is Leander D. Gobbi." The complaint alleges that the material was furnished to Leander D. Gobbi, Mary Gobbi, and Catherine Gobbi, the owners of the property. In the answer there is no denial of the allegation of the complaint in reference to the ownership. The testimony of Leander, however, shows that he was the owner of the property until the building was completed, when it was conveyed to his mother. He also declared that he acted as his mother's agent throughout the entire transaction. Directly in point as to this discrepancy is the case of McClain v. Hutton, 131 Cal. 138, 61 Pac. 273, 63 Pac. 182, 622, wherein it is said: "The claim of Harrison and that of Hubert each contains the statement 'that Charlotte A. Hutton and Fred Hutton are the names of the owners and reputed owners of said premises'; and it is objected that the latter has no interest, and that the claims are therefore invalid. The statute requires the statement of 'the name of the owner or reputed owner, if known.' 'If the names are not known, the claim is sufficient, if it is silent on the subject.' West Coast Lumber Co. v. Newkirk, 80 Cal. 275, 22 Pac. 231. The claimant 'may not know the owner, and if he is ignorant of his name, he is not required to state it.' Corbett v. Chambers, 109 Cal. 183, 41 Pac. 873. Still less can the validity of the claim be affected by a mistake in attempting to carry out the requirements of the law."

The complaint is also for about $50 less than the amount alleged to be due in the notice of lien. But it is well settled that, in the absence of fraud, the claim will not be defeated because the claimant has included too much in his notice. Barber v. Reynolds, 44 Cal. 519; Malone v. Big Flat Gravel M. Co., 76 Cal. 578, 18 Pac. 772; Harmon v. S. F., etc., R. R. Co., 86 Cal. 617, 25 Pac. 124; Continental, etc., Ass'n v. Hutton, 144 Cal. 611, 78 Pac. 21.

Another objection is made that, while the complaint alleges that the material was furnished for the construction of a "dwelling," the evidence showed that another building on the same lot was included. This other building, however, which required a small amount of the material, was a woodshed, and justly held by the court to be a part of the "dwelling." It is within the rule laid down in McClain v. Hutton, 131 Cal. 132, 61 Pac. 273, 63 Pac. 182, 622; O'Neill v. Taylor, 59 W. Va. 370, 53 S. E. 474, and McDermott v. Claas, 104 Mo. 14, 15 S. W. 995. The result of adopting the view of appellants in this regard, it may be remarked, would be simply to reduce by a small amount the sum found to be due.

The contention that the lien must fail because the evidence shows there was no agreement to pay any definite amount, while the complaint and notice of lien each sets forth an express contract, involves a similar situation to that found in Lucas v. Rea et al. (this day decided by this court), 102 Pac. 822, and also in Star Mill & Lumber Co. v. Porter, 4 Cal. App. 470, 88 Pac. 497, and for the reasons therein stated we are of the opinion that the point is not well taken.

3. The complaint seems to have been presented in time. The notice of lien was filed

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

December 28, 1906, and the complaint, March 27, 1907; being thus within the 90 days prescribed in section 1190, Code Civ. Proc. Likewise it cannot be said that the notice of lien was filed prematurely. It is true that the complaint is somewhat uncertain as to whether the building was completed before or after the filing of the notice of the lien, but the finding is that the building was actually completed on November 28, 30 days before said December 28th. The evidence shows that it was completed November 27th, but the finding is not attacked on this ground, and, besides, the discrepancy is immaterial (Santa Monica L. & M. Co. v. Hege, 119 Cal. 378, 51 Pac. 555), since no notice was given of the completion of the building, and therefore the claimant would be entitled to 90 days in which to file the notice of lien. Section 1187, Code Civ. Proc. The court probably should have sustained the demurrer to the complaint on the ground of uncertainty, but the time when the building was completed was peculiarly within the knowledge of defendants. Again the trial removed any uncertainty, and it is manifest that appellants were not prejudiced by the defective allegation. Bank of Lemoore v. Fulgham, 151 Cal. 234, 90 Pac. 936; Irgang v. Ott (Cal. App.) 99 Pac. 528.

4. While there may be some conflict in the evidence as to whether the original contract was for more than $1,000, the finding to that effect is abundantly supported. For instance, Mr. Howell, the contractor, was asked this question: "Now what was your contract price for that dwelling house with Mr. Gobbi?" and his answer was: "Just as I stated, $1,050."

5. There is also evidence to uphold the findings that the material was all purchased to be used, and that, with the exception of a few items of the value of about $20, which were capable of being segregated, it was actually used in the building. To the extent of these items the court properly reduced the amount claimed by plaintiff.

6. Appellants complain that there was neither a sufficient allegation nor proof of a partnership. The complaint, though, alleges "that on or about the 7th day of September, A. D. 1906, R. R. Lucas and T. A. Lucas, composing the firm of Lucas Bros., entered into an agreement," etc., and in the notice of lien, which is expressly made a part of the complaint it is recited that "R. R. Lucas and T. A. Lucas, copartners, under the firm name and style of Lucas Bros., claim a lien." Thus it sufficiently appears, at least in the absence of a special demurrer, that the firm constituted a partnership; and, since it is not denied, it is deemed admitted by the answer. But, again, under the circumstances it is entirely immaterial whether plaintiff's assignors constituted a partnership or not. Yancy v. Morton, 94 Cal. 560, 29 Pac. 1111. The most that could be said is that there is an uncertainty in this respect, but it is difficult to perceive how that could be urged as a defense, since there is no uncertainty as to who furnished the material, and it is clear that they made an assignment of their claim to plaintiff.

7. The claim of lien and the complaint allege the amount to be due for lumber and material, while the finding is "that the value of the lumber and building material furnished by said Lucas Bros. that was furnished for, and was actually used in, the construction of said bulding was and is the sum of $670.50, including the labor performed in the delivery thereof," but the reference to the "labor" is immaterial, and might be rejected as surplusage, since the evidence shows that no extra charge was made for the labor; in other words, that the price of the lumber included delivery.

8. There is nothing lacking in the evidence as to the amount due. The plaintiff testified definitely as to this, and no contrary showing was made by defendants.

The conclusion reached may work a hardship upon appellants, but it is the result of the want of precaution in not having their contract recorded, and not the fault of the law. We have examined all the assignments of error, but we find nothing to warrant a reversal, and the judgment and order are therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

10 Cal. App. 602

Ex parte JUNQUA. (Cr. 95.)

(Court of Appeal, Third District, California. May 15, 1909.)

1. Constitutional Law (§ 81*)—Police Power—Nature.

The police power is inherent in the state, and its exercise by the state is essential to the health, peace, comfort, and welfare generally of the inhabitants thereof.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 148; Dec. Dig. § 81.*]

2. Municipal Corporations (§ 611*)—Counties (§ 21½*)—Police Power—Nature.

The "police power" conferred on cities and counties, etc., by Const. art. 11, § 11, authorizing any county or city, etc., to make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with the general laws, embraces the right to regulate any class of business, the unregulated operation of which may in the judgment of the appropriate local authority interfere with the rights of others, and the only limitation on the power is that regulations shall not conflict with general laws.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1344–1360; Dec. Dig. § 611;* Counties, Dec. Dig. § 21½.*]

3. Constitutional Law (§ 63*)—Delegation of Power.

The right to delegate to a city the authority to determine what are nuisances, and to prevent the same, as is done by Sacramento City Charter, St. 1893, p. 552, c. 7, § 25, subd. 8, is within the legislative power of the state.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 108–114; Dec. Dig. § 63.*]

4. CONSTITUTIONAL LAW (§ 81*) — POLICE POWER.

General or local legislation enacted as an exercise of the police power will not be sustained, where it is oppressive or imposes unnecessary or unreasonably burdensome restrictions, and, where it appears either on its face or from competent extrinsic evidence that the regulation is unjustly oppressive or unreasonably burdensome, the courts will hold it void.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 148; Dec. Dig. § 81.*]

5. MUNICIPAL CORPORATIONS (§ 63*)—ORDINANCES—POLICE POWER.

The courts will examine more critically into county ordinances enforcing the police power to determine whether they do or do not represent the exercise of that power reasonably and without oppression than they will for a similar reason look into city ordinances designed to accomplish the same purpose; but the courts will not refuse to hear evidence to determine whether a city ordinance is unreasonable.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 63.*]

6. MUNICIPAL CORPORATIONS (§ 606*)—ORDINANCES—POLICE POWER.

Under Const. art. 11, § 11, authorizing any city to make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws, and Sacramento City Charter, St. 1895, p. 552, c. 7, § 25, subd. 8, authorizing the city to determine what are nuisances and to prevent the same, an ordinance of the city, making it unlawful for any person to permit any soot to escape from the smoke stack of any furnace within the city in which crude oil is consumed as fuel, is not on its face unreasonable or oppressive, and does not on its face show that its enforcement will necessarily interfere with the right of property or other inalienable rights, and, in the absence of evidence showing that it is unreasonable, it is valid.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1339; Dec. Dig. § 606.*]

Application for a writ of habeas corpus by Jules Junqua, convicted of violating an ordinance of the City of Sacramento. Writ discharged, and petitioner remanded.

Devine & Butler, for petitioner. R. Platnauer, City Atty., for respondent, City Trustees.

HART, J. On the 30th day of July, 1908, the petitioner was convicted of a misdemeanor in the violation of ordinance No. 839 of the city of Sacramento in the city justice's court of said city, and was committed to the custody of the chief of police in default of the payment of the fine imposed upon him by the court. He now claims that the ordinance, for the infringement of the provisions of which he is imprisoned, is invalid "for the reason that it is unreasonable and oppressive," and therefore repugnant to the Constitution of the state and to the federal Constitution. For this reason, he insists, he is entitled to be restored to his liberty through the writ of habeas corpus.

Section 1 of the ordinance under which the petitioner was tried and convicted declares that: "It shall be unlawful for any person, firm or corporation to permit any soot to escape from the smokestack or from the chimney of any furnace within the city of Sacramento in which distillate or crude oil is consumed as fuel." And section 2 prescribes a penalty for the violation of the first section.

It is the claim of the petitioner that the ordinance is void upon its face because, under its terms, the mere fact that a person accused of the violation of its provisions may be shown to have permitted soot to escape from the smokestack or chimney of a furnace, maintained and operated by him, in which distillate or crude oil is consumed as a fuel, however small the quantity of the soot so emitted from such smokestack or chimney may be, is sufficient to sustain a conviction. The contention is, in other words, that the board of trustees of the city of Sacramento is not vested with the power to declare that a nuisance which is not a nuisance per se, and that the Legislature has no authority to delegate to or confer upon the governing body of a municipal corporation the right to exercise such power. This is the specific objection to the ordinance, and upon said objection it is urged with earnestness that the measure is upon its face repugnant to those guaranties of the state and federal Constitutions against interference with the personal liberty of the citizen, enjoyment of property and vested rights, and the taking of property without due process of law, etc. The petitioner has presented a large array of authorities which he asserts supports his contention. These we shall not undertake to review, for an examination of them will disclose that generally they are not opposed to the views which we shall here venture to offer in upholding the ordinance under attack.

That the police power is an inherent attribute of every state or commonwealth in the Union is a proposition which will readily be conceded. It is not only a power which inheres in the sovereignty of the states, but is a power the exercise of which by the states is indispensably essential to the health, peace, comfort, and welfare generally of the inhabitants thereof. In this state the people themselves, by their Constitution, have asserted this power, and have thus expressly conferred its exercise upon all counties, cities, towns, and townships within the state. Const. art. 11, § 11. Under this direct grant, any such county, city, town, etc., may make and enforce within its limits all such police, sanitary, and other regulations as may be deemed necessary for the health, comfort, and happiness of its inhabitants. The only limitation upon this power prescribed by the Constitution is that regulations so made shall not conflict with general laws. This power embraces the right to regulate any class of business, the operation of which, unless regulated, may, in the judgment of the appropriate local authority, interfere with the rights of others, for, as is said in Dobbins v. City of Los Angeles, 139 Cal. 179, 72 Pac. 970, 96 Am. St. Rep. 95, "all property is subject to the police power." In other words, the proposition cannot be maintained that the exercise of this power is confined to the regulation of only such interferences with the public welfare and comfort as come strictly within the common-law definition of a "nuisance." Dobbins v. City of Los Angeles, supra.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The Legislature has expressly conferred upon the legislative authority of the city of Sacramento the power "to determine what are nuisances, and to prevent the same" (subdivision 8, § 25, Charter of City of Sacramento; St. 1893, p. 552, c. 7), and the right to so delegate such authority is within the legislative power of the state; but legislation, either local or general, which, when enacted under the pretext that it represents the exercise of the police power, is shown to be oppressive, thus imposing unnecessary or unreasonably burdensome conditions and restrictions upon and against that class upon which it is designed to directly operate, will not be sustained. And where it appears, either upon its face, or from competent evidence extrinsic to the measure itself, that such regulation is unjustly oppressive or unreasonably burdensome in the restrictions prescribed or the conditions it imposes, it will be held void as violative of the constitutional guaranties of the citizens, for the doctrine, once maintained by the courts, "that where an ordinance is reasonably within a proper consideration of and for the public health, safety and comfort, a court will not disturb the legislative act," upon the theory that the Legislature has investigated and found the facts of which it has predicated the measure, which constitutes a legislative judgment with reference thereto which is final and conclusive upon the courts, has been exploded, at least in this state. In re Smith, 143 Cal. 368, 77 Pac. 180. That is to say, that, while the courts will not, in the case of a regulation coming within the appropriate exercise of the police power, substitute their views for those of the Legislature, yet the determination of the Legislature as to what is a proper exercise of its police powers is not final or conclusive, but is subject to supervision by the courts. Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385 et seq.; In re Smith, supra. In the last-mentioned case, the Supreme Court, whose expressions on the subject under discussion are through Mr. Justice Henshaw, says: "As has been said, there must always be left a large discretion in the legislative body, with the exercise of which the courts will not and have no desire to interfere. Nor will they in any event interfere except where the case be plain that needless oppression is worked and constitutional rights are invaded; but courts are not limited in their inquiry to those cases alone where such a situation is shown upon the reading of the statute. They will consider the circumstances in the light of existing conditions. * * * Owing to the peculiar conditions existing in cities, courts are not keen to question the wisdom of the legislative exercise of their police powers in these respects; but, as the same conditions do not exist in the country, county ordinances, passed in the exercise of the same power, may well be scanned with more critical eye. And as it must happen in the case of many of these ordinances that the unreasonableness and oppression is not apparent upon the face thereof, evidence in such cases will be admitted to show the existing conditions"—citing Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; Tugman v. Chicago, 78 Ill. 405; Oxanna v. Allen, 90 Ala. 468, 8 South. 79; People v. Armstrong, 73 Mich. 288, 41 N. W. 275, 2 L. R. A. 721, 16 Am. St. Rep. 578; Ex parte Patterson, 42 Tex. Cr. R. 256, 58 S. W. 1011, 51 L. R. A. 654; Cleveland, etc., Railway Co. v. Connersville, 147 Ind. 277, 46 N. E. 579, 37 L. R. A. 175, 62 Am. St. Rep. 418; Pieri v. Mayor, etc., of Shieldsboro, 42 Miss. 493; Town of Kosciusko v. Slomberg, 68 Miss. 469, 9 South. 297, 12 L. R. A. 528, 24 Am. St. Rep. 281; Corrigan v. Gage, 68 Mo. 541. See, also, Wheeler v. Plumas County, 149 Cal. 782, 87 Pac. 802, and Matter of McCoy (Cal. App.) 101 Pac. 419. The case of Corrigan v. Gage, supra, was an action to recover on a tax bill, under a municipal ordinance regulating the construction of sidewalks. The trial court refused to allow evidence showing the unreasonableness and oppressiveness of the requirements of said ordinance, and the Supreme Court of Missouri, reversing the cause for that ruling, said: "Speaking in general terms, the authorities of a city may be said to have a large discretion as to the necessity or expediency of the ordinances which they adopt. But their powers in this regard are by no means omnipotent; otherwise the citizens would be without remedy or redress."

It is manifest, from what we have said on this point, that we do not agree with counsel for the respondent that the Supreme Court, in Re Smith, supra, intended to draw a distinction between county and city ordinances by which the principle we have been discussing is made applicable to county to the exclusion of city ordinances. The court says in that case, and in the very nature of things it is essentially true, that there is a marked difference between conditions existing in the country portion of a county and those existing in a city, and that in cities much more drastic police regulations are ordinarily required than in those sections of the county which are sparsely populated, and that therefore the courts will examine more critically into county ordinances adopted to concrete and enforce the power of police to determine whether they do or do not represent the exercise of that power reasonably and without oppression than they will for a similar reason look into city ordinances designed to accomplish the same purpose. This does not mean, however, as we understand the decision, that the courts will refuse to hear evidence, if such hearing in a given case is deemed to be necessary to a solution of the question, in an inquiry prosecuted for the purpose of ascertaining and determining whether a city ordinance whose object is regulation, and which is apparently valid, is not in fact unreasonable and oppressive in its operation, and consequently violative of the constitutional rights of those whose business is thus sought to be regulated. In the first place, we can see no reason in principle for the distinction suggested by the respondent, and, in the second place, it is made very clearly to appear that the court in the Smith Case did not intend to make such distinction by the fact that the authorities cited in that case upon the point invariably deal with city ordinances; but, in the case at bar, we cannot say that there is anything apparent on the face of the ordinance which would indicate that the measure is unreasonable or oppressive, or that its enforcement would necessarily interfere in the slightest degree with the right of property or other inalienable rights of the petitioner. Or, as the Supreme Court says, in Dobbins v. City of Los Angeles, supra, dealing with an ordinance regulating the manufacture of gas and the effect thereof upon the inhabitants of the neighborhood in which the manufactory is situated, it cannot be said judicially that soot from distillate or crude oil used as fuel is not within the category of things which interfere with the public welfare and comfort and therefore beyond the reach of the police power.

Whether it is impracticable to so control as to prevent soot emanating from such oil, when used as fuel, from escaping from a chimney or smokestack, or the effect of the regulation, as enforced, will be to prevent the use altogether of such oil as fuel, we cannot say from the face of the ordinance itself; and it may be, so far as we can judicially know to the contrary, that an examination into the matter might disclose that such soot comes from a chimney or smokestack in such small quantities as that its emission therefrom does not have the deleterious effect which we must assume, from the fact of the passage of the ordinance, and in the absence of evidence showing the contrary, that the governing board of the city of Sacramento has determined that it has, after (presumptively) an investigation of the facts; or it might be shown—although, we admit, we very much doubt it—that such soot emitted from a chimney or a smokestack even in large quantities would not, in a perceptible degree, interfere with the public comfort and welfare. Such a showing would, most assuredly, under the authorities to which we have referred, be a good defense against the enforcement of the ordinance or entitle a party convicted and sentenced for the violation of its provisions to relief from such judgment in a proceeding of the nature of the one before us.

But, as has been said, the subject-matter of the ordinance before us is within the jurisdiction of the legislative authority of the city of Sacramento to regulate, in the exercise of its police power, by direct grant from the Constitution, as well as by express authority from the Legislature expressed in the charter of said city, and, as the ordinance, upon its face, is, apparently, unobjectionable for any reason here urged against its validity, and there being nothing presented here de hors the measure to disclose that the enforcement of its provisions in the case of the petitioner involves an invasion of his constitutional or fundamental rights, it follows that the judgment imposed against and upon the petitioner was within the jurisdiction of the court imposing it, and that therefore his restraint by the chief of police of the city of Sacramento is not unlawful.

The writ is, accordingly, discharged, and the petitioner remanded.

We concur: CHIPMAN, P. J.; BURNETT, J.

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9 Cal. App. 633

ROCKWELL v. ITALIAN-SWISS COLONY et al. (Civ. 593.)

(Court of Appeal, First District, California. May 21, 1909.)

1. New Trial (§ 102*) — Grounds — Newly Discovered Evidence—Diligence.

Under Code Civ. Proc. § 657, subd. 4, authorizing the granting of new trial on the ground of newly discovered evidence which could not have been discovered and produced by the moving party at the trial by the exercise of reasonable diligence, the court need not grant a new trial, unless the evidence could not have been discovered by the exercise of reasonable diligence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 210–214; Dec. Dig. § 102.*]

2. Appeal and Error (§ 981*)—Rulings on Motion for New Trial—Review.

The action of the court, on a motion for new trial on the ground of newly discovered evidence, will not be reversed, except on a clear showing of an abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3876; Dec. Dig. § 981.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3. New Trial (§ 102*)—Newly Discovered Evidence—Sufficiency of Showing.

Where the evidence set forth in the affidavits on motion for new trial on the ground of newly discovered evidence was of facts known to the moving party at the time of trial, except that at that time he did not remember them, and he claimed that he did not know, until the adverse party had testified, what evidence he would be required to meet, the overruling of the motion was proper, especially where the decision was not filed until more than three months after the time of the trial, during which time no offer of the evidence was made.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 210–214; Dec. Dig. § 102.*]

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by L. A. Rockwell against the Italian-Swiss Colony, a corporation, and another. From an order denying a new trial for newly discovered evidence, defendants appeal. Affirmed.

George B. Graham, for appellants. Everts & Ewing, for respondent.

HALL, J. This is an appeal from an order denying defendant's motion for a new trial. The only ground relied on for a new trial was that of newly discovered evidence, and appellant concedes that "there is no question before the court on this appeal other than the ruling of the court in denying defendants' motion for a new trial upon the ground of newly discovered evidence." The defendant A. C. Palladine is the superintendent of the Italian-Swiss colony, and entered into a written contract February 24, 1903, with plaintiff, in which plaintiff agreed to bore a well that would furnish 3,500 gallons of water per minute for defendant, for the sum of $550, or, in case it became necessary to bore a second well to get the water required, plaintiff was also to receive the cost of the pipe for the second well. It was expressly stipulated that Rockwell must furnish a supply of 3,500 gallons per minute before he should be entitled to any compensation. Plaintiff under the written contract sunk a well to a depth of 140 feet, when, in attempting to force down the casing, it collapsed, and the well was rendered useless. Plaintiff sunk a second well, defendant Palladine paying for the casing, to a depth of 175 feet. This well does not, and cannot, furnish 3,500 gallons of water per minute, but only about 1,250 gallons per minute. Defendant has used it ever since it was sunk. Palladine testified that: "I have used the well for irrigation purposes for the last three years, but the ditches on my place will not carry the water that the well pumps." Defendant has never paid anything for the wells, except to furnish the pipe for the second well, taking the position that as the wells do not, and cannot, furnish the stipulated 3,500 gallons of water per minute, nothing is owing under the written contract. Plaintiff brought his action upon a quantum meruit for boring the two wells, and recovered judgment for $487.52, which the evidence showed to be the usual and reasonable price for boring such a well 175 feet deep when the owner furnishes the pipe.

In support of his complaint plaintiff testified that upon the collapse of the first well at about 4:30 p. m. of a given day he left the premises where the well was sunk, but was soon overtaken by one Frank Enos Silva, who had been sent after him by Palladine. Palladine came up, and they entered into an oral agreement for the boring of a second well, by which Palladine agreed to furnish the pipe and to pay the usual price for boring the well. The effect of his evidence was that the original written contract was abandoned, and a new oral agreement entered into for the boring of a second well. He testified that Frank Enos Silva, Manuel Brown, and Tom Shields were present when this oral contract was made, and that the conversation occurred on the road near to the house of one Friezzel, and about one-half mile from the well. Frank Enos Silva testified and corroborated plaintiff. Manuel Brown was also examined as a witness. His evidence is set forth in full, but it is so nearly unintelligible that it throws no light on the issue. Tom Shields was not produced as a witness at the trial. Palladine testified and denied that he had the conversation relied on by plaintiff, and said that he did not see plaintiff after he left the premises until next morning, when he saw him at the railroad station, when plaintiff agreed that if he (Palladine) would advance the money for the pipe for a new well, he would go on with the contract. Defendants introduced other evidence, and the case was submitted for decision. The trial was held on the 14th day of March, 1906, and the findings and conclusions of law filed June 20, 1906.

Upon his motion for a new trial Palladine presented the affidavits of eight persons besides his own, one being that of Tom Shields, and several being of persons who were on the premises when the well collapsed. Some were employés of defendants, and all seem to have been known to him. The affidavits of several of these witnesses tended to prove that Palladine remained on the premises where the well was sunk after plaintiff left, and when he left he went to his home, on premises other than where the well was sunk, and was accompanied by several of the affiants until after he had passed the house of Friezzel and the point where plaintiff claimed to have made the new contract with defendant, and did not on that occasion meet and talk with plaintiff. It may be, and we think must be conceded, that the new evidence set forth in the affidavits is of such character as to raise a strong presumption that, if it had been produced at the trial, the decision of the court would have been against the contention of plaintiff. But the court is not required to grant a new trial upon the ground of newly discovered evidence, unless the evidence could not have been discovered and produced by the moving party at the trial by the exercise of reasonable diligence. Code Civ. Proc. § 657, subd. 4. Due diligence must be shown, and the action of the trial court will not be reversed except upon a clear showing of an abuse of discretion in the ruling. O'Rourke v. Vennekohl, 104 Cal. 254, 37 Pac. 930; Oberlander v. Fixen Co., 129 Cal. 690, 62 Pac. 254; People v. Buckley, 143 Cal. 375, 77 Pac. 169; Tibbet v. Sue, 125 Cal. 544, 58 Pac. 160; Harralson v. Barrett, 99 Cal. 607, 34 Pac. 342; Heintz v. Cooper, 104 Cal. 668, 38 Pac. 511.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The evidence set forth in the affidavits which is of importance is of facts that ought to have been known to Palladine, and were known to him, at the time of the trial, except that at the time he may not have remembered them. The evidence related mainly to his whereabouts immediately after the collapse, and up to the time that he went to his own home, and the witnesses were all well known to him. His excuse is that he did not know until plaintiff testified what evidence he would be required to meet, and that at the trial it did not occur to him that he had been in the company of several persons, some of his own employés, on the afternoon in question, until after he had passed the Friezzel house on his way home. While he may not have known the exact facts upon which plaintiff relied until plaintiff gave his testimony, the complaint itself gave notice that plaintiff did not rely on performance of the written contract. Indeed, the cross-examination of Silva discloses that Palladine had reason to believe, long before the trial, that plaintiff expected to prove that a new agreement had been made. Under such circumstances defendant, by taking plaintiff's deposition, might have fully informed himself as to the particulars of plaintiff's claim. When plaintiff testified that Tom Shields was present when the new agreement was made, he should have taken steps to procure his testimony. In a similar case it was said: "That defendant did not know what the new witness would testify is no excuse. He had been notified by plaintiff's testimony that these witnesses knew the truth of the matters as to which plaintiff had testified, and would contradict him if his testimony was false." Weinburg v. Somps (Cal.) 33 Pac. 341.

When plaintiff gave his testimony as to the conversation on the highway near Friezzel's defendant, if taken by surprise, should have asked for a continuance in order to procure the attendance of Shields, whom he knew, and of his employés and of the others, who knew that he did not meet plaintiff on the highway near Friezzel's home. Palladine knew what these witnesses knew, and his only excuse for not procuring their attendance is lapse of memory at the time of the trial as to his movements that afternoon. But the record before us shows that the trial occurred March 14, 1906, and the decision was not filed until June 20, 1906. At any time prior to the decision defendant might have moved for the setting aside of the submission, and leave to introduce newly discovered evidence. Just when he remembered the particulars as to his whereabouts, and whom he was with, on the afternoon and evening in question, does not appear, except that all of the affidavits save his own and one other were made during the month of May, 1906. Upon the record before us all this evidence might have been offered before the cause was decided.

Upon the whole case we cannot say that the court abused its discretion in denying defendants' motion for a new trial, for lack of diligence in discovering and producing the newly discovered evidence, and for this reason the order is affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

10 Cal. App. 669

PEOPLE v. LAPIQUE. (Cr. 110.)

(Court of Appeal, Second District, California. May 25, 1909.)

1. Indictment and Information (§ 122*)—Information — Variance from Commitment.

A commitment was indorsed on the back of a complaint filed before a magistrate, which complaint set out the same facts and circumstances in detail as were subsequently charged in the information. The commitment recited: "It appearing to me that the offense in the within deposition mentioned, to wit, obtaining money under false pretenses, has been committed," etc. *Held* that, the complaint being thus made a portion of the commitment, the commitment was sufficient under Pen. Code, § 872, prescribing a form of commitment; and hence the information charging obtaining money under false pretenses was not defective because the commitment charged that offense without showing the degree of the offense which by section 486 may be either a felony or a misdemeanor.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 122.*]

2. Criminal Law (§ 206*)—Commitment—Statutory Provisions—Deposition.

Pen. Code, § 872, prior to its amendment in 1905 provided that if it appeared from the examination of accused that a public offense had been committed, and there was sufficient cause to believe him guilty thereof, the magistrate must indorse on the deposition, an order for his commitment, etc. *Held*, that the word "deposition" was synonymous with "complaint," and was changed to "complaint" by the amendment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 411; Dec. Dig. § 206.*]

3. Jury (§ 116*)—Panel—Challenge.

Part of a regularly drawn jury panel is not subject to the challenge for bias of the summoning officer.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 543; Dec. Dig. § 116.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. JURY (§ 150*) — IMPANELMENT — REGULARITY.

Where, in answer to an application of accused to examine into the regularity of the impaneling of the jury, the court, speaking from the record, declared that all of the sixty jurors originally drawn had been excused except those in attendance on the court, no attempt having been made by accused to change the record, the court's refusal of the application was not error.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 659; Dec. Dig. § 150.*]

5. CRIMINAL LAW (§ 730*) — TRIAL — ARGUMENT OF DISTRICT ATTORNEY—MISCONDUCT.

Where the court instructed the jury to disregard any and all statements made by the district attorney, the defendant in his own behalf or the court as to any conviction of accused for any other crime, or anything that bore on the subject, a statement of the district attorney conveying information that accused had been previously convicted, in answer to a statement of accused, was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.*]

6. FALSE PRETENSES (§ 38*)—INFORMATION—VARIANCE.

False pretenses charged in the information were that defendant falsely represented that he was the agent of two individual owners of a lot, and was authorized by them to sell the lot and to sign their names to a contract of sale. The complaining witness testified that he paid the money to defendant because defendant told him the lot belonged to a bank, and that defendant had the right to sell the lot himself, and that witness would not have given the money to defendant if he had not told him that the "bank" owned the lot, and he had the right to sell it. On cross-examination complainant also stated that, before filing the complaint, he went to the bank to ascertain the ownership of the lot. *Held*, that the evidence constituted a fatal variance.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 53; Dec. Dig. § 38.*]

7. FALSE PRETENSES (§ 38*)—INFORMATION—OWNERSHIP OF PROPERTY—PROOF.

Where the ownership of property involved in a prosecution for false pretenses constituted the false representations made to induce complainant to part with his money, and was not an element of the crime or a matter of description, the allegation of ownership could not be treated as surplusage because the property was otherwise sufficiently described, but must be proved as laid.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 50; Dec. Dig. § 38.*]

Appeal from Superior Court, Los Angeles County; W. H. Jamison, Judge.

John Lapique was convicted of obtaining money by false pretenses, and he appeals. Reversed and remanded.

See, also, 98 Pac. 46, 256, 257, 868.

John Lapique, in pro. per. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

TAGGART, J. Defendant was informed against for the crime of obtaining money under false pretenses, and upon conviction was sentenced to 10 years in state's prison.

The errors upon which a reversal of the judgment is urged on this appeal are the following: (1) The denial by the trial court of defendant's motion to set aside the information; (2) the overruling of defendant's demurrer to the information; (3) the refusal of the trial court to permit the defendant to investigate the regularity of the drawing of the jury; (4) the denial of defendant's challenge to the panel; (5) the denial of defendant's motion to instruct the jury to acquit because of a variance in the false representations alleged and those proven; (6) the refusal of the court to give certain instructions requested by the defendant, and its failure to distinguish by indorsement the instructions given, refused, and modified; and (7) misconduct of the district attorney in making statements in the presence of the jury touching the former prosecutions of the defendant.

The error assigned in respect to the motion to set aside the information is that the district attorney did not file an information for the same offense for which the defendant was held by the committing magistrate. This is based upon the fact that the commitment designates the offense for which defendant was held as "obtaining money under false pretenses" without determining the degree of the offense which, by reason of the provisions of section 486, may or may not constitute a felony. People v. Nogiri, 142 Cal. 596, 76 Pac. 490; People v. Lee Look, 143 Cal. 219, 76 Pac. 1028; People v. Picetti, 124 Cal. 361, 57 Pac. 156; People v. Small, 1 Cal. App. 322, 82 Pac. 87. The contention in support of this view is that the same doctrine declared in relation to verdicts attempting to describe an offense, such as were considered in the cases of People v. Cummings, 117 Cal. 499, 49 Pac. 576, and People v. Tilley, 135 Cal. 61, 67 Pac. 42, is applicable here. We cannot subscribe to this view. The commitment is indorsed upon the back of the complaint filed before the committing magistrate, and the complaint sets out the same facts, circumstances, and detail that appear in the charging part of the information. The commitment reads as follows: "It appearing to me that the offense in the within deposition mentioned, to wit: obtaining money under false pretenses, has been committed," etc. The complaint thus being made a portion of the commitment and so considered, the commitment is sufficient under section 872 of the Penal Code. Since the amendment of this section in 1905 the word "complaint" has been the proper word to use in this connection, instead of "deposition" but the latter was held to be the equivalent of "complaint" when the word "deposition" was used in the statute.

There is no merit in the demurrer to the information, and that pleading is good and sufficient against the attack made upon it.

Defendant challenged the panel of jurors in attendance at the trial upon specified grounds covering both section 1059 and section 1064 of the Penal Code. The record discloses that the jurors were a portion of a regularly drawn panel, and therefore a challenge under section 1064 will not lie, and the refusal of the court to permit any examination, with the view of showing prejudice toward the defendant, of the deputy sheriffs who summoned the jurors, was proper. In respect to the attempted examination into the regularity of the impanelment of the jury, which defendant contends the court refused to permit him to make, it appears that the record was before the court at the time, and that, speaking from the record, the court declared that all of the 60 jurors originally drawn had been excused by the court except those who were in attendance upon the court. We cannot presume the court misstated the record, and, if he stated it correctly, it answered all the inquiry made by the defendant. No attempt was made by him to have the record corrected, and he was in no way prejudiced by the action of the court in this respect. As a whole, the instructions given present the law fairly upon the subjects covered, and we see no prejudice to defendant's interest arising from either the giving or refusing to give or modification of any of the instructions presented by the record. The trial judge designated the instructions given and those refused. Those parts of instructions offered which were refused, and those parts which were given and the modifications which were made, appear from the record.

The matter presented under the head or ground specified in defendant's motion for a new trial is as follows: "That the verdict of the jury was arrived at solely by and upon the remarks and instructions of the court to the jury during argument of counsel to the effect that defendant had been previously convicted of two felonies." It rests upon a statement by the district attorney made at the conclusion of defendant's statement of his case to the jury before the evidence was taken. The defendant said to the jury: "Before I go any further, I wish to tell you one thing, to tell you my misfortune to be charged with crime before. You all know Ruef and his fight up there, but I was never convicted by anybody. I want to show the jury that I never was convicted of a crime. I have a right to show that." Thereupon the court said to the defendant, "Don't argue to the jury in connection with that," and the district attorney made the remark: "I presume what he wanted to say was he had been convicted twice, and then the cases were reversed by the Supreme Court, is that it?" To which the defendant replied: "I didn't want to say any such thing. I want to say the Supreme Court turned me loose. You told the reporters last night that yourself. You are trying to prejudice this jury—which is a lie. I will watch you very closely." On the following day the defendant put the district attorney upon the witness stand, and, upon being asked what his purpose was, said, "I want to show by his tricks that he came here and prejudiced the jury, that he charged me with two convictions of which I have never been guilty of," whereupon the court examined the record and stated he had not clearly heard the remarks made on the previous day, and instructed the jury to disregard any and all statements made by either the district attorney, the defendant, or the court in relation to any conviction of defendant of any other crime, or anything that bore upon the subject. It is apparent from this that, if the defendant's case was prejudiced by such a remark, it was the fault neither of the court nor the district attorney.

The record, we think, discloses a fatal variance between the allegation and proof. The false representations charged in the information were that the defendant represented that he was the agent of Mary and Richard Corcoran and authorized by them to sell and transfer a certain lot 8 of the Corcoran tract owned by them, and that he was authorized to sign their names to a certain written instrument which he exhibited to the complaining witness and which purported upon its face to be a contract of sale of said lot, and to which he signed the names of Mary and Richard Corcoran, with his own as their agent, in the presence of the complaining witness, and by reason of said pretended sale induced the complaining witness, Camgros, to pay him the sum of $100 on said contract. The evidence of the complaining witness is that he paid the $100 to defendant on April 19, 1907, because the defendant told him that the lot belonged to the Security Savings Bank, and that he (defendant) had the right to sell the lot himself. The witness testified: "I believed that and that's why I bought the lot. I gave him the money. * * * I believed what he told me about the lot, and that belief was what caused me to give him the money." The district attorney thereupon asked the witness whether or not he would have given the money to the defendant if the latter had not told him that the Security Savings Bank owned the lot and that he had a right to sell it, and the witness answered, "No." Again, on cross-examination the witness stated that, before filing the complaint, he went to the Security Savings Bank to find out about the ownership of the lot. These were the only representations, according to the complaining witness, made at the time of the transaction and the only ones upon which he (complaining witness) relied in parting with his money. Eight days later the defendant handed to the complaining witness a writing executed in the manner alleged in the information. This writing was substituted for the receipt given at the time of the payment of the $100, and bore the same date, April 19, 1907. The witness could not read and did not read the paper or know its contents, and no representations were made to him to the same or similar effect or purport as the contents thereof. There is no escape from the conclusion that the allegations of the information were not proven as alleged. If this variance be treated as one merely relating to a question of ownership, one of the subdivisions of the general rule that the evidence must correspond with the allegations in the pleading is that allegations of matters of essential description must be proved as laid. Taylor on Evidence, § 289. Ownership may or may not be an essential matter of description according to the offense charged and the circumstances of its commission. The general rule is that ownership must be proved as alleged because it identifies the offense, and hence, even where its allegation is unnecessary, it has been held that the rule should be applied in order that the charge may be distinguished from all others upon a plea of former conviction or acquittal. 1 Bishop, New Crim. Proc. § 488b.

The matter of ownership, however, is not to be considered here as an element of the crime or a matter of description, but in respect to what representations were made to induce the complainant to part with his money. It is apparent, then, that the allegation of ownership cannot be treated as surplusage because the property is otherwise sufficiently described. Bishop, Statutory Crimes (3d Ed.) § 1120. The crime charged was to be established by the proof of the false representations alleged to have been made and of their falseness. The fraud must be accomplished by means of the false pretenses alleged to have been made use of for the purpose. They must be shown to be the cause which induced the owner to part with his money. People v. Jordan, 66 Cal. 10, 12, 4 Pac. 773, 56 Am. Rep. 73; People v. Wasservogle, 77 Cal. 173, 175, 19 Pac. 270; People v. Cadot, 138 Cal. 527, 71 Pac. 649. This was not done here.

On the ground of the variance thus shown, the judgment is reversed and cause remanded for a new trial.

We concur: ALLEN, P. J.; SHAW, J.

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10 Cal. App. 654

DRAKE v. RUSSIAN RIVER LAND CO.

(Civ. 512.)

(Court of Appeal, Third District, California. May 25, 1909.)

1. JUDGMENT (§ 248*)—ISSUES.

In a suit to quiet title, it is error for the court to go beyond the issues and to decree that plaintiff is not entitled to rights which defendant is not contesting.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 434, 439, 440; Dec. Dig. § 248.*]

2. DEEDS (§ 99*)—CONSTRUCTION.

The court, in arriving at the meaning of a deed, must consult the language in deeds linked together by express terms.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 262; Dec. Dig. § 99.*]

3. BOUNDARIES (§ 16*) — UNNAVIGABLE STREAMS.

The common-law rule that the boundary of land bordering on an unnavigable stream is along the center of the stream, unless there is something in the deed conveying the land to show a contrary intention, is the rule adopted by Civ. Code, § 830.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 108–117; Dec. Dig. § 16.*]

4. BOUNDARIES (§ 16*) — UNNAVIGABLE STREAMS—"MONUMENT."

A deed describing land as running along an unnavigable stream, or referring to the stream as the boundary, makes the stream a "monument."

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 108–117; Dec. Dig. § 16.*

For other definitions, see Words and Phrases, vol. 5, p. 4576.]

5. BOUNDARIES (§ 16*) — UNNAVIGABLE STREAMS—"MONUMENT."

A deed describing land as bounded on the bank or shore of an unnavigable stream makes the bank or shore the "monument," and the line of low-water mark is the boundary.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 108–117; Dec. Dig. § 16.*]

6. BOUNDARIES (§ 16*) — UNNAVIGABLE STREAMS—"BORDER"—"BOUNDARY."

A deed described the lands as situated on the side of an unnavigable stream and as bounded by the stream on three sides, and gave the particular subdivisions of the section. The grantee in the deed conveyed by deed which fixed the starting point in a subdivision of a section; thence east, a specified distance, to the side of the stream; thence down the stream with the meanderings thereof—being the property conveyed by the first deed. *Held*, that under Civ. Code, §§ 830, 1069, providing that, when land borders on unnavigable water, the owner takes to the middle of the stream, and declaring that a grant must be interpreted in favor of the grantee, one claiming under the deeds took to the middle of the stream; the word "border" being synonymous with "boundary."

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 108–117; Dec. Dig. § 16.*

For other definitions, see Words and Phrases, vol. 1, pp. 851, 852.]

7. ADVERSE POSSESSION (§ 114*)—EVIDENCE—SUFFICIENCY.

Evidence *held* not to show that one acquired by adverse possession any title to an unnavigable stream or bank included in a conveyance to another making the middle of the stream the boundary.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 114.*]

8. WATERS AND WATER COURSES (§ 156*)—EXTENT OF SERVITUDE—STATUTES.

Under Civ. Code, § 806, providing that the extent of a servitude is determined by the terms of the grant, a use made by one of an unnavigable stream and bank within the boundaries of the land of another taking to the center of the stream, which never became anything more than an easement to the extent of the use, does not entitle the former to use the stream or bank for purposes wholly different.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 156.*]

9. EASEMENTS (§ 27*)—EXTINGUISHMENT.

Under Civ. Code, §§ 805, 811, providing that a servitude cannot be held by the owner of the servient tenement, and that the vesting of the right to the servitude and to the servient tenement in the same person extinguishes the servitude, the merger of estates extinguishes the servitude.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 75; Dec. Dig. § 27.*]

10. BOUNDARIES (§ 37*)—WATER COURSES.

An owner of land bordering on an unnavigable stream made a survey thereof by driving stakes on the top of the bank of the stream. Subsequently he executed a deed describing the land as situated on the stream and as being bounded by the stream. A subsequent grantee took possession of the land and passed beyond the survey line and used the stream without objections for over 25 years. *Held*, that the grantee took to the center of the stream notwithstanding the survey.

[Ed. Note.—For other cases, see Boundaries, Dec. Dig. § 37.*]

Appeal from Superior Court, Sonoma County; S. J. Denny, Judge.

Action by Emma Drake against the Russian River Land Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

S. K. Dougherty, for appellant. A. B. Ware and Thos. J. Butts, for respondent.

CHIPMAN, P. J. Action to quiet title to certain land.

Plaintiff and defendant claim through the same source of title, to wit, Frances Korbel, Joseph Korbel, and Anton Korbel, who were the owners of the land in controversy on February 23, 1877. Plaintiff claims a tract of 114.51 acres of land lying in Sonoma county, partly in section 21 and partly in section 28, township 28 N., range 10 W., M. D. B. & M. The Russian river borders plaintiff's land on its north, east, and west sides, describing in shape a horseshoe; the arch of the bend pointing north. The defendant claims that portion of the S. W. ¼ of the S. W. ¼ of section 21, which includes the entire bed of Russian river; the top of the southeast bank being claimed as the southeast boundary of its land. The remaining land in that 40-acre tract concededly belongs to plaintiff. Plaintiff claims that the boundary line of her land is the center of the river, which is a nonnavigable stream. The controversy therefore involves the title to this strip of the river bed and the banks of the stream along plaintiff's boundary. The land claimed by plaintiff is described in her complaint as follows: "Commencing at a point 4.25 chains east of the southwest corner of the N. W. ¼ of the N. W. ¼ of section 28, township 8 N., range 10 W., M. D. B. & M.; thence east 41.05 chains *to the south side of Russian river; thence down the said river, with the meanderings thereof*, N., 8¾ degrees E., 5.65 chains." Thence the courses and distances are given along the bank of the river following down the stream; the last call being: "Thence S., 5 degrees 15 minutes W., 12.52 chains, to the place of beginning, containing 114.51 acres." The court found that plaintiff is now, and for a long time prior to the commencement of the action was, the owner and in possession of the land described as follows—describing the land as in the complaint with the exception that the court omits the portions of the description indicated by italics hereinabove. It was also found that defendant has no right, estate, or title therein, and that "for a period of over 30 years the said plaintiff and her predecessors in interest have exclusively, openly, and notoriously and continuously and adversely occupied all that certain lot, piece, or parcel of land hereinabove described." The court then finds that defendant is the owner of the land particularly described in the answer which, as already stated, includes all the bed of Russian river lying in the S. W. ¼ of S. W. ¼ of section 21, and the banks to the meander line described in the complaint. A decree was accordingly entered in favor of defendant. Plaintiff appeals from the judgment on bill of exceptions.

The findings are challenged as unsupported by the evidence, in this, that the findings limit plaintiff's ownership to the top of the bank of the river and do not find that she is the owner of any part of the bed of the river; also, in finding adverse ownership in plaintiff to the land described and not finding that it extends to the middle of the stream or includes any part of the river bed but excludes plaintiff from the whole thereof; also, that defendant is the owner of the land claimed by it which includes the entire river bed in the S. W. ¼ of S. W. ¼ of section 21, shown above, to the top of the banks. The effect of the decree is to deprive plaintiff not only of access to the river at any point in the 40-acre tract, in section 21, but it denies her right of access to the river wherever her land borders on the river. The entire river frontage of plaintiff's land is 85.27 chains, of which defendant's answer claims but 14.75 chains, leaving a frontage of 70.52 chains to which defendant makes no claim in its answer, but to which the decree adjudges that plaintiff has no right beyond the top of the river bank. Under any view that may be taken of the case, it was error to go beyond the issues and to decree plaintiff to be disentitled to rights which defendant is not now contesting. The decree suggests the Ancient Mariner:

"Water, water, everywhere,
Nor any drop to drink."

Plaintiff deraigns her title from the Korbels, whose deed to R. P. Kelley dated February 23, 1877, conveyed three different tracts, the first about 60 acres; being "all that part of the Pippen claim which is situated, lying and being on the south side of Russian river, and is the part east of the Russian river, of the north half of the northwest quarter of section 28, tp. 8 north, of range 10 west, M. D. M."; also "all that part of the land of the Pippen claim which is situate, lying and being on the south side of Russian river, and is the southeast part of the south half of the southwest quarter of section 21 (same T. and R.) containing about 40 acres"; also "that part of the land of the Blakely claim which is situate, lying and being on the south side of Russian river and bounded on the east by Russian river, and is the western fraction of the N. W. ¼ of the N. E. ¼ of section 28, T. 8 N., R. 10 W., M. D. M., containing about 5 acres more or less; and all these described parts of land forming one complex, being bounded and inclosed by the Russian river on the north, east and west side. All the above described property is situated in Sonoma county, California. [Signed] Frances Korbel. Anton Korbel. Joseph Korbel. Properly acknowledged and recorded in Liber 61 of Deeds, at page 3." Kelley conveyed this land to Andrew Jackson Hare, July 26, 1877, by the same description as in the Kelley deed. Hare conveyed the same land to Robert P. Kelley, September 28, 1877, by the same description as above given, and on the next day, September 29, 1877, Kelley conveyed to his wife, Celesta, the same land by the same description. November 2, 1877, Celesta conveyed this land by the same description to De Courcy Hodgkin; September, 12, 1878, Hodgkin conveyed to Charles F. Poff by same description; and on May 16, 1879, Poff conveyed to Robert P. Kelley by like description. On December 18, 1879, Kelley conveyed to John Taggart, Sr., by the description as given in the plaintiff's complaint, calling for 114.51 acres, "being the same property conveyed to the said R. P. Kelley by F. Korbel et al., by deed dated February 23, 1877." On October 7, 1881, Taggart conveyed to Richard Hutchinson by the same description given in the Kelley deed to Taggart, and by the same description Hutchinson conveyed to Richard S. Drake, October 1, 1887, who by like description conveyed the land to his wife, Emma, on June 14, 1897, the plaintiff in the action.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It was stipulated that February 23, 1877, when they conveyed to Kelley, the Korbels owned the S. W. ¼ of the S. W. ¼ of section 21. Their deed to Kelley of that date conveyed a fraction of that 40 lying south of and bordering on the river. The title remained, as shown above, until 1904, when the Korbel Bros. were incorporated as F. Korbel & Bros., and on August 26, 1904, they conveyed to the corporation all their interest in the lands described as "part of the S. W. ¼ of S. W. ¼ of section 21; being on the north side of Russian river, containing 20 acres, more or less, and extending to the bank south of Russian river, in T. 8 N., Range 10 West, M. D. M." Anton Korbel and Teresa Korbel, on October 31, 1904, also conveyed by grant, bargain, and sale to the Korbel corporation by same description as last above. On August 26, 1904, the Korbel corporation conveyed to L. C. Cnopius, and on October 14, 1904, Cnopius and wife conveyed to the Russian River Heights Land Company by description as in first deed to the Korbel corporation, and on April 7, 1906, this company conveyed by same description to defendant.

It will thus be seen that the Korbels did not by deed make any assertion of right to the entire river bed in the 40-acre tract involved in the controversy until 1904. We have, then, the question principally discussed: Do the conveyances, through which plaintiff claims, carry title to the center of the Russian river where the river is the boundary of plaintiff's land?

Section 830 of the Civil Code provides as follows: "Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on tide water, takes to ordinary high-water mark; when it borders upon a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream, at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream." In the present case the land borders upon a stream unnavigable, and unless the deeds, which we are now to examine, "indicate a different intent," the Code rule must prevail, and the grant is to be interpreted in favor of the grantee. Civ. Code, § 1069.

To arrive at the meaning of the grant in the particular drawn in question, we must consult the language used in the deed from the Korbels to Kelley, as well as that used in the deed from Kelley to Taggart and in the deed to plaintiff, for they are linked together by express terms. In the deed of the Korbels to Kelley the land in part is described as "situated, lying and being on the south side of Russian river and is the part east of the Russian river" (and describing the particular subdivision of the section); in part it is described as "lying and being on the south side of the Russian river"(and describing the subdivision of the section); "also, that part of the land * * * which is situate, lying and being on the south side of the Russian river, and bounded on the east by the Russian river" (and describing the subdivision of the section); "and all these described three parts of land forming one complex, being bounded and inclosed by the Russian river on the north, east and west side." This deed could not have expressed the intention of the grantors any better or more clearly if it had read "bordering on the Russian river" instead of "bounded and inclosed by the Russian river." The language of the deed, without question, means that the river is the border or boundary; the term "border" being synonymous with "boundary," as are the terms "bordered" and "bounded." Webster. It is not possible to say from this language that it "indicates a different intent," and unless this can be said the Civil Code declares that "the owner takes to the middle of the stream." The Code rule is also the common-law rule and has been adopted generally throughout the United States. 4 Am. & Eng. Ency. of Law (2d Ed.) p. 828. It is there said: "Where land borders on a stream which is nonnavigable in fact, the boundary line is to be taken as running along the center of the stream, unless there be something in the deed itself to show a contrary intention." Where in a deed the land is described as bounded on the bank or shore of a stream, the grantee does not take to the center; but the bank or shore is the monument and not the stream, and the line of low water will usually be the boundary (Id. p. 830); but where the stream itself is referred to as the boundary, or the line is described as "running along" a stream, then the stream is the monument, and the filum aquæ the boundary (Id. p. 831). Here the language is explicit and makes the river, not its banks, the boundary. This it seems to us too plain to require further comment. Futhermore, the rule which makes the bank the monument would still give the owner the right to go to the line of low water as her boundary. Am. & Eng. Ency. of Law, supra. And even this right is taken from plaintiff by the decree.

Passing to the deed of Kelley to Taggart, we have there a deed showing apparently a survey of the land. Its starting point is 4.25 chains from the southwest corner of the N. W. ¼ of the N. W. ¼ of section 28; "thence east 41.05 chains, to the north side of Russian river; and thence down said river [not along the bank], with the meanderings thereof, * * * to the place of beginning, * * * being the same property conveyed to the said F. P. Kelley by F. Korbel et al., by deed dated February 23, 1877, and recorded in Liber 61 of Deeds, page 3 of Sonoma County Records." Whether this language means the same as if it said to the south bank of the river, intending to make the bank and not the river itself the boundary, is not clear. Nor is it perhaps very clear that in saying, "thence down said river with the meanderings thereof," the grantor meant "thence down the bank of said river." We incline to think that the intention here shown is to make the river the boundary. However this may be, the deed itself makes clear the intention to be to convey "the same property conveyed to the said F. P. Kelley by F. Korbel et al., by deed dated February 23, 1877," thus removing all doubt of the grantor's intention and leaving the question to be answered by the deed to Kelley. Plaintiff takes to the middle of the stream unless the grant to her "indicates a different intent" (Civ. Code, § 830), and in ascertaining such intent "the grant is to be interpreted in favor of the grantee" (Civ. Code, § 1069). Our opinion is that by the grant plaintiff takes to the middle of the river.

It may be profitable to note some of the many cases in illustration of the meaning of "bounding on" or "running along" a stream where land is described. In Lowell v. Robinson, 16 Me. 357, 33 Am. Dec. 671, the deed begins the line of boundary at Meadow brook, "at a stake by the side of the river or millpond, thence by the said pond to the first mentioned bounds." The court said: "It is too well settled to admit of doubt that, when land is bounded upon a river or stream, the grantee will hold to the thread of the stream. * * * When the monument is stated to stand by the river or by the edge of the river, the same idea is communicated as if it had stated that the line of boundary commenced by the river or by the edge of the river, instead of at the monument thus standing, unless from other parts of the conveyance it should clearly appear that such was not the intention." See cases in note. In Luce v. Carley, 24 Wend. (N. Y.) 451, 35 Am. Dec. 637, quoting from the opinion, Cowen, J., says: "The deed from the Curreys bounded Barnabas Wood by a stake and maple tree mentioned in the deed as standing on or near the east bank; the intermediate line running along the river as it winds and turns." Here, "thence down said river, with the meanderings thereof." "It is never thought that monuments mentioned in such a deed as occupying the bank of the river are meant by the parties to stand on the precise water line at its high or low mark. They are used rather to fix the termini of the line which is described as following the sinuosities of the stream, leaving the law to say, as the line happens to be above or below tide water, whether the one-half of the river shall be included with the islands which lie on the side of the channel nearest to the line described. * * * If the parties meant to exclude it, they should do so by express exception. Without adhering rigidly to such a construction, water gores would be multiplied by thousands along our inland streams, small and great, the intention of parties would be continually violated, and litigation become interminable." In Pike v. Monroe, 36 Me. 309, 58 Am. Dec. 751, the description began "at the south side of a large white oak on the bank, * * * and from thence down river," etc., and it was held that the line must be taken as along the river, and that the words do not indicate merely the general direction. In Cox v. Freedley, 33 Pa. 124, 75 Am. Dec. 584, a lot was described by courses and distances and by streets and lanes. "Along the northeast side of Egypt street" and "along the southeast side of Race street" are two parts of the description. The measurements to these streets would terminate at their side respectively. Held, that upon abandonment of these streets the deed carried title to their middle. So held in Moody v. Palmer, 50 Cal. 31. The principle is applied in Hendricks v. Feather River Canal Co., 138 Cal. 423, 71 Pac. 496. See, also, cases cited in 2 Devlin on Deeds, § 1026a.

We are now to inquire what, if anything, has happened to affect plaintiff's rights as we have regarded them? It appears by the evidence that the Russian river is a stream from 300 to 400 feet wide between banks. It is subject, like other streams in the state, to floods when it is bank full and its bottom entirely covered by water of considerable depth. Where the river flows through the S. W. ¼ of the S. W. ¼ of section 21, in the season of low water, the channel is along the north bank, and a sand and gravel bar has formed along the south bank, extending beyond the center of the river. In the year 1879 or 1880 the Korbels erected a chute or sluice in this channel about six or eight feet in width and built wings from the north bank and from the bar converging at the chute in which an undershot wheel was erected. This wheel was attached to a pump which raised water to supply the boiler of a steam sawmill located near the river bank on the Korbel Bros.' land and to furnish water at other buildings. This dam was a temporary affair and usually went out in high water and was replaced again as needed in the summer. The bottom and sides of this sluiceway generally withstood high water.

Witness Oliver Westcott, called by defendant, gives a description of the dam and wheel: "I reside in Guerneville in this county, and have lived in that vicinity about 42 years. I know the site of the old Korbel mill, the property now owned by the Russian River Land Company. I know the premises across the river occupied by Mrs. Drake and know the bar at the river there. I have seen a dam there, I could not state the exact date, but it must have been about 1880, something like that." (Anton Korbel testified that it was built in 1879 or 1880.) "To the best of my recollection it was there for four or five years." (Korbel testified: "We maintained it there six years, until we shut the mill down. That dam was 42 feet long, something like that across the river.") Westcott, resuming: "I was right at the wheel several times. I was right at the dam. The dam was just immediately above it. It must have been from 40 to 60 feet long. The wheel I think was about 8 feet, the diameter. I should judge it was 5 or 6 feet, the paddles of the wheel. Q. Was the river dam clear across there? A. No, it wasn't. Q. I mean clear across the water? A. It was dammed clear across the water. They had to raise the water some in order to run the wheel. * * * The dam was formed first, of course, and then there was a sluiceway made that was to confine the water to five feet. It came in on an angle, you know, to the wheel; and the bottom, if I recollect right, was boarded. There was a platform of boards from the water, under the water, and then they put in a wheel above, you see, above the wheel and the paddles. There was probably 12 or 14 paddles on it, and the water by rushing through this race and undercurrent, you know, would give it motion and give it power." Korbel testified that the river at this point is 300 or 400 feet wide from bank to bank. "Q. And you extended that (the dam) 40 feet to the edge of the water? A. That is the low water or the summer water, where we could put a dam in." Witness Butts (of counsel for defendant) testified that the dam was about 50 or 60 feet long. "It went to where the ground and the bar was high enough so it was higher than the dam. I should judge 20 or 30 feet, probably, from the lower edge of the bank. * * * This dam was there from 1880 to 1886." Mr. Butts was mistaken in his estimate of the distance of the dam from the south bank, for all witnesses agree that the river was 300 feet and more wide, and none of them make the dam more than 50 or 60 feet long, and the wheel was near the north bank. He also testified that the dam backed the water clear across the river some distance above; "but right at the bank the dam was narrow, and the bar was higher, so it didn't back it across right at the dam, but triangular across above." The east arm of the river carried the current to the north bank at the apex of the horseshoe bend, thus causing a long and wide bar to form on the south side of the river and extending well down towards the south line of the 40-acre tract in dispute. A little distance below the dam the current strikes the west bank of the river along the west arm of the horseshoe bend and is diverted across the stream to the southeast side, thus terminating the bar in question and forming a bar along the west side of the river with the water channel next to plaintiff's land.

The court found that plaintiff and her predecessors had been in adverse possession of the land south of the river for 30 years, and plaintiff testified that she has been in possession and living on the land for a period of 26 years (the trial was in 1907), and her son Charles, 25 years old at the trial, testified that he was born there. This was at the time the property was conveyed to Hutchinson and 6 years before the property was conveyed to plaintiff's husband. The mill was shut down and the dam was abandoned for use about 1886. There is evidence that plaintiff knew of this obstruction and its use while she lived on the place and, so far as appears, made no objection; but there is nothing in the record to show that prior to 1887 either she or her husband had any interest in the land or were in any position to object or consent to the obstruction. Furthermore, the evidence shows that the dam in no wise interfered with the use of the bar and the river bed by plaintiff or her predecessors or furnished cause for complaint. It was not until defendant asserted a claim to the top of the bank, under its deed executed in 1904, that her rights were called in question, and she then brought this action.

Plaintiff was called as a witness and was asked to state what use had been made of the river bed by her, along where this bar is situated, for the past 25 years. She testified: "When we had an alfalfa field in there, we had a fence so we could let our stock go down to the water at different places there, and, furthermore, we used it to go down on the bar to go across the river bed with a team when we wanted to go around there; and we hauled brush out there, even at the present time, we hauled brush on one side, and on the other side we are drying prunes. We go down to the river bed and go over where we dip prunes. * * * The bank on the north side is rocky, more rocky than it is on the south side, on the side where we planted willows along in order to keep the land from washing out, to hold the land." This testimony is not contradicted.

It seems to us that the evidence on this feature of the case wholly fails to establish any right in defendant to the river bed and the south banks to their top as held by the trial court. Whatever use was made of the river ceased in 1886 or 1887 and never became anything more than an easement to the extent of the use. It did not carry with it the fee of the land entitling the defendant to use the bar for purposes wholly different from the use for which the easement was acquired—conceding that it was acquired. Allen v. San Jose Land & W. Co., 92 Cal. 138, 28 Pac. 215, 15 L. R. A. 93. "The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired." Civ. Code, § 806. "A servitude is extinguished: * * * (4) When the servitude was acquired by enjoyment, by disuse thereof by the owner of the servitude for the period prescribed for acquiring title by enjoyment." Civ. Code, § 811.

Furthermore, the land upon which it is claimed by defendant that the servitude was laid—the servient tenement—belonged to the Korbels at the time the servitude is alleged to have been created by them; but "a servitude cannot be held by the owner of the servient tenement" (Civ. Code, § 805), and the vesting of the right to the servitude and the right to the servient tenement in the same person extinguishes the servitude (Civ. Code, § 811), that is, the merger of estates extinguishes the servitude.

If, as we think is clear enough, defendant has failed to establish title to the bed of the river and the banks thereof, to which it makes claim, above the dam, still less supported is its claim below the dam. The utmost use to which the stream below the dam was put in connection with the dam was to carry off the water passing under the wheel in the dam, and nobody pretends that this interfered in the slightest degree with plaintiff's enjoyment of that part of the stream bed or the bar to which she claims title.

There was evidence that a logging car track was surveyed or run out over a portion of the bar below the dam over which Korbel testified they hauled logs for "about a couple of years." Mr. Butts testified that this track was located in 1881. It appeared that about six months after Taggart had conveyed to Hutchinson, which was October 7, 1881, Taggart made claim to the river bed, and the Korbels paid him $50 for the right of way for the car track referred to above. It is not apparent how Taggart by this action, to which Hutchinson was not a party and of which he is not shown to have had any knowledge, could bind Hutchinson. There is no evidence that it was used after 1882, and at most it was but a right of way which in no sense can be said to establish title to anything not conveyed which was "the right of way for a logging road over, across and upon the bar in Russian river situated in," etc. (giving the description of the land in sections 21 and 28). There is no evidence as to the exact location of this road. A diagram was used at the argument, but which was no part of the record, which shows this road to run along the bar on the west side or northerly side of the river in section 28 and crossing the channel to the bar on the south or easterly side in section 21, and thence running, below the dam, across the channel to the mill. It is some distance from the east bank at all points. In our view of the Taggart deed to Hutchinson, Taggart had no interest in the bed of the river when he assumed to convey this right of way. And, as there is no evidence that it was used as such longer than two years, no prescriptive right to it is shown. Besides, if it exists it would not deprive plaintiff of the use of the river bed subject to this right of way. We fail to find any significance in this feature of the case sufficient to support defendant's claim.

One other phase of the case remains to be noticed. Korbel testified that he made a survey of the land conveyed to Kelley before the deed was executed. Considerable importance is attached to this fact by defendant, which justifies some consideration of it. The purpose of the evidence, which went in under objection, was to show that the land afterwards conveyed extended only to the top of the bank, and not to the river at any point. His entire testimony in chief was as follows: "Q. State whether or not you ever was present when a survey was made of the south portion of that quarter section, being the lands occupied by Mrs. Drake. A. Yes, I was present. Arthur Cox was the surveyor, and there was about three or four men from the mill with me. I drove the stakes." He testified that this survey was a few days before the deed to Kelley of February 23, 1877. "Q. Now where did you survey that? Where did you commence? A. I believe we commenced on the section 28, I think so, if I remember right. Q. Where did you survey to? A. Well, we surveyed the whole land, what I sold at that time. We surveyed the south side of the river bank, on top of the river bank. On the south side, on the river bank, on the top of it. I drove the stakes, all around, so many chains one way and so many chains this way (showing)." He was asked on cross-examination why, if he made this survey, he did not make the deed to Kelley conform to it, but was unable to explain it. There is nothing in his testimony inconsistent with the operation of the Code rule to which we have referred. It does not appear that the field notes of this survey were used and found their way into the Taggart deed until after the land had been several times reconveyed by the description in the Kelley deed. It is quite likely the line was run along the bank, and altogether unlikely that the survey was made, or could have been made, in the center of the stream. Such a survey would have been idle, for the stakes would have quickly disappeared. This was in February, 1877, the season when in all probability the surveyor could not have followed the center of the stream if he had desired to do so. There is absolutely nothing in Korbel's testimony tending to "indicate a different intent" from that expressed in his deed to Kelley, that the three tracts of land "formed one complex, being bounded and inclosed by the Russian river on the north, east, and west side." Besides, the deed afterwards executed must be presumed to have expressed the intent of the grantor. Nor is it at all probable that Kelley and his successors in interest went into possession of that land with the understanding that they could not pass beyond the surveyed line mentioned by Korbel and found in the Taggart deed; could not even water their stock on the shores of that stream without committing a trespass. Certain it is that plaintiff had no such understanding for she and her husband exercised the right under a deed, which we hold by its terms gave the right, for over a quarter of a century without let or hindrance from any one.

We are clearly of the opinion that when the defendant corporation, in 1904, took its deed to the land in dispute, its grantor had no title thereto, and defendant acquired none.

The judgment is reversed, and the cause remanded.

We concur: BURNETT, J.; HART, J.

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10 Cal. App. 679

KERN VALLEY BANK v. KOEHN.
(Civ. 602.)

(Court of Appeal, Second District, California. May 26, 1909.)

1. APPEAL AND ERROR (§ 931*) — REVIEW — PRESUMPTIONS.

It will be presumed that the trial court found every fact necessary to support its order that the evidence justified.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3762–3771; Dec. Dig. § 931.*]

2. APPEAL AND ERROR (§ 1008*)—REVIEW—IMPLIED FINDINGS OF FACT.

An implied finding of fact in support of an order, so far as it passed on the weight of evidence or credibility of witnesses, will not be interfered with any more than would an express finding.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1008.*]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by the Kern Valley Bank against Charles A. Koehn. From an order, defendant appeals. Affirmed.

J. W. P. Laird, Rowen Irwin, and E. L. Foster, for appellant. George E. Whitaker, for respondent.

TAGGART, J. Appeal from an order refusing to dissolve an attachment.

Plaintiff sued defendant on a promissory note and attached certain property belonging to defendant. The affidavit for the attachment contained the usual clause negativing the holding of any property by mortgage lien or pledge to secure the payment of the note. Defendant moved the court to dissolve the attachment on the ground that the promissory note sued on was secured by a lien and pledge of personal property made by defendant to plaintiff, and that such property was so held by plaintiff at the time such attachment was issued. In support of his motion defendant introduced his own affidavit to the effect that he had executed a bill of sale of an undivided one-half interest in a quartz mill of a value between $2,500 and $9,000 to secure the payment of the note, and a letter of the date March 23, 1903, signed " H. A. Blodget, President," and purporting to be from plaintiff, wherein it is stated that a bill of sale given by defendant to plaintiff, bearing date August 5, 1898, conveying an undivided one-half interest in a quartz mill (describing it), "was given to secure payment of a certain indebtedness now evidenced by a certain promissory note made by you to the said Kern Valley Bank for the sum of $5,320, bearing date October 2, 1900 [the date and amount of the note sued on]; and that the said Kern Valley Bank holds said property as collateral for the payment of said described note." Plaintiff filed a counter affidavit by its cashier to the effect that at no time mentioned in its complaint did the plaintiff hold any interest in the property mentioned in defendant's affidavit and does not now, and that plaintiff never received or accepted the same or held or holds the same or any portion thereof as security for the payment of the promissory note which is sued upon herein. It is also denied that any bill of sale of the property was ever made to the plaintiff.

The action was brought July 17, 1907, and the order denying the motion filed September 6, 1907. The theory upon which the appeal is presented by the appellant appears to be

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that we will consider the weight of the evidence in passing upon the ruling of the trial court on the motion. This we cannot do. The evidence is conflicting, and we must presume that the court found every fact necessary to support its order that the evidence would justify. So far as it passed upon the weight of the evidence of credibility of the witnesses, its findings are conclusive upon this court. An appellate court will not disturb the implied findings of fact made by a trial court in support of its order, any more than it will interfere with the express findings upon which a final judgment is predicated.

Order affirmed.

We concur: ALLEN, P. J.; SHAW, J.

10 Cal. App. 683

GOYTINO v. McALEER et al., City Board of Police Com'rs. (Civ. 671.)

(Court of Appeal, Second District, California. May 27, 1909.)

1. Licenses (§ 17*)—Billiard Hall—"Useful Enterprise."

The business of conducting public billiard halls and poolrooms is not a "useful enterprise" within the rule that a municipality cannot say who shall exercise the right of engaging in a lawful business having no injurious tendency; and an ordinance authorizing the licensing of poolrooms is valid.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 42-46; Dec. Dig. § 17.*]

2. Licenses (§ 20*)—Police Power—Regulation of Poolrooms—Discretion of Municipal Boards.

A municipal board, authorized to make such regulations as to permits to run poolrooms as may be necessary for the maintenance of public order, etc., may, in the exercise of a legal discretion, deny an application for a permit to run a poolroom in a part of the city inhabited by a class of people which would render a poolroom a place of resort for objectionable persons, and disturb the public peace.

[Ed. Note.—For other cases, see Licenses, Dec. Dig. § 20.*]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Application for a writ of mandate by J. P. Goytino against Owen McAleer and others, constituting the Board of Police Commissioners of the City of Los Angeles, to compel the issuance of a poolroom license. From a judgment denying the application, plaintiff appeals. Affirmed.

See 4 Cal. App. 655, 88 Pac. 991.

Haas, Garrett & Dunnigan, for appellant. W. B. Mathews, Leslie R. Hewitt, City Atty., and John W. Shenk, Asst. City Atty., for respondents.

TAGGART, J. Appeal from a judgment denying an application for a writ of mandate. The writ was asked to issue against the defendants, as the board of police commissioners of the city of Los Angeles, to compel them to issue to the plaintiff a permit authorizing the clerk and auditor of the city to issue to plaintiff a license to conduct a poolroom in that city, he having made an application therefor in accordance with the provisions of the ordinance of the city relating thereto. The answer alleges, and the trial court found, that the application was considered in open session of the board, and denied on the ground that the place named therein was located in a part of the city inhabited by a class of people which would render a poolroom, if established therein, a place of resort for disorderly and objectionable persons, and that a poolroom in said locality, being populated by cholos and other people of like or similar character, would, in the judgment of the board, tend to the disturbance of the public peace, and to render the preservation of order in said locality difficult. This same matter was before this court on an original application for a writ of mandate in civil case No. 326, a decision in which was filed December 31, 1906, and is reported in 4 Cal. App. 655, 88 Pac. 991; the writ being denied. As one of the reasons given for denying the writ, it was said that petitioner had a remedy by appeal from the judgment of the superior court, if the writ should be denied by that court, and the proceeding was, in accordance with the suggestion in the opinion, prosecuted to a judgment in the superior court, and is now before us on appeal. With the reasons stated in the opinion filed on the former application we are entirely satisfied, and think they fully answer all the questions here presented.

In the federal case cited by appellant (Dobbins v. Los Angeles, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169), the distinction between ordinances which regulate "useful business enterprises" and those which are not to be so classified is expressly recognized, and the law of that case is made applicable only where a "useful" enterprise or business is under consideration. It is only where a business is lawful and has no injurious tendency that the governing body cannot say who shall and who shall not exercise the right itself. Los Angeles v. Hollywood, etc., 124 Cal. 344, 57 Pac. 153, 71 Am. St. Rep. 75. Public billiard halls and poolrooms have been distinctly classified by this court as among those which cannot lay claim to being within the rule applicable to "useful" enterprises, in two decisions filed since the former opinion in the controversy before us was filed (Ex parte Meyers, 7 Cal. App. 528, 94 Pac. 870; Ex parte Murphy [Cal. App.] 97 Pac. 199); and the views expressed in the latter case are approved by the Supreme Court in an application for writ of habeas corpus made to it in the same matter (Ex parte Murphy [Cal.] 100 Pac. 1134). Conceding that no arbitrary discretion can be exercised by the board of

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police commissioners in applying the ordinance in question, the reasons assigned by the answer for denying the application for a license were exactly such as should actuate a police department in denying a permit or license to keep a place of amusement which is liable to become the scene of disorderly conduct and disturbances of the peace. It cannot be urged that, though the ordinance be fair and lawful in its terms and provisions, it was so enforced as to work a discrimination against a part of the community, or some particular member or members thereof, for no lawful reason. Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; Dobbins v. Los Angeles, 195 U. S. 223, 240, 25 Sup. Ct. 18, 49 L. Ed. 169.

We are of opinion that the writ was properly denied by the superior court, and its judgment is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

10 Cal. App. 567

HOOE v. O'CALLAGHAN (CAMPION, Intervener). (Civ. 554.)

(Court of Appeal, First District, California. May 10, 1909.)

1. Vendor and Purchaser (§ 132*)—Record Title—Sufficiency.

The public records being destroyed, it is impossible for the vendor to convey a good or perfect record title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 132.*]

2. Vendor and Purchaser (§ 335*)—Forfeit of Deposit.

The purchaser does not forfeit the deposit money, where the public records are destroyed, so that a good or perfect record title cannot be conveyed, though he gives the vendor no notice of the condition of the records, a thing which would be idle.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 335.*]

3. Vendor and Purchaser (§ 58*)—Default in Contract.

The covenants of vendor and purchaser in a contract of sale being mutual and dependent, neither, without performance or offer to perform on his part, can put the other in default.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 58.*]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Raleigh P. Hooe against Daniel O'Callaghan; E. J. Campion intervening. Judgment for intervener. From an order denying a motion for new trial, plaintiff appeals. Affirmed.

Costello & Costello, for appellant. Leon E. Prescott, for respondent. Edmund Tausky, for Chas. F. O'Callaghan.

KERRIGAN, J. This action was brought by Raleigh P. Hooe, as assignee of his wife, Etta Mae Hooe, against defendant, Daniel O'Callaghan, to recover $500 alleged to have been received by defendant from E. J. Campion, the intervener, for the use of Mrs. Hooe. At the conclusion of the introduction of evidence, the court, being of opinion that no issue or question of fact was presented for determination, instructed the jury to return a verdict for Campion, the intervener, and against the plaintiff and defendant. This was done, and in due time a judgment was accordingly entered. This is an appeal by plaintiff from an order denying his motion for a new trial.

The undisputed facts of the case are, briefly, as follows: On April 11, 1906, Etta Mae Hooe, through her agent, authorized in writing Daniel O'Callaghan, a real estate agent, to sell the real estate described in the complaint for the sum of $10,000 net. On April 14, 1906, O'Callaghan procured Campion, the intervener, to make an offer of $10,500 for the land, and to deposit with him $500 on account of the purchase price, with the understanding that Campion was to have 30 days to examine the title, and if the title was found defective, and could not be perfected within 60 days, the deposit was to be returned. On April 17th following, O'Callaghan informed Mrs. Hooe, through her agent, Raleigh P. Hooe, of said offer by Campion and of its terms, and she accepted it in writing, and agreed, upon receipt of $10,000, to convey the property to Campion with perfect title, free and clear of incumbrances. On the next day the greater part of the records in the office of the recorder of the city and county of San Francisco (where the property was situate) were destroyed by fire. The evidence further showed that O'Callaghan was employed as exclusive agent of the assignor of the plaintiff to sell her property, and that Campion was at all times ready, willing, and able to purchase said property upon the conveyance to him of the aforesaid title.

Upon these facts we are of opinion that plaintiff had no right to the $500 deposited, and that the action of the trial court in directing the jury to return a verdict in favor of Campion was correct. It was impossible for Mrs. Hooe, by reason of the destruction of the public records, to convey to Campion a good or perfect record title to the property (Turner v. McDonald, 76 Cal. 180, 18 Pac. 262, 9 Am. St. Rep. 189; Goldstein v. Hensley, 4 Cal. App. 444, 88 Pac. 507; Easton v. Montgomery, 90 Cal. 307, 27 Pac. 280, 25 Am. St. Rep. 123; Benson v. Shotwell, 87 Cal. 49, 25 Pac. 249; Gwin v. Calegaris, 139 Cal. 384, 73 Pac. 851; Calhoon v. Belden, 3 Bush (Ky.) 674; 29 Am. & Eng. Ency. Law (2d Ed.) 607; Title & Document R. Co. v. Kerrigan, 150 Cal. 289, 88 Pac. 356, 8 L. R. A. (N. S.) 682, 119 Am. St. Rep. 199. In this last-mentioned case the court said: "The registration of titles has become so thoroughly imbedded in our system of dealing with lands that a title which cannot be traced and established by some form of public record is practically unmerchantable. * * * In this county the system of registration has become so completely established that the courts can take judicial notice of the fact that in the great majority of cases parties dealing in real estate rely for the proof of their titles upon the chain of title that will be disclosed by an examination of the records. * * * It is also a matter of common knowledge that in the city and county of San Francisco at least, if not in the counties, the disaster of April last worked so great a destruction of the public records as to make it impossible to trace any title with completeness and certainty." The case of Calhoon v. Belden, supra, is also particularly in point, for there the question of title arose, as here, from a destruction of the public records. The parties to that action entered into an agreement for an exchange of houses and lots, to be consummated in November, 1862. Before the arrival of that date (the parties having in the meantime mutually delivered possession of their respective houses and lots), the house obtained from Calhoon was destroyed by fire, and later, in July, 1863, Gen. John Morgan's Confederate army destroyed by fire the clerk's office of Marion county and all its records and archives. Thereafter Calhoon sought a specific execution of the contract, and Belden claimed a rescission. The court, in part, said: "If, in fact, Calhoon's title be perfect, Belden is not bound to accept his conveyance without such proof of it as will arm him with the recorded means of vindicating its validity in after times; and there is no such proof, or even allegation, in this case. He cannot therefore be entitled to a specific execution of the contract, but is equitably bound to take back the damaged lot, and restore to Belden that which was exchanged for it. As the contract implied that perfect titles were to be interchanged and guaranteed, a rescission is the inevitable consequence in equity."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

In the case at bar it is contended by plaintiff that Campion forfeited the $500 deposited. There is no satisfactory evidence in the record to sustain this contention. On the contrary, the record shows that Campion was ready, willing, and able to pay the purchase price of the property upon the conveyance to him of good title. It is true that he gave Mrs. Hooe no notice of the condition of the record; but, as it was impossible for her to perform her part of the contract by conveying to him a perfect title, such notice was unnecessary, and the giving of it would have been an idle and useless act (Maupin on Merchantable Title, etc., §§ 87, 240), which the law does not require (Civ. Code, § 3532). She could not have maintained an action for the purchase price, and we think in this action she is not entitled to judgment for the amount of the deposit. In Maupin on Merchantable Title to Real Estate, at section 238, it is said: "It is frequently provided in contracts of sale that the purchaser shall forfeit his deposit if he fails to comply with his contract within a specified time. The vendor cannot insist upon this forfeiture if he be unable to perform the contract on his part for want of title. In such a case there is a complete failure of the consideration, and the vendor has no more right to keep the purchaser's money than he would to compel specific performance of the contract."

Finally, Mrs. Hooe not only did not have a record title to the property, but she made no tender of a deed thereto to Campion; and, as the covenants of this contract were mutual and dependent, it was necessary that she should have made such a tender before commencing this suit. When the covenants of a contract are mutual and dependent, neither party thereto can put the other in default without showing a performance or offer to perform on his part. Dennis v. Strassburger, 89 Cal. 583, 26 Pac. 1070; Maupin on Mer. Title, etc., § 88; 29 Am. & Eng. Ency. of Law (2d Ed.) 646.

The order is affirmed.

We concur: COOPER, P. J.; HALL, J.

10 Cal. App. 675

CABRERA v. PAYNE et al. (Civ. 597.)

(Court of Appeal, First District, California. May 26, 1909. Rehearing Denied June 22, 1909.)

1. Vendor and Purchaser (§ 128*)—Contracts—Record Title.

The purchaser in a contract for the sale of realty, which gives him a specified time within which to examine the title and consummate the purchase, and which stipulates that if the title is defective the vendor shall have a specified time in which to perfect it, and if not perfected the deposit paid on the price shall be returned, is entitled to a perfect record title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 128.*]

2. Vendor and Purchaser (§ 112*)—Contracts—Abandonment.

The purchaser in a contract for the sale of realty may rely on the improper condition of the record title to avoid the contract and recover the deposit, though he did not intend to take the property under any circumstances, where he did nothing which estopped him from insisting on a strict compliance with the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 199, 200; Dec. Dig. § 112.*]

3. Contracts (§ 321*)—Actions—Accrual of Cause of Action.

Where a party to a contract has repudiated it or has put it out of his power to perform, or where the contract has been by an act of God or of the law rendered impossible of performance, a right of action accrues to the adverse party immediately.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1510; Dec. Dig. § 321.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. VENDOR AND PURCHASER (§ 334*)—CONTRACTS—REPUDIATION—EFFECT.

Where a vendor in a contract binding him to give a perfect record title tendered to the purchaser a deed, though the public record of the title had been destroyed by fire, under the pretext that the purchaser was compelled to accept a report on the title of a title insurance company, and stated to the purchaser that that was all that would be done under the contract, and nothing further was done, the vendor absolutely, repudiated the contract, and the purchaser could sue immediately for the deposit, though the vendor had a specified time in which to perfect the title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 961; Dec. Dig. § 334.*]

5. VENDOR AND PURCHASER (§ 339*)—ACTION BY PURCHASER FOR DEPOSIT—TENDER OF PERFORMANCE—NECESSITY.

Where the vendor absolutely repudiated the contract of sale, the purchaser could recover the deposit paid, without tendering performance of the contract on his part.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 997–999; Dec. Dig. 339.*]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by D. Cabrera against Clyde S. Payne and another. From a judgment for defendants, plaintiff appeals. Reversed.

Chas. S. Peery, for appellant. Marshall Nuckolls, for respondents.

KERRIGAN, J. This is an action to recover $1,000, a deposit paid upon the purchase price of a certain piece of real property in San Francisco. Judgment was entered, denying plaintiff any relief, and in favor of the defendants for their costs, from which judgment, and from the order of the court denying his motion for a new trial, plaintiff appeals.

Under the terms of the contract the purchaser was given 20 days from February 7, 1907, within which to examine the title to the property and consummate the purchase, and, if the title was found to be defective, the vendors were to have 90 days in which to perfect it, and, if not perfected within that time, the deposit was to be returned. Time was made of the essence of the contract. Within the 20 days allowed for the examination of title, plaintiff rejected it, both orally and in writing, upon the ground, among others: "That the records of the city and county of San Francisco do not show any valid title to said property in said Clyde Payne or Charlotte Payne, and that there is no public record of said property whatever in said city and county." The other written grounds of objection were subsequently waived. About a month later, and before the expiration of the 90 days given to the vendors to perfect title, the plaintiff commenced this action for the return of the deposit.

Under the contract the purchaser was entitled to a good or perfect record title. Bates v. Howard, 105 Cal. 173, 38 Pac. 715; Goldstein v. Hensley, 4 Cal. App. 444, 88 Pac. 507; Gwin v. Calegaris, 139 Cal. 384, 73 Pac. 851; Hooe v. O'Callaghan (Cal. App.) 103 Pac. 175; Title Document R. Co. v. Kerrigan, 150 Cal. 289, 88 Pac. 356, 8 L. R. A. (N. S.) 682, 119 Am. St. Rep. 199; Calhoon v. Belden, 3 Bush (Ky.) 674. But as the public record of the title had been destroyed by the great fire in San Francisco in April, 1906, and could not be restored within 90 days, either under the "Act to provide for the establishment and quieting of title to real property in case of the loss or destruction of public records," the so-called McEnerney act (St. Ex. Sess. 1906, p. 78), or otherwise, the plaintiff was entitled to the return of his deposit unless, as is claimed by defendants, he abandoned the contract, or has brought this action prematurely.

There is in the record testimony of a conversation between the plaintiff and the agent of the defendants, and also expressions in a letter from plaintiff's attorney to the defendants' agent, which lend color to the suggestion of the defendants that plaintiff would not have taken the land even if the title thereto had been perfect; but we do not think there is anything either in the letter or the conversation which can be construed as an abandonment or repudiation by plaintiff of the contract. It may be that plaintiff did not intend to take the property under any circumstances; but, even so, he had a right to rely on the imperfect condition of the record as an excuse for avoiding the contract, and, as we view the record, plaintiff did not mislead the defendants, or in fine do anything which could be held to estop him from insisting upon a strict compliance with the terms of the agreement.

Upon the question of whether or not the suit was prematurely commenced, it was brought before the expiration of the 90 days after objection to the title. If the defendants had repudiated the contract, or voluntarily put it out of their power to perform; or if the contract had been by the act of God or of the law rendered impossible of performance, a right of action would have accrued to plaintiff immediately, and without waiting for the day of performance fixed in the contract. Garberino v. Roberts, 109 Cal. 125, 128, 41 Pac. 857; 29 Cyc. 927; Burks v. Davies, 85 Cal. 113, 24 Pac. 613, 20 Am. St. Rep. 213; 24 Am. Ency. of Law, 643; Poirier v. Gravel, 88 Cal. 79, 82, 25 Pac. 962; Norris v. Moody, 84 Cal. 143, 146, 24 Pac. 37; Scovell v. McMahon, 62 Conn. 378, 26 Atl. 479, 21 L. R. A. 58, 36 Am. St. Rep. 350. Here the contract was not impossible of performance within the ordinary legal meaning of that term, nor did the defendants do anything to disqualify or disable them from performing it; but the defendants, a few days after notice of objection to the title, under the pretext that plaintiff was compelled to accept the report on the title of a certain title insurance company, tendered plaintiff a grant, bargain, and sale deed of the land, and told him that this was all that would be done for him under the contract; and indeed nothing further was done, doubtless for the very simple reason that it was impossible, as we have seen, to inaugurate and complete the necessary proceedings for restoring the record of the title within the stipulated 90 days. The inability of the defendants to comply with the terms of their contract, together with their conduct just noted, worked the same effect, we think, as an absolute repudiation of their contract, and gave to the plaintiff the right to have his deposit returned to him immediately. Defendants not having returned it, and declining to do so, we think suit would lie for its recovery without waiting for the expiration of the 90 days allowed in the contract to perfect title.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Tender of performance by plaintiff of the conditions of the contract on his part was, of course, under the facts of this case, unnecessary. Merrill v. Merrill, 95 Cal. 337, 30 Pac. 542.

The judgment and order are reversed.

We concur: COOPER, P. J.; HALL, J.

155 Cal. 697

CRIM et al. v. UMBSEN. (S. F. 4,991.)

(Supreme Court of California. June 18, 1909. Rehearing Denied July 17, 1909.)

1. Vendor and Purchaser (§ 132*)—Record Title.

The record from which it may be determined whether the vendor has "title fairly deducible of record," to which the purchaser under his contract is entitled, is the entire record of the recorder's office; and, a large part of this being destroyed, the vendor does not give such title by obtaining and having recorded deeds constituting a chain from the United States.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 132.*]

2. Vendor and Purchaser (§ 132*)—Record Title—General Index.

The preservation, at the time of the destruction of a large part of the records of the recorder's office, of the general index of the office, does not enable the vendor to give in accordance with his contract a title fairly deducible of record; it furnishing nothing more than clues to documents, at most constituting constructive notice of the existence thereof.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 132.*]

3. Vendor and Purchaser (§ 112*)—Rescission of Contract—Motive.

The purchaser being entitled to rescind because of the vendor's inability to give perfect title of record, it is immaterial whether his real motive for rescinding is based on depreciation in value of the property.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 112.*]

4. Vendor and Purchaser (§ 112*)—Rescission of Contract—Title.

The purchaser's right to rescind, because of the vendor not having a title fairly deducible of record, is to be determined from the title at the time fixed for performance of the contract and delivery of conveyance, without regard to subsequent perfection of the title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 199, 200; Dec. Dig. § 112.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by William H. Crim and another against Henry P. Umbsen. From a judgment for defendant, and from an order denying a motion for new trial, plaintiffs appeal. Affirmed.

Edward C. Harrison, for appellant Crim. Cushing, Grant & Cushing, for appellant Joost. Bishop & Hoefler, for respondent.

MELVIN, J. This case furnishes one of the peculiar problems growing out of the great conflagration of April 18, 1906. On April 10th of that year plaintiffs (who are appellants here) entered into a written contract with defendant and respondent, for the sale to the latter of a tract of land in the city and county of San Francisco, for the sum of $150,000, of which amount $15,000 were paid at that time; the receipt thereof being evidenced by the contract. By the terms of this agreement 30 days were allowed the defendant for examination of the title. At the expiration of this period the balance of the purchase price was to be due and payable upon tender by appellants of a good and sufficient deed. If the title proved to be defective, 30 additional days were allowed the sellers to perfect it, and if, at the expiration of that term, the title should be incurably defective, then the deposit was to be returned. The contract also provided that, if the buyer should fail to consummate the purchase in accordance with the conditions of the instrument, the deposit was to be forfeited. At the time of the execution of the contract the vendors placed in the hands of the purchaser an abstract of title. This was destroyed in the great fire of the following week, and at the same time the greater part of the records of the county recorder's office, as well as most of the other public and official records of San Francisco, were burned. The general index in the county recorder's office was saved, however. This showed the date and character of and the names of the parties to all instruments that had been recorded there. Prior to the 9th day of May, 1906, the time for the examination of title was extended for a further period of 30 days by written memorandum subscribed by the vendors, and on June 7, 1906, defendant gave a written notice to plaintiffs alleging that their title was defective. The specification was as follows: "That there is no record whatever showing that you, or either of you, or any other person or persons, are the owners, or have any interest in said property, or any part thereof."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It is conceded that prior to June 11, 1906, there was no record title showing that the plaintiffs, or either of them, had any ownership of, or interest in, the property described in the contract; but on the last-mentioned date they placed of record in the county recorder's office of San Francisco a deed, purporting to convey the title of said property to themselves from certain grantors in whom the fee would rest according to the chain of title which they afterwards established of record. On July 6, 1906, appellants recorded certain conveyances and other instruments, some of which were originals and others certified copies. By these documents, originals of which had been of record prior to the fire, a chain of title was established, beginning with the patent issued by the government of the United States. Immediately after the recordation of these instruments plaintiffs exhibited to defendant the recorder's receipt therefor, and at the same time tendered him their deed of conveyance of the property, accompanied by a release of a certain lien of the Bank of California. Defendant refused to accept the proffered deed or to pay the balance of the purchase price, and on July 30, 1906, gave a written notice of rescission of the contract. Thereafter this action was brought. In the complaint the facts above set forth were alleged, and damages demanded in the sum of $34,915 for breach of contract. Defendant answered, denying plaintiffs' allegations of good title, and he also filed a cross-complaint setting up affirmatively a want of record title in plaintiffs, stating that his sole purpose in entering into the contract of purchase was that he might obtain a tract of land which, in the course of his business as a dealer in real estate, he might sell at a profit, either as a whole or in subdivisions, as speedily as possible; averring that for this purpose it was necessary that he should obtain a good marketable title, fairly deducible from the record; alleging the rescission of the contract; and praying for return of the $15,000 paid as a deposit on the purchase price of the land. Judgment was given for defendant on the main case and for the return of the deposit according to the prayer of the cross-complaint. This appeal is from the judgment and from the order of the superior court denying the motion of plaintiffs for a new trial. Respondent's theory, which the court below adopted, was that the chain of title offered by appellants is not the record contemplated by the terms of the contract, but that the record from which title should be fairly deducible is the entire record of the city and county, that this setting (the entire record) alone determines whether or not the "chain" is sufficient, and that the setting having been destroyed, there could be no title furnished by appellants in accordance with the terms of their contract of sale.

Appellants concede that the vendee should have a title "fairly deducible of record," but contend that, having furnished a chain of title leading from a recognized source, the government of the United States, they have fulfilled their part of the agreement, and that the burden is upon the vendee to point out defects in the title. They further assert that the preservation of the general index in the recorder's office furnishes the vendee with sufficient means of determining whether or not there is any outstanding title in opposition to their proffered chain of title, or any cloud upon it. In support of their first contention they cite Easton v. Montgomery, 90 Cal. 313, 27 Pac. 280, 25 Am. St. Rep. 123. In the case at bar, however, the vendee did point out a defect in their title which was admittedly good when made, as at that time they had no deed of record conveying or purporting to convey the title to them. They sought to remedy this defect, and doubtless did everything in their power to offer a perfect title; but, if their theory be correct, the burden of proof would have been as effectually shifted to the vendee if they had met his objection to the sufficiency of their title by merely filing a quitclaim deed from some one, releasing to them that person's interest in the property. This cannot be the correct rule of law, because "in every executory contract for the sale of land there is an implied condition that the title of the vendor is good, and that he will transfer to the vendee by his deed of conveyance a title unincumbered with defect." See Easton v. Montgomery, 90 Cal. 314, 27 Pac. 280, 25 Am. St. Rep. 123, and cases cited.

In relation to the preservation of the general index, it may be said that the mere mention (if any were therein contained) of persons and instruments having relation to the land here in litigation would furnish the intending purchaser with nothing more than clues to the documents, without apprising him of any substantial part of their contents. Such data as the index contained might constitute constructive notice of the existence of the recorded instruments relating to this property, but would not have any higher function.

That the destruction of the records in San Francisco by the great fire of April, 1906, made all titles for the time practically unmerchantable, cannot be doubted. The very purpose of the McEnerney act was the removal of this objection to titles in that city and county. In commenting upon that statute this court has used the following language: "The general purpose of the statute is plain. It was intended to provide a method whereby owners in possession of real estate in counties where the records are destroyed to such an extent as to make it impossible to trace a record title may secure a decree which shall furnish a publicly authenticated evidence of title. It is hardly necessary to point out that under the system of registration of land titles which has grown up in all of the states of this Union it is practically essential to the security of ownership in real property that there exist some method by which the title can be made clear of record. Without regard to the effect of duly recorded instruments as constructive notice (whether or not the record remains in actual existence), the registration of titles has become so thoroughly imbedded in our system of dealing with lands that a title which cannot be traced and established by some form of public record is practically unmerchantable. * * * It is also matter of common knowledge that in the city and county of San Francisco at least, if not in other counties, the disaster of April last worked so great a destruction of the public records as to make it impossible to trace any title with completeness or certainty. That some provision was necessary to enable the holders of real estate in this city to secure to themselves such evidence of title as would enable them not only to defend their possession, but to enjoy and exercise the equally important right of disposition, is clear." Title, etc., Restoration Co. v. Kerrigan, 150 Cal. 305, 88 Pac. 356, 8 L. R. A. (N. S.) 682, 119 Am. St. Rep. 199.

We cannot consider the motives which prompted respondent to rescind the contract of sale. It was his right under that instrument to receive a perfect title of record at the time or within the time specified in the agreement. This the plaintiffs could not give him. He was entitled to rest upon the provisions of the contract, whether or not his real purpose was to avoid taking and paying for a tract of land that had depreciated in value. In determining his rights we must only consider the title as it existed at the time fixed for the performance of the contract and the delivery of the conveyance. Reynolds v. Borel, 86 Cal. 538, 25 Pac. 67; Turner v. McDonald, 76 Cal. 177, 18 Pac. 262, 9 Am. St. Rep. 189; Wilcox v. Lattin, 93 Cal. 594, 29 Pac. 226; Gwin v. Calegaris, 139 Cal. 387, 73 Pac. 851; Calhoon v. Belden, 3 Bush (66 Ky.) 674. In Calhoon v. Belden, supra, the court considered a problem somewhat like that presented to us. The litigants had entered into an executory contract for the exchange of houses. Each had delivered possession to the other, and their agreement provided for conveyances of titles at a day certain. Before that date one of the houses burned, and subsequently the courthouse was destroyed by fire. The entire record of Calhoon's title was burned. Calhoon brought suit for specific performance, and Belden answering denied the sufficiency of the plaintiff's title and prayed for a rescission of their agreement. Belden was successful in the lower court, and the decree refusing to enforce specific performance and rescinding the contract according to Belden's prayer was sustained on appeal. The following significant language is used by the court: "If, in fact, Calhoon's title be perfect, Belden is not bound to accept his conveyance without such proof of it as will arm him with the recorded means of vindicating its validity in after times, and there is no such proof, or even allegations, in this case. He cannot therefore be entitled to a specific execution of the contract, but is equitably bound to take back the damaged lot and restore to Belden that which was exchanged for it. As the contract implied that perfect titles were to be interchanged and guaranteed, a rescission is the inevitable consequence in equity." See, also, Hooe v. O'Callaghan (Cal. App.) 103 Pac. 175; Cabrera v. Payne (Cal. App.) 103 Pac. 176.

In view of the conclusion which we have reached, it is unnecessary to examine respondent's assertion that the appellants' chain of title is deficient in itself.

As plaintiffs were not able to furnish to defendant, according to the terms of the agreement, a title "fairly deducible of record" because there was no complete record from which he could determine the nature and defensibility of the offered title, it follows that the judgment of the superior court denying plaintiffs' prayer and decreeing restoration of the deposit to defendant must be sustained, and it is so ordered. The order denying the motion for a new trial is also sustained.

We concur: LORIGAN, J.; HENSHAW, J.

156 Cal. 776

MORRIS v. CLARKIN et al. (L. A. 2,083.)

(Supreme Court of California. June 30, 1909.)

1. QUIETING TITLE (§ 10*)—TITLE OF PLAINTIFF—SUFFICIENCY.

Under Civ. Code, § 1006, providing that occupancy for any period confers title against all except the state and those having title by prescription, transfer, etc., actual possession for any period under claim of ownership is sufficient title to sue to quiet title as against a trespasser or one establishing no title in himself.

[Ed. Note.—For other cases, see Quieting Title, Dec. Dig. § 10.*]

2. QUIETING TITLE (§ 12*)—TITLE OF PLAINTIFF—SUFFICIENCY.

A grantee in a deed of land inclosed it by a fence of two rails, nailed to posts set in the ground from 6 to 10 feet apart. Laths were nailed vertically to the rails. They were repeatedly torn off, and for some years they were replaced by the grantee. *Held*, that the grantee was in the actual possession under a claim of ownership, and could sue to quiet title against one not connecting himself with the title.

[Ed. Note.—For other cases, see Quieting Title, Dec. Dig. § 12.*]

In Bank. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by J. E. Morris against Gladys M. Clarkin and others, in which defendant A.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Lunnun appeared and filed answer. From a judgment of nonsuit, plaintiff appeals. Reversed.

H. C. Millsap, for appellant. Hass, Garrett & Dunnigan, for respondents.

SLOSS, J. Action to quiet title to lot 178 of the Wingerter tract, in the city of Los Angeles. The defendant Lunnun appeared and filed an answer denying all the material allegations of the complaint. On a trial before the court sitting without a jury, the defendant, at the close of plaintiff's testimony, moved for a nonsuit, which was granted. Judgment in favor of defendant was entered, and plaintiff appeals.

It was stipulated that in September, 1889, one Francis Morris was the owner of the property in controversy, and that he then conveyed it to the defendant Gladys M. Clarkin. In May, 1895, the plaintiff obtained a deed to the same property from Francis Morris. His effort at the trial was to show that he had, from and after the receipt of this deed, maintained adverse possession of the premises, coupled with payment of all taxes levied and assessed upon the land (Code Civ. Proc. §§ 323, 325) for such period of time as to vest the title in him. The form of possession relied on was that defined in subdivision 2 of section 323 and subdivision 1 of section 325 of the Code of Civil Procedure, viz., protection by a substantial inclosure. The respondents' contention, sustained by the court, was that the evidence failed to show that the land had, for a continuous period of five years prior to the commencement of the action, been "protected by substantial inclosure." The evidence regarding this matter was not as clear and satisfactory as might have been desired. The plaintiff showed that for some period of time he had inclosed the land by a fence, consisting of two horizontal 1x3 rails, nailed to posts set in the ground at distances of from 6 to 10 feet apart. Laths were nailed vertically to these rails. It is not questioned that, so long as the component parts of the fence remained in position, the fence constituted a "substantial inclosure." It appears, however, that the laths had repeatedly been torn off, and that, for some years, they had, from time to time, been replaced by plaintiff. Whether or not the evidence would have justified a finding that a substantial inclosure had been maintained by plaintiff during any consecutive period of five years (coincident with the payment of taxes by him) is a somewhat close question. It need not, however, be here determined.

The respondent Lunnun, the only party appearing in the court below in opposition to plaintiff, did not in any way connect himself with the title to the property. The stipulation of the parties shows a conveyance from the original owner to Gladys M. Clarkin, and leaves the ownership in her. So far as the evidence goes, Lunnun is an entire stranger to the title. Actual possession for any period, under claim of ownership, is sufficient evidence of title in plaintiff as against a trespasser or one who establishes no title in himself. McGovern v. Mowry, 91 Cal. 383, 27 Pac. 746; Civ. Code, § 1006. The evidence above recited is clearly sufficient to support a finding that, for some time at least, the plaintiff had been in actual possession of the premises. Knowles v. Crocker Estate Co., 149 Cal. 278, 86 Pac. 715; Lofstad v. Murasky, 152 Cal. 64, 91 Pac. 1008. Since the defendant Lunnun did not go forward and show any title in himself, he was not entitled to a nonsuit.

The judgment is reversed.

We concur: SHAW, J.; ANGELLOTTI, J.; MELVIN, J.; HENSHAW, J.; LORIGAN, J.

SOCIALIST PARTY et al. v. UHL et al.
(S. F. 5,285.)

(Supreme Court of California. June 28, 1909.)

1. Statutes (§ 125*)—Title—Subjects.

Act March 24, 1909 (St. 1909, p. 691, c. 405), entitled "An act to provide for and regulate primary elections and providing the method whereby electors of political parties may express their choice at such primary elections for United States Senators," is not in violation of Const. art. 4, § 24, providing that every act shall embrace but one subject, to be embraced in its title; the advisory vote for United States Senator being germane to the subject of a primary election.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 125.*]

2. United States (§ 11*)—Election of United States Senator.

There is no constitutional objection to St. 1909, p. 691, c. 405, authorizing a public expression of choice of candidates for United States Senator.

[Ed. Note.—For other cases, see United States, Dec. Dig. § 11.*]

3. Elections (§ 120*)—"Political Parties"—"Organizations of Electors."

Const. Amend. 1908, art. 2, § 2½, provides that the Legislature may enact laws as to the election of delegates to conventions of political parties, and shall enact laws, providing for the direct nomination of candidates for public office by electors, political parties, or organizations of electors without conventions, at elections to be known as "primary elections," etc. *Held*, that "political parties" as so used was intended to embrace those which had participated in a struggle at the polls for political ascendancy, and political "organizations of electors" was intended to include new parties which had not participated in prior elections, organized to advance some principle or measure of public policy.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 120.*

For other definitions, see Words and Phrases, vol. 6, pp. 5444, 5445; vol. 8, p. 7757.]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. ELECTIONS (§ 120*)—PRIMARIES—CONSTITUTIONAL PROVISIONS.

Const. Amend. 1908, art. 2, § 2½, authorizing the Legislature to enact laws for the direct nomination of candidates at primaries, by electors, political parties, or organizations of electors, and also authorizing the Legislature to determine the tests and conditions on which such classes, or either of them, may participate in such primary election, was sufficiently complied with, in so far as nomination by electors and organizations of electors was concerned, by the enactment of Act March 24, 1909 (St. 1909, p. 691, c. 405), providing, in addition to direct primaries, for political parties for nominations by electors or bodies of electors by petition, as authorized by Pol. Code, § 1188.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 120.*]

5. ELECTIONS (§ 120*)—DIRECT PRIMARIES—CONSTITUTIONAL PROVISIONS.

Const. Amend. 1908, art. 2, § 2½, authorizing the Legislature to provide for direct primaries, does not require the Legislature to adopt a universal mode whereby all the classes of electors mentioned therein may participate in primary elections, but authorizes the Legislature to provide reasonable and different tests and conditions for participation by the different classes.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 120.*]

6. ELECTIONS (§ 120*)—DIRECT PRIMARIES—CONSTITUTIONAL PROVISIONS IN NONUNIFORMITY.

Under Const. art. 11, § 6, providing that general laws shall not be binding upon municipalities as to strictly municipal affairs, Const. Amend. 1908, art. 2, § 2½, providing for direct primary elections, did not require the passage of an act applicable to municipal elections in cities operating under special charter, and hence Primary Election Law March 24, 1909 (St. 1909, p. 691, c. 405), was not invalid because section 2 expressly declared that it should not apply to the nomination of officers to be voted for at municipal elections in cities having a charter providing a nomination system.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 120.*]

7. ELECTIONS (§ 120*)—MUNICIPAL ELECTIONS—"MUNICIPAL AFFAIRS."

The election of municipal officers is strictly a municipal affair, within Const. art. 11, § 6, providing that general laws shall not be applicable to municipalities as to matters which are strictly "municipal affairs."

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 120.*

For other definitions, see Words and Phrases, vol. 5, p. 4619; vol. 8, p. 7726.]

8. ELECTIONS (§ 120*)—PRIMARY ELECTIONS—STATUTES—VALIDITY—FEES OF CANDIDATES.

Under Const. Amend. 1908, art. 2, § 2½, authorizing the enactment of a primary election law, and providing that the Legislature shall determine the tests and conditions on which electors, political parties, or organizations of electors may participate, neither the whole of Primary Election Law March 12, 1909 (St. 1909, p. 691, c. 405), nor the part thereof requiring the payment of certain fees by candidates on the filing of nomination papers and affidavits of candidacy, was invalid as a violation of Const. art. 1, § 24, declaring that no property qualification to vote or hold office shall ever be required of any person.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 120.*]

9. ELECTIONS (§ 120*)—PRIMARY ELECTION LAW—VALIDITY.

Const. Amend. 1908, art. 2, § 2½, authorizing the Legislature to determine the tests and conditions on which participation in primary elections may be had, either by electors as voters, or by electors as candidates, authorized the Legislature to provide, by Primary Election Law March 24, 1909 (St. 1909, p. 691, c. 405), that when nomination papers of a candidate were filed, they should be accompanied by an affidavit of affiliation, such provision not being in violation of Const. art. 22, § 3, prescribing the form of oath to be taken by one before entering on the duties of an office, and which declares that no other authority, declaration or test shall be required as a qualification for any office or public trust; such provision being applicable only to persons appointed or elected to office, and not to candidates for election.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 120.*]

In Bank. Original application by the Socialist Party (a political party) and by Henry Hagelstein, as chairman of the county committee representing such party in the city and county of San Francisco, for a writ of mandate against George Uhl and others constituting the board of election commissioners of the city and county of San Francisco, and J. H. Zemansky, registrar of voters in such city and county. Writ denied.

Austin Lewis (R. M. Royce, of counsel), for petitioners. Thomas V. Cator, Hugh McIsaac, and Percy V. Long, City and County Atty., for respondents. F. P. Deering and Frank J. Sullivan, amici curiæ.

LORIGAN, J. This is an original application by the petitioners for a writ of mandamus to compel the respondents—the election commissioners and the registrar of voters of the city and county of San Francisco—to receive petitions and hold a primary election under the so-called primary law of 1901 (St. 1901, p. 606, c. 198), as amended in 1907 (St. 1907, p. 650, c. 345), the provisions of which are found in the Political Code, embraced in sections 1357 to 1375, inclusive. The petition contains all the necessary averments showing that the Socialist Party is a legal political entity, entitled, under the terms of the primary law referred to, to participate in any primary election to be held under that law, and to have a writ of mandate issued as prayed for by it if the said primary law is still in force.

It is further averred that the Socialist Party desires to file with said board of election commissioners its petition, pursuant to the provision (Pol. Code, § 1361) of said primary law, declaring its intention to hold a local political convention for said city and county, for the purpose of making nominations of members of said party as candidates for public offices of said city and county, to be voted for at the election to be held therein on November 3, 1909. It is further averred that it is the duty of said election commissioners, pursuant to the provisions of said primary law, to hold a primary election in said city and county on the second Tuesday in August, A. D. 1909, in which said Socialist Party is entitled to participate for the purpose of electing delegates to a nominating convention of said party for said city and county; that the board of election commissioners refuses to take any steps or make any preparations for the holding of a primary election on said second Tuesday of August, A. D. 1909, under said act of 1901 as amended, but, on the contrary, asserts that it does not intend to hold a primary election on said second Tuesday in August, but on the third Tuesday of said month, under the provisions of an act of the Legislature approved March 24, A. D. 1909, entitled "An act to provide for and regulate primary elections and providing the method whereby electors of political parties may express their choice at such primary elections for United States Senators." St. 1909, p. 691, c. 405.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

In the petition for the writ it is contended by the petitioners that the act of March 24, 1909, under which the respondents are proceeding to conduct said primary election, is null and void, as contravening various sections of the Constitution of this state which are set forth in the petition, that the act of 1901 as amended is still in force and effect, and that it is the duty of the respondents to proceed under the terms of that act and hold a primary election on the second Tuesday of August, 1909, and to make the necessary preparations for that purpose. The respondents have demurred to the petition, and the matter is submitted for final decision upon the demurrer. The whole purpose of this proceeding is to test the validity of the primary election act of March 24, 1909.

In 1890 an amendment to the Constitution of the state was adopted (article 2, § 2½) as follows: "The Legislature shall have the power to enact laws relative to the election of delegates to conventions of political parties at elections held and designated as primary elections * * *" It was under this constitutional provision that the primary law of 1901, as amended in 1907, was enacted, and it applied, as the constitutional provision directed, solely to the election of delegates to the conventions of political parties at primary elections. In 1908 this constitutional amendment was replaced by the existing section 2½ of article 2 thereof, which provides, among other things, that: "The Legislature shall have the power to enact laws relative to the election of delegates to conventions of political parties; and the Legislature shall enact laws providing for the direct nomination of candidates for public office, by electors, political parties, or organizations of electors without conventions at elections to be known and designated as primary elections; also to determine the tests and conditions upon which electors, political parties, or organizations of electors may participate in any such primary election. It shall also be lawful for the Legislature to prescribe that any such primary elections shall be mandatory and obligatory; * * * provided, however, that until the Legislature shall enact a direct primary election law under the provisions of this section the present primary election law shall remain in force and effect." It was subsequent to this last amendment to the Constitution that the act of March 24, 1909, was passed, and it purports to have been adopted in harmony with the mandate of that constitutional amendment. Various objections are urged against the validity of the act, and we shall refer to the particular provisions thereof as we consider the special grounds upon which they are assailed.

It is insisted, first, that the entire act is void because it violates section 24, art. 4, of the Constitution, which provides that "every act shall embrace but one subject, which subject shall be embraced in its title." The act is entitled "An act to provide for and regulate primary elections and providing the method whereby electors of political parties may express their choice at such primary elections for United States Senator." The particular points made are that the provision in the title of the act relative to the expression of a choice by the electors for a candidate for United States Senator is a different subject-matter from nominating candidates for public office provided for in the title of the act referring to the regulating of primary elections, and that the constitutional provision itself provides a distinct and complete subject for legislation, and is limited to the making provision for the election of delegates to the conventions, and providing for the direct nomination at primaries of candidates for public office; that a United States Senator is not a candidate for public office in the sense that the words are used in the constitutional provision, nor is an advisory vote to advise the Legislature as to such choice a direct nomination of candidates for public office. We cannot agree with counsel on these points. As far as the provision of the act with reference to an advisory vote relative to United States Senators is concerned, we think that the matter of such advisory vote is germane to the subject of a primary election. It is so held in State v. Blaisdell (N. D.) 118 N. W. 141, 146. The case of State v. Nichols, 50 Wash. 508, 97 Pac. 728, 730, seems to be to the same effect. The subject being germane so as not to fall within the inhibition of the Constitution relating to different subjects in the title of the act, there is nothing in the point that the constitutional provision relative to providing for a primary election excludes the right of the Legislature to provide, in a primary act, for the expression of a choice for United States Senator by the voters at a primary election. Of course it is conceded that the matter of selecting a United States Senator lies with the Legislature as an elective body, and that such selection cannot be made at a primary election. What is provided for in the act on this subject is, however, the giving of an opportunity to voters of the parties participating in the primary to express their choice for a candidate for United States Senator. The act as a primary act is distinct and complete as providing for direct nominations, with the added feature relative to an advisory vote relative to United States Senators. There is nothing in the Constitution—either amendment 2½ of article 2, or any other provision—which prohibits the Legislature from providing at a primary for an expression of a choice as to a candidate for United States Senator. It is within the general legislative power to do so, and that it has provided for this advisory vote at a primary election is for the purpose of convenience and to save expense, and that the expression of such choice might be made by the voters of the respective political parties at the same time, and under the same political machinery, as is used at the general primary. Because conducted at the same time, and under the same election machinery, it is not strictly a part of the primary election contemplated by amendment 2½, art. 2, of the Constitution. It is something in addition to it, and, as said in the Blaisdell Case, what is sought by the provision is "merely the consummation of an incomplete party nomination," an expression of a choice by the voters as to a candidate for United States Senator to be elected by the Legislature. What the effect may be of these provisions relative to such choice by the electors—whether at all binding upon the Legislature—is a matter of no present concern. We are only considering whether a provision for such advisory vote, expressed in the title of the act, is germane to the subject of a primary election, also expressed therein, and whether legislation in connection with primary laws granting such right of expression of a choice is prohibited by the constitutional provision particularly under consideration, or any other, and we are satisfied that the subject of the title giving the right to express such choice is germane to the subject of a primary election, and that the legislation upon the subject embraced in the act in question is violative of no constitutional provision.

Now as to the objections which are urged against certain provisions of the act which, it is claimed, render the entire act void. Section 5 thereof provides that the name of a candidate shall not go on the official ballot at the primary election unless nomination papers in his behalf are filed. These nomination papers must be signed and verified by qualified electors, and must contain, among other things, a statement of the political party with which such qualified electors affiliate, and a further declaration on their part that they intend to support the candidate named by them. These nomination papers, to the number of a designated percentage of the voters of the party of a candidate—the percentage depending upon whether he is a candidate for a state, congressional district, county, city, or city and county, office—must be signed by such voters, and, with the nomination affidavit of the candidate, filed, before such candidate is entitled to a place on the primary ballot. It is further provided that the basis of such percentage in each case—that is as to the nomination of candidates by voters of his party—shall be the vote of the party for its candidates at the last preceding presidential election. But any other political organization which, at such presidential, or last state election, was represented on the official ballot by either regular party candidates or individual nominees only, who had received 3 per cent. of the total vote at such presidential or state election in the state, or a political subdivision thereof, in which the candidate seeks the nomination, may have a separate primary election ticket as a political party. It is also provided that "nothing herein shall be construed as prohibiting the independent nomination of candidates to be voted for at any general election by 'electors' or 'bodies of electors' as provided by section 1188 of the Political Code. * * *" The section of the Political Code referred to allows the nomination of candidates for public office by petition signed by electors equal in number to 3 per cent. of the entire vote cast at the last preceding election in the state, district, or political subdivision for which the nomination is to be made, and further authorizes the designation by the signers of the petition of a committee to represent said signers collectively as a political party by any name which may be selected and adopted by them. These are practically all the provisions in the act with reference to the nomination of candidates.

It is insisted by the petitioner that, as the only method provided for the nomination of candidates in the act is one for their nomination by "political parties" alone, the Legislature has failed to carry out the mandate of the Constitution which requires that provision shall be made in any legislation with reference to a primary election for the nomination of candidates by "electors," "organizations of electors," as well as political parties; that the act is incomplete legislation on a subject where full legislation is constitutionally required, and hence the act is void; that the provisions of the act saving to electors, or bodies of electors, the right to nominate candidates to be elected to public office by petition as provided in section 1188 of the Political Code is a different mode of nomination than the constitutional mode of direct nomination at a primary, and which, it is insisted by petitioner, the constitutional mandate requires shall be accorded to all classes that are mentioned in the constitutional provision. These objections to the validity of the act appear to present an abstract question as far as the record before us discloses. The petitioner is a political party whose right to participate in a primary is conceded, and there are no "electors," or "organizations of electors," who are complaining as to the constitutionality of the law. This, however, does not prevent the particular attack on the act from being made, nor relieve us from the necessity of disposing of it.

Not much stress is laid upon the alleged failure of the Legislature to provide for the participation in primaries of "electors" as distinct from "political parties" or "organizations of electors." The main argument is addressed to the difference in meaning between "political parties" and "organizations of electors." Ordinarily there would seem to be no distinction in meaning between these terms. They would appear to be synonymous. It is claimed, however, by petitioner that there is this distinction, namely, that "political parties" are those which theretofore had participated in a struggle at the polls for political ascendancy, and that "organizations of electors" are those who have not, new parties organized to advance some principle or measure of public policy, but which have not participated in any election, and that it is such new parties to which the term "organizations of electors" applies, and whose right to participate in primaries must, in any act relating to a primary law, be provided for. We are not prepared to say that this definition is not correct, but, conceding it to be true, we do not perceive anything in the constitutional provision which makes it the imperative duty of the Legislature to provide any other mode for participation in a primary than such as it has done. In reading the constitutional amendment it will be noted that, while it provides enactment by the Legislature for the direct nomination of candidates at primaries by "electors," "political parties," or "organizations of electors," it is equally provided that the Legislature may determine the tests and conditions upon which such classes, or either of them, may participate in such primary election. Under this latter clause of the Constitution we think it was left to the Legislature to provide any reasonable tests or conditions under which participation by any of the classes mentioned in the primary law should be had, and that the fixing of conditions, under which practically only political parties which had candidates for presidential electors at the last preceding presidential election, or political organizations which, having no such candidates, yet were represented by candidates on the official ballot at said presidential election or last preceding state election and received a certain vote, should be entitled to participate, together with the provision of the act with reference to section 1188 of the Political Code, was a sufficient compliance with the constitutional requirement. That the Legislature was authorized to fix some tests and conditions is clear. In doing so it had a right to take into consideration the political situation of the state, disclosed by the existence of political parties and political organizations with which, at the last presidential or state election, the great majority of the voters of the state had allied themselves. The existence of these political parties and political organizations it could take notice of, and legislate intelligently concerning, and the particular provisions of the act apply to such political parties and organizations.

On the other hand, "organizations of electors" as meaning something different from political parties is an indefinite term. Such organizations may as well mean an association together of a few electors—two, four, or six—as a large number. At best it is but an indefinite subject of legislation, and one which may present difficulties to a Legislature in the way of determining either what shall be considered organizations of electors, or to provide for participation when defined. There is nothing in the constitutional provision which requires the Legislature to adopt a universal mode whereby all the classes mentioned may participate. Under the power to provide tests and conditions it may prescribe different tests as to different classes; its power being limited, however, to providing tests and conditions which are reasonable and not arbitrary. As far as political parties and political organizations are concerned, it has provided these tests and conditions, and established a mode whereby they may participate, against which no objection upon the ground of unreasonableness can be urged. As to that class the legislation is complete.

On the other hand it has not, as it is claimed by petitioner, failed to establish a mode whereby classes other than political organizations may participate. It has saved to them the provisions of section 1188 of the Political Code. Under the terms of that section any electors, whether formed into an organization or not, may petition to have the names of any candidates they desire to nominate placed upon the official ballot to be voted for at the ensuing election, and may take any party designation they may choose to adopt which does not conflict with that of any party organization; and, if at the election their candidates, or the party which they represent, receive the requisite vote, such party may at the succeeding primary be entitled to participate therein. With this provision in their behalf they are entitled to nominate candidates in any event, and to participate in the primary elections if they receive the required vote to bring them within the conditions of the general primary law. Of course it is contended that this mode of nominating under section 1188 of the Political Code is not granting a right to par ticipate in the present primary. True, but it does give them an opportunity to participate in future primaries. It provides a test and condition under which electors or organizations of electors may acquire the status of a political party, and may go into a primary with the same rights as any other party. It is no valid objection that this mode does not provide for present participation in primaries. It provides, however, how participation may be had—the conditions under which it may be availed of—and as they secure the right when the tests or conditions are met, we think the rights which are conferred by the amendment on electors or organizations of electors are secured. It is true petitioner presents strong reasons why the constitutional amendment should be interpreted so as to hold that the Legislature is required to make direct provision for the present right of participation in a primary by all classes mentioned in the constitutional provision. It is, however, a universal principle to be applied to the construction of statutes that such a construction shall be given as will sustain the law; and, notwithstanding the contention of the petitioner to the contrary, we are of the opinion that the Legislature may adopt any reasonable tests or conditions, and provide any mode, which in effect secures the rights of all such classes, and that, by the provision in the act with reference to section 1188, it has done so.

It is provided by section 2 of the act here in question that its provisions as to primary elections shall not apply "to the nomination of officers of municipalities whose charters provide a system of nominating candidates for such offices." It is claimed that this exception from the operation of the act of chartered municipalities renders the act void; it being insisted that the act in question is not general, but is special and local, because it exempts municipalities operating under charter from the application of its provisions. There are various municipalities in this state having charters which provide for the nomination of municipal officers by methods distinct from each other and different from the mode laid down under the primary law under discussion. They have systems of their own for the nomination of municipal officers. The city and county of San Francisco under its charter provides that its elections for municipal officers shall be held under the general laws of the state governing elections, and hence the primary law applies to it as a general law.

It is contended by petitioner that under the constitutional mandate it is required that the primary law shall apply to all elections, including elections for municipal officers. If this were true, there would be merit in the claim of petitioner because the act, in so far as it attempts to exempt chartered municipalities, would result in the failure on the part of the Legislature to execute the provisions of the Constitution by making the law applicable to all elections; that instead of providing a general law, one special in its character has been enacted. But we do not think the position of petitioner tenable. While the act exempts chartered municipalities from its operation, it is not thereby rendered special or local. The constitutional provision under which the primary law was enacted does not in terms require the passage of an act which would apply to all elections. It is obvious from its terms that the law which the Legislature was called upon to enact was a law applying to general elections, elections that were conducted on party lines, and that the Legislature was not required to pass a law applying to municipalities which might or might not happen to be conducted on such lines, and whose candidates might, and generally do, represent purely municipal policies or local issues. There is nothing in the constitutional provision making any primary law enacted thereunder applicable in charter elections. The law enacted under the constitutional provision stands, as far as municipalities are concerned, the same as any other general law which, under the Constitution (section 6, art. 11), is not binding upon a municipality as to matters which are strictly municipal affairs. That the election of municipal officers is strictly a municipal affair goes without question. It is held in People v. Hill, 125 Cal. 16, 57 Pac. 669, that city charters prevail over the general law as far as regulating the method in which a charter election shall be conducted. If section 2½ referred to charter elections as being within the scope of any legislation required to be enacted under it, there would be no room for discussion of this point. All the constitutional provision requires, however, is the passage of a general law relating to primary elections. As far as municipal elections are concerned, being municipal affairs, it cannot control them. Under these views the exemption of municipalities did not render the act unconstitutional for want of general application to all elections.

The act provides for the payment of certain fees by candidates on filing with the proper officer their nomination papers and affidavits of candidacy. These fees apply to all nominees—state, district, county, and municipal—and range from $50 to be paid by a candidate for state office to $10 to be paid by county, legislative, or municipal officers, where the selection of candidates for municipal office is held under the primary law. It is insisted that this provision with reference to the imposition of fees renders the act void, as such imposition is in conflict with article 1, § 24, of the Constitution, which prescribes that no property qualification shall ever be required of any person to vote or hold office. If this position of petitioner were sound, however, it would not have the effect of invalidating the entire act. This provision could be declared unconstitutional without affecting the general scheme of the primary law, as it is not such an essential part of the law that if it were eliminated the rest of the act could not stand. But we are satisfied that the weight of authority is against the position of petitioner. The constitutional provision under which the primary law was passed gives the Legislature the right to fix the conditions upon which participation in a primary election may be had. Under this grant of power it has the right to determine what are reasonable regulations under which the right to participate in the primary may be exercised. It is not claimed that the fees are unreasonable, but the right to exact them at all is questioned.

It is provided in the act that these fees are to be paid into the county or municipal treasury when they are paid by county or municipal candidates, and when paid by candidates for state or district nominations are to be apportioned and paid by the state treasurer to the county treasurer of the counties in which such candidates are to be voted for. The validity of this provision requiring the payment of fees is sustainable under the constitutional amendment, as being within the power of the Legislature to provide reasonable conditions for the exercise of the rights granted by the primary law. As said by one court to which this question was presented: "The right to exact a reasonable fee for the privilege of running for office may be sustained, on the principle that fees in actions and proceeding in courts, and for filing and recording papers, are sustainable, namely, that those who seek the benefit of a particular proceeding provided by law may be compelled to reimburse the state for a portion of the costs the state incurs in maintaining the instrumentality to carry into effect the particular proceeding. In other words, the state asks the candidate for office under a particular law to reimburse it for a part of the expense it incurs in carrying that law into effect. This clearly the state may lawfully do." State v. Nichols, 50 Wash. 508, 97 Pac. 728, 730. Aside from this, such a provision is a reasonable restriction, and provides an orderly and systematic method by which the people may select their candidates for public office. The exaction of a fee tends to prevent an indiscriminate scramble for office, where it is fixed at an amount that will impose no hardship upon any person for whom there should be any desire to vote as a nominee for any office, and yet enough to prevent the wholesale filing of petitions for nominations of any one, regardless of whether or not he is a desirable candidate. It is but a reasonable means adopted by the Legislature to regulate primary elections for the selection of candidates for public office. And the constitutional provision that no property qualification shall be required of any person to vote or hold office is not violated by such provision as to the payment of a fee, but is a reasonable regulation prescribed by the Legislature on the wise assumption that any candidate who is of sufficient worth to stand before the people as a candidate for public office, and whose candidacy calls for the payment of the fee required by the act, will be at no difficulty to pay the required amount. State v. Scott, 99 Minn. 145, 108 N. W. 829. See, also, Montgomery v. Shlef, 118 Ky. 766, 82 S. W. 389.

There are, it is true, cases that hold to the contrary view: People v. Election Com'rs, 221 Ill. 9, 21, 77 N. E. 321; State v. Drexel, 74 Neb. 776, 105 N. W. 174, 179; Johnson v. Grand Forks County, 16 N. D. 363, 113 N. W. 1071. But as pointed out in State v. Scott, supra, the provisions of the act involved in State v. Drexel and People v. Commissioners, supra, called for, in the first of these cases, the payment of a fee based on the emoluments of the office to which the candidate aspires, and, in the second case, the fee was made to correspond with the importance of the office from the standpoint of dignity and influence, as well as from the standpoint of emolument. In both these cases it was held that the fees imposed were arbitrary and unreasonable, bore no relation to the service rendered, and made the ability of a person to pay the test of his qualifications. While these cases held that the provisions of the act respecting fees were arbitrary and unreasonable, still it was recognized in both of them that some reasonable regulation might be adopted by the Legislature to control a primary election for the selection of candidates for office, and within the view of the cases cited by us as sustaining the imposition of a fee, it is apparent that the charge as made in the act of our Legislature in question was a reasonable regulation upon the subject. The other case cited by petitioner—Johnson v. Grand Forks County, supra—while grounded to a large extent upon State v. Drexel and People v. Commissioners, supra, is based also on considerations independent of those set forth in those cases, and sustains the position of petitioner. This, at best, presents a conflict of authority, but with a preponderance in favor of the validity of the imposition of a fee, and in our judgment the conclusions reached in the cases we have cited, and which sustain the imposition of such fees as a reasonable regulation, are the most satisfactory.

The act provides that when the nomination papers of a candidate are filed, they shall be accompanied by an affidavit of such candidate, declaring, among other things, the name of his party and that of the office for which he desires to be a candidate, that he affiliated with said party at the last preceding general election, and either that he did not vote thereat, or voted for a majority of the candidates of said party at said next preceding general election, and intends to so vote at the ensuing election. It is insisted that this provision requiring such an oath is violative of section 3, art. 20, of the Constitution, which prescribes the form of oath to be taken by one before entering upon the duties of an office, and which declare that "no other oath, declaration or test shall be required as a qualification for any office or public trust." But this section has nothing to do with any oath which may be required to be taken by a candidate at a primary election. It only applies to persons who have been appointed or elected to office, and are about to assume a discharge of the duties thereof.

The power is vested in the Legislature, under section 2½ of article 2, to determine the tests and conditions upon which participation in a primary election may be had, either by electors as voters thereat, or by electors as candidates thereunder. The right is thus conferred to prescribe any reasonable test, and it is the duty of the Legislature to prescribe one. Such a test is provided for in section 1366a of the Political Code as to electors, wherein it is provided that an elector when registering shall declare the name of the political party with which he intends to affiliate at the ensuing primary election. And it further provides that he shall not be entitled to vote unless he states, at the time of registration, the name of the political party with which he intends to affiliate, nor shall he be permitted to vote on behalf of any party other than the party designated in his registration. Schostag v. Cator, 151 Cal. 600, 91 Pac. 502.

The right and duty of the Legislature to prescribe a test for electors voting at a primary cannot be questioned, not do we perceive any reasonable grounds for questioning the validity of a test as to candidates. The obvious purpose of a primary law is to preserve the integrity of parties. The necessity for maintaining the integrity of such parties is recognized in the constitutional provision with reference to primary elections. The right which once exclusively vested in a political party to supply its own tests as to the rights of one to participate in its primary elections has been modified under the constitutional provisions empowering the Legislature also to prescribe tests, and it is the duty of the Legislature, when legislating upon the subject of primaries, to so legislate as to maintain the integrity of parties, and the integrity of any political party, and the success and furtherance of its principles and policies is best attained through legislation which will permit participation in its affairs by those only who are devoted to its principles and policies. It is manifestly proper for the Legislature to permit only those to participate with a party at a primary election who are in sympathy with the aims of the party, those who are committed to its principles and in sympathy with, and loyal to, its tenets. In order to effect this end it is just as desirable to prescribe a test whereby the right of a person to become a candidate of a party at a primary election shall be determined as it is to furnish a test by which an elector shall be permitted to vote for a party candidate at such election. All these matters tend to sustain party integrity, which is one of the chief aims of a primary election law. If the indiscriminate right to vote with any party at a primary were given to electors, whether they were in accord with the principles of the party or not, it would soon tend to destroy all party organization. So to permit persons to become indiscriminately the candidates of any or all parties at a primary election would tend to have the same effect. A political party is an organization of electors believing in certain principles concerning governmental affairs, and urging the adoption and execution of those principles through the election of their respective candidates at the polls. The existence of such parties, the dominant party and the parties in opposition to it, lies at the foundation of our government, and it is not expressing it too strongly to say that such parties are essential to its very existence. The design of the primary law is not to destroy political parties, but, while carefully preserving their integrity, to work out reforms in their methods of administration. Such being the purpose of the law, it is not only proper to prescribe such a test, but the absence of such a test would tend to work the absolute disintegration and destruction of all parties, except for the saving power within the party itself of prescribing its own tests and regulations. The power of a political party to prescribe such a test for any of its members seeking preferment at its hands may not be doubted; and, if the party can prescribe such a test, so also can the Legislature. Thus the Legislature, in the interest of party integrity, not only wisely, but as a duty, sought by test requirements to confine the right of electors to vote for candidates of a party to those who had registered as affiliating with the party, and likewise confined the right of a person to have his name printed upon the official ballot, as a candidate for nomination by a party at such primary election, to one who in his affidavit declared that he affiliated with such party at the last preceding general election, and who voted, if he voted at all, for a majority of the candidates of the party at such election, and intends to so vote at the ensuing election. Under the test provided in this act a person can have his name printed on the official ballot only as a candidate at a primary of the party with which he affiliated at the last general election. Likewise under the act an elector can only vote for persons to be candidates of the party with which he has registered that he affiliates. These provisions deny the indiscriminate right of a person to become a candidate upon the official ballot of all parties, or of any other party than the party with which he is affiliated, as it denies also the indiscriminate right of an elector to vote for persons as the candidates of any other party than the one he has declared his affiliation with. Both of these tests appear to us to be reasonable ones, and such as under the constitutional provision relating to primary elections the Legislature was authorized to provide.

The act further provides that a candidate defeated at a primary election shall be ineligible for nomination to the same office at the same election. It is insisted that this provision is void. The determination of this question may be properly reserved to a case when it arises. It is sufficient here to say that if this provision be void, this fact would not operate to invalidate the remainder of the law.

These are the only points which we deem need particular discussion. Other attacks made upon the validity of the act, while considered, we do not discuss, as they are not deemed of sufficient importance to warrant it.

The petition for the writ is denied.

We concur: BEATTY, C. J; MELVIN, J; HENSHAW, J; SLOSS, J; SHAW, J.

ANGELLOTTI, J. I concur in the judgment and generally, except in one regard, in the views expressed by Justice LORIGAN. I am unable to assent to his conclusion that the provision relative to the filing of an affidavit, by any person designated by electors of a party for nomination, as a condition precedent to the printing of his name as a candidate on the primary ballot, in which affidavit he must state substantially that he is a member of the party for whose nomination he is designated, etc., is a valid provision. Its effect is, of course, to prevent the printing on the ballot of the name of any person as a candidate for the nomination of a political party unless he is a member of the party, and has otherwise complied with the requirements of the provision.

It appears plain to me that the provision in the Constitution giving the Legislature the power to prescribe the tests and conditions upon which political parties, organizations of electors, and electors may participate in a primary election was not intended to warrant a restriction in any degree of the right of the members of a party to nominate for any particular office any one whom they desire, who has the legal qualifications for the office, regardless of his political affiliations. The tests and conditions referred to in this provision are the tests and conditions upon which political organizations may have nominations made at the primary, and the tests and conditions upon which electors may participate, both in the selection of candidates for nomination by their party to be voted for at the primary, and in voting as members of a party at the primary itself, and have no reference to the persons who may be selected for nomination. It has always been recognized that a political party has the absolute right to nominate any one for office whom it sees fit to select, regardless of his political affiliations, provided he has the proper legal qualifications for the office, and that each of two or more parties may nominate the same man as a candidate for the same office, and, as has been said by this court, "if any confusion of political principles should thereby result, that is a matter wholly for the political parties themselves, and not at all for either the Legislature or the courts." Murphy v. Curry, 137 Cal. 479, 70 Pac. 461, 59 L. R. A. 97. The object of our constitutional provision relating to a direct primary law is simply to enable the members of a party to directly name the nominees thereof, instead of selecting them by the convention method—to empower them to do directly the thing they have been heretofore required to do through delegates or representatives elected by them. Their freedom of choice as to the candidates to be selected must be the same in the one case as in the other. No such control over parties as would enable the Legislature to preclude a political party from nominating any person it desires to nominate who is legally eligible to the office, could have been contemplated. Whosoever was eligible for nomination to any office by a party under the convention method must be eligible under any direct primary law that may be enacted by the Legislature.

The act before us does not even purport to make one ineligible for nomination by one political party simply because he is a member of another party. It purports to do no more than prevent the printing of his name on the official ballot as a candidate for nomination. Under the express terms of the act any member of a party may write in the blank space contained on his ballot the name of any person as his choice for the nomination; and, if a person whose name is not printed on the ballot receives in this way a plurality of the votes cast by members of the party, he is the nominee of the party, regardless of his previous or present political affiliations, and regardless of the fact that he may also be the nominee of another party for the same office. The objection to the legislative act in this regard is practically the same as the objection held to be good in Eaton v. Brown, 96 Cal. 375, 31 Pac. 250, 17 L. R. A. 697, 31 Am. St. Rep. 225. The provision of the act under discussion "destroys the just and equal and uniform operation which in an election law, of all others, is demanded, no less by the express terms of our fundamental law than by the genius and spirit of our institutions." Under it, although members of a party to the extent in number prescribed by the act for the selection of a candidate for nomination desire to place before the electors of that party as a candidate for nomination thereby one who is not a member of the party, or did not affiliate with it at the last election, etc., they may not do so upon the same terms and with the same opportunity for the consideration of his candidacy by the electors of the party generally as are afforded the aggregations of members of that party which select as candidates for nomination persons who are members of the party, and who can or will make the prescribed affidavit. We know, as a matter of fact, that the disadvantages that would result from the failure to have the name of such candidate printed on the ballot, while other names are printed thereon, are of such a nature as to practically preclude, in most instances, any fair consideration and expression as to his candidacy on the part of the electors of the party generally. The provision is thus clearly a substantial discrimination against such members of a party as desire to select for a nomination for any office one who is not a member of the party although under the very terms of the act he is eligible, and in favor of such members of the party as desire to award the nomination to some member of the party. Whatever may be our views as to which is the better policy for a political party to pursue in such a case, the question is one solely for the members of that party to settle, and not for the Legislature or the courts. The discrimination is not warranted by any principle or rule of which I am aware, and operates to destroy the equal and uniform operation of the law which the Constitution demands. The views expressed in Murphy v. Curry, supra, and Eaton v. Brown, supra, fully sustain this conclusion. It is very clear that the invalidity of this provision should not be held to invalidate the whole act, of which it is a very minor and unessential part.

What I have said does not, in my opinion, affect the conclusion reached in the opinion of Justice LORIGAN as to the validity of the provision for the payment of a reasonable fee on the filing of the certificate of nomination. The conclusion that such a charge may be made by the state, if reasonable in amount, appears to be fully supported by principle and authority.

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155 Cal. 712

PERKINS et ux. v. SUNSET TELEPHONE & TELEGRAPH CO. (S. F. 4,962.)

(Supreme Court of California. June 21, 1909. Rehearing Denied July 21, 1909.)

1. Jury (§ 97*)—Competency—Bias.

Mere acquaintance of the jurors with a litigant does not imply bias by them in his favor any more than it raises a presumption of prejudice against him.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 431–437; Dec. Dig. § 97.*]

2. Jury (§ 70*)—Special Venire—Selection.

There was no impropriety in a refusal to draw a jury from citizens whose names appeared on the supervisors' list, rather than from talesmen summoned on a special venire; it not appearing that the sheriff was in any way disqualified.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 70.*]

3. Evidence (§ 528*)—Expert Evidence—Personal Injury.

A question asked a physician in an action for injury through falling into a hole, dug by defendant telephone company, as to whether or not, in the witness' opinion, one falling into the hole could receive injuries sufficient to cause plaintiff's present condition, was proper.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2336; Dec. Dig. § 528.*]

4. Evidence (§ 553*)—Expert Witnesses—Hypothetical Questions.

A hypothetical question need not necessarily contain a synopsis of all of the circumstances in evidence, but the examiner may choose a portion of the facts shown by the testimony, and where there was evidence, in an action for personal injuries, that plaintiff had received a blow on the side of the head, a question asked an expert medical witness whether or not plaintiff's condition could have been produced by a blow on the side of the head was proper as one preliminary to a more minute inquiry regarding the subject under investigation.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2369–2374; Dec. Dig. § 553.*]

5. Evidence (§ 528*)—Expert Evidence—Personal Injuries.

Questions asked a medical expert, in an action for personal injuries, whether one who is suffering from hemiplegia, caused by injuries to either side of the brain, sometimes has a recurrence of the comatose condition, and whether, from witness' experience as a practicing physician, he would or would not be surprised if plaintiff had another stroke of any kind, were proper.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2337; Dec. Dig. § 528.*]

6. Appeal and Error (§ 1048*)—Harmless Error.

In an action for personal injuries a medical expert witness was asked what in his opinion was the usual percentage that survived the third stroke of paralysis, and answered that there are comparatively few that survive on account of the weakness of the arteries. *Held* that even if the question was improper, the answer was so indefinite that no injury resulted to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4143; Dec. Dig. § 1048.*]

7. Release (§ 56*)—Action to Set Aside—Evidence.

In an action to set aside a release given in settlement of a claim for personal injuries, evidence regarding plaintiff's mental condition both before and after the time of the release was competent on the issue as to her soundness of mind at the time she executed the release.

[Ed. Note.—For other cases, see Release, Dec. Dig. § 56.*]

8. Appeal and Error (§ 1051*)—Harmless Error—Admission of Evidence.

Where, in an action by wife for personal injuries, it appeared that plaintiff's husband had relinquished to her all his interest in the community property and in the cause of action for damages, and he was permitted to testify in reference thereto, error in permitting a witness to testify to a conversation with the husband, in which he disclaimed an interest in the money to be recovered from defendant, saying that it was plaintiff's property if she received it, was harmless.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161–4170; Dec. Dig. § 1051.*]

9. Evidence (§ 471*)—Opinions—Ownership of Property.

Under the rule that ownership of property is a fact to which a witness may testify, plaintiff wife, in an action for personal injuries, was properly permitted to state that the damages which she expected to recover were hers.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 471.*]

10. Appeal and Error (§ 1050*)—Harmless Error—Admission of Evidence.

Plaintiff was asked by her counsel whether she was a religious lady, and answered, "I hope I am." *Held* that, while the question was immaterial, error in permitting it was not prejudicial as causing the jury to put more confidence in plaintiff's sworn statements because of the fact that she was religious.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1050.*]

11. Husband and Wife (§ 51*)—Contracts—Property.

A husband and wife may enter into a contract regarding their property, whereby one may release to the other all interest, both present and in expectancy.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 51.*]

12. Husband and Wife (§ 39*)—Contracts Between—Evidence.

The courts will resort to circumstantial evidence furnished by the general conduct of the spouses with reference to their property in determining the existence or nonexistence of a contract between them where the exact terms of the alleged agreement have escaped the memory of one or both of the parties thereto.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 39.*]

13. Assignments (§ 24*)—Personal Injuries—Cause of Action.

A claim for personal injuries growing out of a tort is not assignable.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 42–46; Dec. Dig. § 24.*]

14. Husband and Wife (§ 266*)—Community Property—Conveyance Between Husband and Wife.

Where a husband and wife mutually agreed that all community property on hand, or to be thereafter acquired, should be the separate property of the wife, and thereafter, on the wife receiving personal injuries, the husband relinquished to her all his interest in the cause of action for damages, the agreement was sufficient to transmute community property into separate property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 926; Dec. Dig. § 266.*]

15. Release (§ 57*)—Mental Capacity—Sufficiency of Evidence.

In an action to set aside a release of a claim for personal injuries, evidence *held* to support a finding that plaintiff was of unsound mind on the day it was executed, though not entirely without understanding.

[Ed. Note.—For other cases, see Release, Dec. Dig. § 57.*]

16. Damages (§ 132*)—Personal Injuries—Excessive Damages.

In an action for personal injuries to plaintiff, who was about 57 years old, a physician testified that plaintiff's right side was at one time completely paralyzed, but at the time of the trial she could use her right foot a little, that she was blind in her right eye, that the sight of her left eye was impaired, and that her spine was so curved that it caused the ribs to contract the chest. Other physicians added some details as to hemorrhage from the lungs and stomach, and testified to plaintiff's good health prior to the accident. *Held*, that a verdict for $25,000 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372–385; Dec. Dig. § 132.*]

17. Municipal Corporations (§ 806*)—Defective Sidewalks—Personal Injuries—Contributory Negligence.

Mere abstraction or lack of attention to the condition of a sidewalk by a pedestrian passing over it cannot be assigned as contributory negligence.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1678, 1682; Dec. Dig. § 806.*]

Department 2. Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by J. F. Perkins and another against the Sunset Telephone & Telegraph Company. From a judgment for plaintiffs and from an order denying defendant's motion for a new trial, it appeals. Affirmed.

Pillsbury, Madison & Sutro, Thomas, Pemberton & Thomas, and Weldon & Held, for appellant. John W. Preston, Arthur J. Thatcher, and Casper Ornbaun, for respondents.

MELVIN, J. Elizabeth M. Perkins, one of the plaintiffs, who is the wife of the plaintiff J. F. Perkins, was injured by falling into a hole which had been dug by the servants of appellant for the reception of a telephone pole in a street in the city of Ukiah. She and her husband brought suit against the defendant corporation for damages and for the rescission of a certain contract of release which they had made with the Sunset Telephone & Telegraph Company. The judgment was in favor of plaintiffs upon both issues. The agreement was thereby declared void and was ordered canceled upon restoration to the defendant of the consideration. Damages in the sum of $25,000 were awarded plaintiffs. This is an appeal from the judgment and from the order denying defendant's motion for a new trial. The questions with reference to the alleged release were, upon appellant's motion, determined by the court, and the verdict for damages was rendered by a jury.

Appellant's first assignment of error relates to the selection of jurors from a special venire, instead of from the list prepared according to statute by the board of supervisors. Our attention is called to the fact that seven of the jurors who tried the case resided at or near Ukiah, where plaintiffs lived, and all but one member of the jury knew Perkins and his wife. This acquaintance, appellant contends, was of such nature that the jurors must have given unconsciously more weight to the testimony of plaintiffs than to that of other witnesses. This, it is asserted, compelled the defendant corporation to submit its cause to an unfair jury. There is no merit in this contention. Mere acquaintance of the jurors with a litigant does not imply bias by them in his favor any more than it raises a presumption of prejudice against him. Nor is there any impropriety in the court's refusal to draw a jury from the citizens whose names appeared on the supervisors' list, rather than from talesmen summoned on a special venire. People v. Suesser, 142 Cal. 359, 75 Pac. 1093. It was not here suggested that the sheriff was in any way disqualified.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appellant directs this court's attention to a number of alleged errors in the admission of evidence. These we will consider in detail. Dr. Bond was asked this question, to which the following answer was given: "State whether or not, in your opinion, Doctor, you think that a person falling into a hole could receive injuries sufficient to cause her present condition?" Answer: "I think it could." The objection to this question was that it "called for a conclusion in a matter of expert testimony." While the interrogatory was exceedingly broad, and the question omitted specification of the size of the hole, the manner of the fall, the weight of the individual, and like details, there was no objection made to the question on the ground that it was not sufficiently specific, or that it did not contain enough details to make it a fair hypothetical question in view of the evidence in the case. It is too well established to require extended argument that an expert surgeon may state generally the sort of agency, means, or instrument which may have produced a given injury; as, for example, whether or not a wound was inflicted by a blunt or a cutting instrument, or whether or not an ascertained lesion was a gunshot wound. The above question was within this rule. See State v. Seymour, 94 Iowa, 699, 63 N. W. 661; Batten v. State, 80 Ind. 394; People v. Durrant, 116 Cal. 179, 48 Pac. 75.

Two of the physicians were asked if the condition of Mrs. Perkins could have been produced by a blow on the side of the head. Objection was made to such inquiries on the ground that they were "mere speculation and mere probability" or "too speculative." These objections were properly overruled. No line of inquiry is more thoroughly within the scope of a legitimate examination of an expert surgeon than that relating to the probable cause of a physical injury. No objection was made to the form of the question nor to its general character. While it is true that a hypothetical question, where allowable at all, must conform to the testimony (Rowe v. Such, 134 Cal. 576, 66 Pac. 862, 67 Pac. 760), it is also the rule in California that such question need not necessarily contain a synopsis of all of the circumstances in evidence. The examiner may choose a portion of the facts shown by the testimony as a basis of his hypothetical inquiry. People v. Hill, 116 Cal. 567, 48 Pac. 711. There was evidence that Mrs. Perkins had received a blow on the side of the head, and this question was at least proper as one preliminary to a more minute inquiry regarding the subject under investigation. The following questions were propounded to Dr. Stout: "A person who is suffering from hemiplegia, caused by a clot on the brain, or injuries to the right side of the brain, or either side of the brain, sometimes have a recurrence of the comatose condition, do they not?" "From your knowledge and experience as a practicing physician, would you, or not, be surprised should Mrs. Perkins have another stroke of any kind?" To each question the objection was made that it was "immaterial and speculative." Dr. Bond was asked and gave the following answer to this question: "Well, in your opinion, according to medical authority and according to your own wide experience and observation, what is the usual per cent. that survive the third stroke in this country?" Answer: "I think there are comparatively few that survive on account of the weakness of the arteries." The only objection to this query was: "There was no evidence of a third stroke in this case." Counsel did not even interpose the time-honored objection that the question was incompetent, irrelevant, and immaterial. The evident purpose of plaintiff in asking these questions was to determine the extent and probable result of Mrs. Perkins' injuries. It was held by this court in Martin v. S. P. Co., 130 Cal. 287, 62 Pac. 515, that the character of the injuries sustained, as well as their probable duration and the professional care required for their alleviation, were proper subjects for the opinion of experts. The questions asked of Dr. Stout were clearly within the principle announced in that case. While the question put to Dr. Bond would, if standing alone, be considered erroneous perhaps, we cannot see how appellant could have been injured by it. The doctor had testified without objection that after the second attack of paralysis a patient was more apt to die, but that he could not give the percentage of persons who survived a second seizure. He was then asked regarding the percentage of those who recover after a third stroke. In view of the range of the previous questions to which no objection was made, this last inquiry was but natural, though perhaps not entirely proper. At any rate, his answer was so indefinite that no injury could have been wrought as against this defendant.

Mrs. Randall, an intimate acquaintance of Mrs. Perkins, gave her opinion regarding the latter's mental condition at the time of the signing of the release mentioned in the pleadings. She described the plight of Mrs.

Perkins after the accident and before the date upon which the release was signed. It is not clear whether or not her testimony had reference also to a period subsequent to the execution of that instrument. It makes no difference whether or not her description of her friend's illness included some matters occurring after the release was signed, because it is proper in such an action as this to receive evidence with regard to a person's mental condition both before and after the time of the act involved in the investigation. Estate of Toomes, 54 Cal. 516, 35 Am. Rep. 83; People v. March, 6 Cal. 547; People v. Willard, 150 Cal. 556, 89 Pac. 124. It is true, as appellant's counsel state, that "the only issue in this branch of the case was the soundness of mind of Mrs. Perkins at the time she executed the release on the 8th day of February, 1906"; but one way to determine that question was to consider evidence of her mental condition before and after that date.

Witness Randall was permitted, over appellant's objection, to testify to a conversation with Mr. Perkins in which the latter disclaimed any interest in the money to be derived from the telephone company, saying that "it was her property if she received it"; and Mrs. Perkins was allowed to state while on the witness stand that the amount of damages which she expected to be paid by the telephone company was hers. We think that the objection to the question asked of Mrs. Randall should have been sustained, and the motion to strike out the answer should have been granted; but, in view of the fact that Mr. Perkins was permitted to testify with reference to this matter, the error was not vital if respondents' theory of the case is correct, and that question we will presently examine. While the answer of Mrs. Perkins that the claim against the company was her property was in a sense an expression of opinion, there is authority for the introduction of such evidence and sustaining such a question as the one propounded to her by her counsel. As a general rule, ownership of property is a fact to which a witness may testify. Bunting v. Salz (Cal.) 22 Pac. 1133; Kaltschmidt v. Weber, 145 Cal. 598, 79 Pac. 272; Hardison v. Davis, 131 Cal. 638, 63 Pac. 1005.

Elizabeth M. Perkins was asked by her counsel, "Are you a religious lady?" Objection that the question was immaterial was overruled, and the witness answered, "I hope I am." The objection should have been sustained; but we fail to see how appellant could have been injured by the erroneous ruling. We cannot share the apprehension of appellant's counsel that her reply must have caused the jurors to put more confidence in her sworn statements because of the suggestion that she was a religious lady. Her answer was not positive; but, even if it had been, and had she proclaimed her piety, we cannot see how her mere profession of religious belief could have created an improper influence upon the minds of the jurors. Nearly all civilized people have some sort of religion, and the discovery by a jury that a witness possesses such belief would not, we think, so far differentiate that individual from the rest of mankind as to give his or her statements peculiarly solemn weight with the jurors. Cases might arise in which evidence that a witness belonged to some certain religious sect might either increase or diminish the credit of the witness with some juror or jurors; but we fail to see how the mere possession of convictions regarding religion could operate to create improper bias in the minds of jurors.

The court found, among other things: That for more than 10 years there had been an agreement between J. F. Perkins and his wife, whereby it was mutually consented that all community property on hand or to be acquired by either should be and become the sole and separate property of Elizabeth M. Perkins; that said agreement was still in force and had been in effect since it was made; that Mr. Perkins had deeded all of the realty of the community to his wife in 1902; that she had thereafter collected and retained all the rents, issues, and profits therefrom; that in 1903 he had by bill of sale transferred to her all title to a part of the personal property of the community; and that after the injury to Mrs. Perkins, and prior to the execution of the agreement of February 8, 1906, with the telephone company, J. F. Perkins had relinquished to his coplaintiff all his interest in the cause of action for damages. Appellant attacks these findings on the ground that the evidence is insufficient to support them; but they set forth substantially the facts deducible from the testimony of plaintiffs themselves and of other witnesses. Appellant calls attention to the fact that there is no evidence of an assignment by the husband of his interest in the cause of action, and then cites authorities to the effect that a cause of action for tort is not assignable. Undoubtedly appellant is correct in its position that such cause of action generally cannot be assigned; but the point is not here involved. The findings are not that there was an assignment, but that, long before the cause of action arose, Mr. Perkins relinquished his interest in the community property, and that his act, after the injury to his wife, was one of relinquishment and not of assignment. Respondents contend that: First, the cause of action was the separate property of the wife when it arose; and, second, that in any event the agreement between the two spouses was sufficient to transmute the community property into separate property.

Under our law there can be no doubt that a husband and wife may enter into a contract with respect to their property whereby one may release to the other all interest, both present and in expectancy. Crum v. Sawyer, 132 Ill. 443, 24 N. E. 956; In re Davis, 106 Cal. 453, 39 Pac. 756; Von Glahn v. Brennan, 81 Cal. 264, 22 Pac. 596; Wren v. Wren, 100 Cal. 279, 34 Pac. 775, 38 Am. St. Rep. 287; Kaltschmidt v. Weber, 145 Cal. 598, 79 Pac. 272. In the case last cited the following language is used: "There can be no doubt that the husband may make a gift of the community property to the wife, and that the effect of such gift will be to transmute it into her separate estate. The provision in section 172 of the Civil Code that he cannot make a gift of community property unless the wife, in writing, consent thereto, is a provision for her benefit and protection, and it has no application to the case of a gift by the husband directly to the wife. And so, also, he may, under sections 158 and 159 of the Civil Code, contract with her by an agreement that her personal earnings shall be her separate property, and this may apply to future as well as past earnings, and the effect of such an agreement will be to convert such earnings from the status of community property to that of separate property of the wife." It will be seen, by an examination of the authorities cited above, that the utmost freedom of contract exists in California between husband and wife, and that the courts will resort to circumstantial evidence furnished by the general conduct of the spouses with reference to their property in determining the existence or nonexistence of a contract where the exact terms of the alleged agreement have escaped the memory of one or both of the parties to it. In the case at bar there was both positive evidence, and also testimony as to facts and circumstances, tending to show that the contract, whereby the husband remitted to his wife all his interest in that which would ordinarily have been the community property, was, and had been, in existence for a long period of years. The findings upon that subject were supported by the evidence. According to the view we take of the matter, it is not necessary to determine whether or not a husband may assign to his wife his interest in an action not arising out of a wrong to his own person. It is a rule universally recognized that one who is injured personally may not assign a claim growing out of such tort; but there is some authority to the effect that almost every other kind of property is assignable. Rued v. Cooper, 109 Cal. 693, 34 Pac. 98. However, the court found here, not an assignment, but a relinquishment, of all the husband's claim to the community property. If such remission as to further accretions before the cause of action would operate as a transmutation of the property into the wife's separate estate, we see no reason why the same result could not be attained by the same means after the cause of action came into existence. It was therefore proper for the court to find with reference to the agreement which the plaintiffs made after the accident and before February 8, 1906.

The finding that Elizabeth M. Perkins was of unsound mind, but not entirely without understanding, on February 8, 1906, is attacked by appellant on the ground that it is not supported by the evidence; but we think that the finding, which seems to have been made in view of the provisions of section 39 of the Civil Code, is supported by the evidence of experts and of laymen. Dr. Stout testified that Mrs. Perkins was in a stuporous and comatose condition and was without sufficient mental capacity to transact ordinary business when he saw her on the 4th, 5th, 6th, and 9th days of February, 1906. Dr. Dickinson, whose observation of the patient covered a time both before and after the 8th of February, and who saw her on that day near the time when her signature was appended to the document which defendant offered as a release, testified that, while she answered questions rationally, she did so only by the words "yes" or "no." He said that it was difficult to secure answers from her at all, and in his opinion she was not in a condition to transact business upon that day. Mrs. Randall gave her opinion that Mrs. Perkins was not of sound mind on February 8th, and related the fact that the patient mistook her for a Mrs. Stickney. She also said that Mrs. Perkins was in a stupor on that day. Mrs. McCallum and Mrs. Scott both gave similar testimony. The evidence adduced from these witnesses, as well as from her son and her husband, sufficiently supports the finding upon the mental condition of Mrs. Perkins.

Appellant attacks the verdict as excessive, and it therefore becomes necessary to examine the evidence upon that point. Dr. Bond testified that Mrs. Perkins' right side was at one time completely paralyzed, but that at the time of the trial she could use her right foot a little. He stated that she was blind in her right eye, and that her spine was so curved that it caused the ribs to contract the chest. He also said that the sight of her left eye was impaired. Dr. Dickinson's description was much the same, except that he added some details as to hemorrhage from the lungs and stomach. He also told of the lady's good health prior to the accident. Dr. Stout's account of the physical condition of Mrs. Perkins was similar to those of his professional brothers. Mrs. Perkins was 57 years of age at the time of the trial. In the prevailing opinion in Reeve v. Colusa Gas & Elec. Co., 152 Cal. 110, 92 Pac. 94, we find the following: "It is impossible adequately to describe the suffering and misery—past, present, and future—inflicted upon the plaintiff as a consequence of the injury. The verdict is large, the amount of damage was a question for the jury, subject to the supervision and correction of the trial court, and, having been passed by the latter without disapproval, it is not for us to say, under the circumstances, that it is excessive." We think this language is thoroughly applicable to the case at bar, and we cannot say, as matter of law, that the verdict rendered was excessive.

Appellant's counsel criticise as erroneous one of the instructions upon the subject of contributory negligence. After reciting the averment in the answer that the injury was due to the contributory negligence of Mrs. Perkins, the instruction continues as follows: "I further instruct you that whether the signs, signals, warnings, barriers, lights, and obstructions, if any, were sufficient under the conditions to make the said plaintiff guilty of contributory negligence, is a question of fact for you to determine from the evidence; and it is also a question of fact for you to determine from the evidence whether or not there was at the time of the accident any sign, signal, light, warning, barrier, barricade, or obstruction to protect the public from falling into and being precipitated into the said excavation." Appellant calls attention to the omission from this instruction of the element of respondent's possible carelessness and abstraction, and complains that the jury must have inferred that, as matter of law, it was appellant's duty to maintain at the excavation some sign, signal, or light. Mere abstraction or lack of attention to the condition of the sidewalk by a pedestrian passing over it cannot be assigned as contributory negligence. Even intoxication does not constitute contributory negligence in such case, for, as Mr. Justice Heydenfeldt once wittily observed: "A drunken man is as much entitled to a safe street as a sober one, and much more in need of it." Robinson v. Pioche, 5 Cal. 461. Nor can this instruction be construed as one in which the jury must conclude that barriers, etc., must be maintained by one who leaves an excavation in a public street. In a prior instruction the jurors had been told that it was the duty of defendant to "place proper guards or barriers or lights" around any excavation or obstruction left by it, and in both prior and subsequent instructions the matter of contributory negligence was sufficiently explained to the jury.

It is conceded by respondent that ordinarily a mistake of fact concerning the extent of an injury is not sufficient to avoid a release fully, fairly, and understandingly executed; but here we are called upon to consider a finding that Perkins, a man enfeebled in mind and body, was ignorant of the character, nature, and extent of the injuries to his wife. The finding may be fairly interpreted as referring to the injuries as they existed at the time of the execution of the release, and not to their extent as developed at a later period. In that view of the finding, the rule with reference to a "speculative contract or transaction," as stated in Colton v. Stanford, 82 Cal. 389, 23 Pac. 16, 16 Am. St. Rep. 137, would have no just application, especially when we consider the enfeebled condition of the mind of J. F. Perkins as found by the court.

The judgment and order from which defendant appeals are sustained.

We concur: LORIGAN, J.; HENSHAW, J.

156 Cal. 113

GRAHAM v. GILLETT, Governor, et al.

(S. F. 5,294.)

(Supreme Court of California. June 29, 1909.)

1. Mandamus (§ 23*)—Status of Petitioner.

The status of one, as a person merely desirous of bidding for public bonds offered for sale under the act under which they were issued, is not such as to entitle him to invoke a writ of mandate to have them signed by certain officers.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 55-58; Dec. Dig. § 23.*]

2. Mandamus (§ 3*)—Other Sufficient Remedy.

Petition of one desirous to bid for public bonds, offered for sale under the act under which they were issued, for writ of mandate requiring certain officers to sign them will be denied, not merely because petitioner has not a sufficient status, but because any successful bidder will be entitled to bonds properly executed, so that, if the bonds tendered are not so executed as to make them valid, he may compel issuance of others which are sufficient.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 3.*]

In Bank. Application of E. C. Graham for writ of mandate to Hon. James N. Gillett, Governor, and others. Writ denied.

Heller, Powers & Ehrman, for petitioner. U. S. Webb, Atty. Gen., for respondents.

PER CURIAM. This is a petition for an alternative writ of mandate to the Governor, Controller, and Treasurer of the State, requiring them to execute certain bonds offered for sale, in pursuance of an act approved March 20, 1903, and known as the "San Francisco Seawall Act." St. 1903, p. 247, c. 211. By the provisions of the act the treasurer was directed to prepare 2,000 bonds for $1,000 each. They were all to bear date January 2, 1905, and were to be sold from time to time as the needs of the fund required. They were to be executed in behalf of the state by the Governor, Controller, and Treasurer, but it is not clear from the terms of the law whether they were to be signed by those who were incumbents of said offices at the date which the bonds were required to bear, or by those who might be in office at the time they were offered for sale. They were in fact signed by Governor Pardee and the Controller and Treasurer who were in office January 2, 1905, and in that form 500 bonds are now offered for sale. The petitioner is desirous of bidding, and in that character alone seeks to compel the present Governor, Controller, and Treasurer to sign 500 bonds, to be issued in place of those already signed by their predecessors.

The writ of mandate is denied for two reasons: First, because the petitioner has not at present a status which entitles him to invoke the remedy; and, second, because he, or any other successful bidder at the sale, will be entitled to bonds properly executed, and if the bonds tendered are not so executed, as to make them valid securities, he may then compel the issuance of others which are sufficient in every respect.

155 Cal. 742

SCHWARTZ v. PANAMA R. CO.

(L. A. 2,256.)

(Supreme Court of California. June 25, 1909. Rehearing Denied July 24, 1909.)

1. CARRIERS (§ 180*)—CONNECTING CARRIERS—LIMITATION OF LIABILITY.

Defendant, a carrier operating a line of vessels between New York and Colon, and a line of railroad from Colon to Panama, contracted with plaintiff to transport certain articles from New York to Colon to be there delivered to a connecting carrier. The contract provided that, if they were delivered to any other carrier for transportation to the ultimate destination, the carrier selected should be the agent of the owner, and that the liability of each carrier should be terminated by proper delivery to the succeeding carrier; that the bill of lading was signed for the different carriers severally; that only the carrier in whose actual custody the goods were at the time of any loss, damage, or delay should be responsible therefor; and that the receipt of any carrier for the goods should be prima facie evidence of the condition in which he received them. The contract named a through rate, not to be prepaid, but of which each carrier was to collect his portion from the succeeding carrier, the full amount to be collected by the terminal carrier from the consignee. The contract did not provide who should be the carriers beyond the end of defendant's route, and it selected the carrier to continue the transportation. The contract was made prior to the enactment of the Hepburn act, making the initial carrier of goods for transportation from one state to another liable for transportation to their destination. *Held*, that defendant was only bound to deliver at the end of its route to some other competent carrier for transportation, and that thereupon its liability ceased, as under Civ. Code, § 2201, if a common carrier accepts freight for a place beyond its usual route, he must, unless he stipulates otherwise, deliver to some other carrier and his responsibility thereupon ceases.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 815–828; Dec. Dig. § 180.*]

2. EVIDENCE (§ 80*)—PRESUMPTIONS—LAWS OF OTHER STATES.

Where there is no evidence in an action against an initial carrier for loss of goods as to what the law of the state is relative to a connecting carrier's liability in the place where the shipment originated, it will be presumed it is the same as it is in this state.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101; Dec. Dig. § 80.*]

3. CARRIERS (§ 173*)—CONNECTING CARRIERS—SPECIAL CONTRACTS FOR TRANSPORTATION.

A carrier may so contract to carry to some point beyond the end of its route as to be liable for delivery at such point, and, when he has so contracted, all connecting lines are his agents, for whose default he is responsible.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 760–763, 781–784; Dec. Dig. § 173.*]

4. PLEADING (§ 36*)—ADMISSION—EFFECT.

A contract for transportation of freight from New York to Colon specified Colon as the point to which the initial carrier was to transport them. In an action against such carrier for the loss of the articles, the answer admitted that it was to transport them to Panama; the latter place being connected with the former by a line of railroad under the management of defendant. *Held*, that the admission in the answer did not necessitate the disregarding of the terminus named in the contract, as the answer simply admitted that, by reason of its ownership and operation of the railroad, it was liable for the transportation of the goods beyond the point designated in the contract, and as far as the end of the railroad route.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 81–86; Dec. Dig. § 36.*]

Department 1. Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by Jacob Schwartz against the Panama Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Aylett R. Cotton (Anderson & Anderson, of counsel), for appellant. Goldberg & Meily, for respondent.

ANGELLOTTI, J. This is an appeal from a judgment in favor of plaintiff and from an order denying defendant's motion for a new trial, in an action brought to recover damages for the failure of defendant to comply with the terms of an alleged contract of carriage.

The material facts established by undenied allegations of the complaint, or evidence as to which there was no conflict, were as follows: Defendant is a corporation organized, existing, and doing business as a common carrier for hire of goods, wares, and merchandise under and by virtue of the laws of the state of New York. It owns and operates a line of steam vessels sailing between the port of New York and the port of Colon in the republic of Panama, and also a line of steam railroad connecting with its line of steamers at Colon, and thence extending across the Isthmus of Panama to the port of Panama, where its route as a common carrier terminates. The Pacific Mail Steamship Company, a corporation, is a common carrier of goods, operating a line of steam vessels from Panama to San Francisco, Cal. and the Pacific Coast Steamship Company, a corporation, is a common carrier of goods, operating a line of steam vessels from San Francisco to the ports adjacent to Los Angeles, Cal. In April, 1905, plaintiff, at the port of New York, delivered to defendant for carriage certain machinery for the manufacture of soda water and carbonated waters, of which he was the owner. This machinery was then contained in 10 packages, each bearing upon it in plain and visible manner the initials and address of plaintiff as consignee at Los Angeles, Cal. Defendant accepted the same for carriage, giving to plaintiff a bill of lading therefor. The provisions thereof material here are as follows:

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"Panama Railroad Co.

"Panama Railroad S. S. Line.

'R. L. Walker, Traffic Manager, 24 State Street, New York.

"Marks and Numbers.

"a|d—J.S.

"Freight from New York to Los Angeles, Cal.

"3,164 lbs. at $180.

"New York, ———. 190—. No. ———.

"Received by the Panama Railroad Company of L. Furtenberg, under the contract hereinafter contained, the property mentioned below, marked and numbered as per margin, in apparent good order and condition (contents and value unknown), viz:

"3 stands
"3 fountains
"3 coolers
"1 Box of parts
—
"10 pkgs.

"One cooler rim broken.

"Consigned to Jacob Schwartz at Los Angeles, to be transported by steamship Seguranca appointed to sail Apr. 17, 1905, or by any other or succeeding steamer or vessel, whether belonging to said company or any other owner, to the port of Colon, and there, * * * if destined beyond, to be there delivered to connecting carrier and so on by one connecting carrier to another, until they reach the station or port nearest to the ultimate destination. If their ultimate destination be beyond the point for which rates are named, as per margin, they may by the connecting carrier nearest to such ultimate destination, be delivered to any other carrier, to be transported to such ultimate point; and the carrier so selected shall be regarded exclusively as the agent of the owner or consignee. * * *

"Every carrier is liable to the preceding carrier for all accrued charges; and in the event of loss of the property after transfer from one carrier to another, the carrier having the property in charge when the loss occurs shall have a lien on the remaining property, if any, for all such advances.

"It is mutually agreed that the liability of each carrier, as to goods destined beyond its own route, shall be terminated by proper delivery of them to the next succeeding carrier. This bill of lading is signed for the different carriers who may be engaged in the transportation, severally, not jointly, and each of them is to be bound by and have the benefit of all the conditions thereof as if signed by it, the shipper, owner and consignee. * * *"

Certain conditions were printed on the back of this contract. Among them was one exempting such carrier from any liability for certain kinds of articles unless their nature and value are expressed, and for any loss or damage "arising from * * * fire from any cause, on land or on water." Another provision was "in case of loss, detriment or damage to the goods, or delay in the transmission thereof, imposing any liability hereunder, the carrier in whose actual custody they were at the time of such loss, damage, detriment or delay, shall alone be responsible therefor. The receipt of any carrier for the goods shall be prima facie evidence of the condition in which he received them, in a suit against any other common carrier." There was no provision in the contract as to who should be the carriers beyond the end of defendant's route, and the defendant was left free to select such carriers. The charges for freight were not prepaid, but were to be collected from the consignee by the final carrier at the point of destination. One of these packages, containing parts of the machinery indispensable to the operation of the whole, was carried by defendant to Panama, and there delivered by it to the Pacific Mail Steamship Company for further carriage. It was then carried by the latter to San Francisco, where it was delivered to the Pacific Coast Steamship Company for further carriage. It was by the last-named company shipped and loaded on its steam vessel "State of California" then lying at a wharf in San Francisco. While so situated, the contents of said package, through the fault, negligence, and wrong of the Pacific Coast Steamship Company, were so damaged and destroyed by fire occurring in the hold of said vessel that they were rendered wholly worthless, incapable of use, and of no value whatever. The remaining nine packages were carried with due diligence by defendant to Panama, and there delivered by it to the Pacific Mail Steamship Company on May 8, 1905, in good order and condition. One of these packages has never reached its destination. The remaining eight packages were never tendered to plaintiff until December 8, 1905, on which date the Pacific Coast Steamship Company did tender them to plaintiff at Los Angeles, but at such time the contents thereof were "rusted, broken, damaged, and destroyed, and were incapable of use and of no value whatever, and the plaintiff declined to receive the same." Upon these facts, it is clear that whatever default there was in relation to the contract of carriage occurred after the delivery of the packages by defendant at the end of its route to the Pacific Mail Steamship Company, and was primarily the default of either the latter company or that of the Pacific Coast Steamship Company.

It is conceded that under what is known as the American rule (as distinguished from the English rule), which prevails in most of our states, the mere acceptance of freight by a common carrier for a place beyond his route imposes on him, "unless he stipulates otherwise," only the obligation to deliver it at the end of his route in that direction to some other competent carrier carrying to the place of address, or connected with those who thus carry, and his liability as a carrier ceases upon making such delivery. This is the rule embodied in section 2201 of our Civil Code. See Palmer v. Atchison, etc., R. R. Co., 101 Cal. 187, 35 Pac. 630. It is also the rule declared by the decisions in the state of New York, the state in which the shipment was made. See Condict v. Grand Trunk Ry. Co., 54 N. Y. 500; Jennings v. Grand Trunk Ry. Co., 127 N. Y. 438, 28 N. E. 394. There was no evidence as to what the statutory provisions of that state in relation to carriers are, and we must therefore assume that the law of New York was the same as our own. Palmer v. Atchison, etc., Co., supra, 101 Cal. 195, 35 Pac. 630; Cavallaro v. Texas, etc., Ry. Co., 110 Cal. 348, 357, 42 Pac. 918, 52 Am. St. Rep. 94. We are speaking of the situation as it existed prior to the taking effect of the act of Congress, known as the Hepburn act (June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1907, p. 892]), which provides that the initial carrier receiving goods for transportation from a point in one state to a point in another state shall be liable for transportation to the point of destination. The shipment here was made prior to the taking effect of this act. Plaintiff's theory, as shown by the allegations of his complaint, which was sustained by the findings of the trial court, is that defendant did "stipulate otherwise"—that by special contract it undertook to deliver the goods at Los Angeles, and that the connecting carriers between Panama and Los Angeles were its agents in the performance of said contract for whose negligence it was responsible. It is everywhere recognized that the carrier may so contract to carry to some point beyond the end of his route as to be liable for delivery at such point, and that, when he has so contracted, all connecting lines are his agents, for whose default he is responsible. 1 Hutchinson's Carriers, §§ 226, 240; Pereira v. Central Pacific R. R. Co., 66 Cal. 92, 4 Pac. 988; Colfax, etc., Co. v. Southern Pacific Co., 118 Cal. 648, 50 Pac. 775, 40 L. R. A. 78; German Fruit Co. v. California, etc., Co., 133 Cal. 426, 65 Pac. 948. The question here presented is whether defendant did so contract with reference to the shipment made by plaintiff. If any such obligation on the part of defendant existed, it existed solely by reason of the fact that it had assumed it by positive agreement. See 1 Hutchinson's Carriers, §§ 231, 232; Myrick v. Michigan Central R. R. Co., 107 U. S. 102, 1 Sup. Ct. 425, 27 L. Ed. 325.

We are unable to find in the contract in the case at bar the assumption by defendant of any obligation other than the obligation of transporting the goods to the end of its route, and there delivering them to some other competent carrier carrying to the place of address or connecting with those who thus carried. So far as the terms of the contract relate to this matter, they are perfectly clear and certain, and susceptible of no other construction. Their effect was, as stated by Judge Lurton in an opinion concurred in by Judges Taft and Clark in Cincinnati, etc., Co. v. Fairbanks Co., 90 Fed. 467, 33 C. C. A. 611, where a very similar contract was under consideration, "that the initial carrier undertook, for itself and its connecting lines in the route, 'severally and not jointly,' that each would carry safely to the point of junction with the next succeeding carrier, and then deliver to it, and that each should be liable exclusively for any loss while in its custody." It is true that in that case the various connecting routes were specified, but this appears to have been considered material only in view of the fact that the blank in the receipt in which the name of the place to which the goods were to be transported by the initial carrier had not been filled in, thus leaving such point unnamed, and giving some basis for the claim that the initial carrier was to transport to the only other place expressly designated, viz., the place to which the goods were consigned. In the contract at bar the port of Colon was expressly named as the point to which the defendant was to transport the goods. It is urged that these words "port of Colon" must be disregarded and the contract of shipment construed as if they had not been written and the space left blank, for the reason that the terminus of defendant's route was, in fact, Panama, and defendant's answer admits a contract to transport to the terminus of its route at Panama; in other words, to carry the goods across the isthmus from Colon to Panama. There is no force in this contention. The answer of the defendant admits no more than that, by reason of its ownership and operation of the railroad across the isthmus, it was liable in the matter of the carrying of the goods beyond the point designated in the contract and as far as Panama, the end of the railroad and its route. But, whatever the liability of the defendant by reason of the fact that the railroad across the isthmus was a part of its operated route, the port of Colon was designated by the contract as the point to which it would transport the goods, and at which it would deliver them to a connecting carrier, and this designation cannot be disregarded.

There is absolutely nothing to indicate any intention to assume any obligation beyond the carrying to the end of its route other than the obligation to deliver to a connecting carrier, and the assumption of any additional obligation is expressly repudiated by clear and unambiguous language. The words following the undertaking that the goods shall be delivered to connecting carrier, viz., "and so on by one connecting carrier to another, until they reach the station or port nearest to the ultimate destination," can mean no more, in the light of the other provisions of the contract, and especially in the light of the provision that the contract "is signed for the different carriers who may be engaged in the transportation, severally, not jointly," etc., than that the defendant was undertaking for itself and its connecting lines, "severally, not jointly," that each would perform its part of the contract, and stipulating that each should have the benefit of all the conditions thereof. The provision to the effect that, if the ultimate destination be beyond the point for which rates are named, they may by the connecting carrier nearest such ultimate destination be delivered to any other carrier to be transported to such ultimate point, which carrier "so selected shall be regarded exclusively as the agent of the owner or consignee," was simply a provision for the protection of the ultimate connecting carrier relating to the disposition of the property at the end of the route covered by the contract, the route for which rates were named, and as to which the carriers to be engaged in the transportation had severally contracted, each for his own portion thereof. We do not see that this provision aids in the determination of the question under consideration. A similar provision was contained in the bill of lading in Cincinnati, etc., Co. v. Fairbanks Co., supra. Nor was it important that the contract contained elaborate and detailed stipulations as to the rights, duties, and liabilities of connecting carriers, the contract being executed by defendant not only for itself, but also for and on behalf of such connecting carriers. The naming of a through freight rate which was not to be prepaid, but of which each carrier was to collect his portion from the next succeeding carrier, and the whole amount of which to be collected by the ultimate carrier from the consignee at the end of the route, has very little significance. None of the elements suggested is necessarily inconsistent with the theory that the defendant was not assuming any responsibility beyond the end of its route (see Moore on Carriers, § 475), and when considered in connection with the explicit provisions that "it is mutually agreed that the liability of each carrier, as to goods delivered beyond its own route shall be terminated by proper delivery of them to the next succeeding carrier" and "in case of loss, detriment or damage to the goods, or delay in the transmission thereof, imposing any liability hereunder, the carrier in whose actual custody they were at the time of such loss, damage, detriment or delay, shall alone be responsible therefor," and the further provision that "this bill of lading is signed for the different carriers who may be engaged in the transportation, severally, not jointly," all of which constitute parts of the contract equally with the provision relied on by plaintiff, are entirely consistent with such theory. The contract was undoubtedly, as claimed by plaintiff, a through contract, but, so far as it applied beyond the end of defendant's route, it was a contract clearly and unequivocally entered into by defendant solely on behalf of the connecting carriers who might be engaged in the transportation, and not for itself. It must, therefore, be held that there was no stipulation on the part of defendant to deliver the goods at Los Angeles or to be responsible therefor beyond the terminus of its line, and that its liability as to the goods ceased upon its delivery thereof to the Pacific Mail Steamship Company.

The California cases in which contracts for carriage have been held to be through contracts, imposing on the initial carrier the obligation of carrying through to destination, are all clearly distinguishable from the case at bar. We have examined the various cases cited by learned counsel for plaintiff, and find nothing therein to lead us to doubt the correctness of our conclusion. The question is simply one as to the proper construction of a written contract, the meaning and intent of which appear to us to be entirely clear.

From what we have said it follows that the findings of the trial court as to the undertaking and default of the defendant are not sustained by the evidence.

The judgment and order denying a new trial are reversed.

We concur: SLOSS, J.; SHAW, J.

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155 Cal. 752

SMITH v. MATHEWS. (S. F. 5,008.)

(Supreme Court of California. June 25, 1909. Rehearing Denied July 24, 1909.)

1. STATUTES (§ 48*)—CONSTRUCTION—HARMONY WITH CONSTITUTION.

Where possible, statutes must be construed in a sense which will harmonize them with the Constitution.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 46; Dec. Dig. § 48.*]

2. STATUTES (§§ 159, 161*)—REPEAL BY IMPLICATION.

In the absence of an express repeal, an existing statute is not abrogated by the enactment of a new one, unless the provisions of the later act are so inconsistent with the former that the two cannot have a concurrent operation, or unless the later act so fully covers the whole subject-matter of the prior act as to afford conclusive evidence that it was intended to supersede it entirely.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 229, 231, 235–237; Dec. Dig. §§ 159, 161.*]

3. Sheriffs and Constables (§ 29*)—Compensation.

Act March 18, 1907 (St. 1907, p. 354, c. 282), providing a uniform system of county and township governments, by section 1 amended the Political Code by incorporating all the provisions of the county government act of 1897 (St. 1897, p. 452, c. 277), with its amendments as revised and amended by the new act. Section 2 declared that the provisions of the act, so far as substantially the same as existing statutes, must be construed as continuations thereof, and that nothing in the act shall be deemed to affect the term of office of any person holding office under such statutes. Section 3 provides that the act shall take effect immediately. By Pol. Code, § 4243, subd. 15, as so amended, constables of townships having a population of 500 in counties of the fourteenth class are allowed, in addition to certain fees, a salary of $50 a month. Before the enactment of the act, constables in such townships were allowed certain fees, but no salary, under Act March 21, 1905 (St. 1905, p. 670, c. 1011), amending the county government act of 1897. *Held*, that in view of Const. art 11, § 9, providing that the compensation of a county, town, etc., officer shall not be increased after his election or during his term of office, and the fact that the act of 1907 in numerous sections raises the salaries of such officers, as well as alters them in other instances, without disclosing whether the result is an increase or reduction, the act was not intended to go into immediate effect, but to apply only to officers to be elected for subsequent terms, and the county government act of 1897, as amended by Act March 21, 1905, continued to govern the compensation of constables elected before the enactment of the act of 1907, in townships of 500 inhabitants in counties of the fourteenth class.

[Ed. Note.—For other cases, see Sheriffs and Constables, Dec. Dig. § 29.*]

In Bank. Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Mandamus by A. J. Smith against C. W. Mathews. From a judgment awarding a peremptory writ, defendant appeals. Reversed.

Robert Duncan, for appellant. J. W. Preston, for respondent.

BEATTY, C. J. This is a proceeding in mandamus and presents only a question of statutory construction. In the year 1907 the petitioner was constable of Little Lake township, in Mendocino county; his term of office having commenced in January of that year, and at a time when the compensation for his official services was regulated by section 1 of an act approved March 21, 1905, relating to the compensation of county officers in counties of the fourteenth class. St. 1905, p. 670, c. 1011. By that act he was allowed certain fees, but no salary.

On the 18th of March, 1907, the Governor approved an act entitled "An act to repeal title 2 of part 4 of the Political Code, and to add a new title 2 of part 4 of said Code in place thereof, relating to the establishment of a uniform system of county and township governments." St. 1907, p. 354, c. 282. This act consisted of three sections, as follows:

"Section 1. Title 2 of part 4 of the Political Code is hereby repealed and a new title 2 of part 4 of said Code is hereby added to read as follows:" What follows covers more than 200 pages of the volume of statutes, and consists of a re-enactment of the old title of the Political Code, with additions and amendments in sections numbered consecutively from section 4000 to section 4325, in which are incorporated all of the provisions of the county government act of 1897 (St. 1897, p. 452, c. 277), with its various amendments, as revised and amended by the new act. From this brief description it will be seen that the object of the Legislature was to systematize and codify the various provisions relating to county and township government theretofore contained in the Political Code and the county government act, by making them a part of the Political Code under the title: "The Government of Counties." The second and third sections of the act read as follows:

"Sec. 2. The provisions of this act, so far as they are substantially the same as existing statutes, must be construed as continuations thereof and not as new enactments; and nothing in this act contained shall be deemed to shorten or extend the term of office or employment of any person holding office or employment under the provisions of such statutes.

"Sec. 3. This act shall take effect immediately."

By subdivision 15 of section 4243 of the Political Code as so amended constables of townships having a population of 500 or more in counties of the fourteenth class are allowed, in addition to certain fees, a fixed salary of $50 per month. In the month of June, 1907, the plaintiff demanded of the defendant, who was auditor of Mendocino county, a county of the fourteenth class, a warrant for $50, claimed as salary for the previous month. His demand was refused, upon the ground that the amendment to the statute increased the compensation of his office and therefore could not be given effect as to him, during the term to which he had been elected prior to its passage, without a violation of section 9 of article 11 of the Constitution, which provides that: "The compensation of any county, city, town, or municipal officer, shall not be increased after his election or during his term of office," etc. There could not, of course, be any answer to this objection of the auditor, if his construction of the statute was correct; but the plaintiff, contending that it could not be construed as increasing his compensation, commenced this proceeding to enforce compliance with his demand, and in the superior court was awarded a peremptory writ commanding the defendant to issue the warrant. In the District Court of Appeal this judgment was reversed upon the ground that the superior court had erred in sustaining plaintiff's demurrer to the answer of the defendant, in which he justified his refusal to issue the warrant, upon the ground that the effect of subdivision 15 of section 4243 of the codifying act would be to increase the plaintiff's compensation after his election. It seems to have been assumed by both parties to the controversy that, by the terms of the act, and especially the concluding section, providing that it should take effect immediately, there was plainly manifested an intention on the part of the Legislature that said subdivision should regulate the compensation of the constables then in office in Mendocino county, and the principal question argued by counsel and considered by the court was whether, assuming such to have been the intention of the Legislature, it was competent for the court to defeat that intention by holding the act in abeyance as to the defendant, upon proof that its effect would be to increase the compensation provided for his office at the date of his election. The superior court had held that no evidence aliunde could be received for the purpose of invalidating an act of the Legislature, and upon the conceded construction of the act in question had ordered the peremptory writ. The District Court of Appeal, holding that such evidence was competent and material, and, in effect, that the amended act would remain in abeyance as to any particular incumbent of the office of constable until the end of his term, whenever it was made to appear that its practical effect would be to increase his compensation, reversed the judgment of the superior court. Subsequently, upon petition of plaintiff, and of a number of other county and township officers similarly situated with reference to numerous amendments contained in the codifying act affecting other classes of counties, the cause was transferred to this court for hearing and decision, and here again it was submitted upon an argument mainly confined to the question decided by the District Court of Appeal, and resting largely upon the same tacit assumption that the Legislature had plainly declared its intention that all the new provisions of the codifying act relating to official compensation should apply to those then in office, so far, at least, as they did not appear on their face to effect an increase of the compensation allowed by the law previously in force. Upon this assumption we affirmed the judgment of the superior court, holding, in accordance with the doctrine of Stevenson v. Colgan, 91 Cal. 649, 27 Pac. 1089, 14 L. R. A. 459, 25 Am. St. Rep. 230, that the constitutionality of an act of the Legislature is always a pure question of law, and that when the right to enact a law depends upon the existence of a fact the passage of the act implies, and the conclusive presumption is, that the Governor and the Legislature have performed their duty, and ascertained the existence of the fact before enacting or approving the law—a decision which the courts have no right to question or review.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Before this judgment of affirmance became final, it was set aside, and a second rehearing ordered for the purpose of considering a question presented for the first time in a new petition filed by the appellant, in which he contended that upon a proper construction of the codifying act it could not be held that the Legislature intended that the amendment contained in section 4243, or any similar changes of the county government law appearing in other sections of the act should apply to the then incumbents of the several offices affected. In support of this position, he calls attention to the fact that the codifying act contains no express repeal of the county government act of 1897, by which, as subsequently amended from time to time, the compensation of every county and township officer in the state was regulated prior to the approval of the codifying act, and he contends that there is no repeal by implication of any of those provisions. His position, in short, is that, until new terms of office begin, both acts are in force and in harmonious operation, the county government act of 1897, with its amendments, for the purpose of regulating the compensation of all officers who were elected prior to March 18, 1907, and the codifying act for the purpose of regulating the compensation of their successors. This, as he points out, is necessarily true as to all direct increases of compensation appearing upon a comparison of the express provisions of the two acts, for it has been the settled doctrine of this court ever since the decision in Dougherty v. Austin, 94 Cal. 601, 28 Pac. 834, 29 Pac. 1092, 16 L. R. A. 161, that in such cases the incumbent cannot claim the increased compensation, but continues to receive that which was provided by the law in force at the date of his election, which as to him continues in force (unless expressly repealed) to the end of his term, notwithstanding the fact that the amended law is also in force in most cases for more than 18 months before the end of his term for the purpose of fixing the compensation of his successor in a new term. This results from the fact that the Legislature meets in biennial session on the first Monday of January, the same day upon which all two-year terms of county officers begin and end. Any law it passes increasing the compensation of a county officer will generally be in effect before July with or without an urgency clause, but must remain in abeyance more than 18 months, during which time the compensation of the incumbent is governed by the old law. As said by this court in reference to the statute increasing the salaries of the justices: "Though an existing statute, it is not in force because there is no subject upon which it can constitutionally operate. It remains in abeyance, and must so remain until the beginning of the next ensuing regular term of the office of justice of the Supreme Court." Harrison v. Colgan, 148 Cal. 73, 82 Pac. 676.

There is nothing therefore novel or startling in the proposition now advanced by the appellant. The Constitution (article 11, § 9) clearly implies that there must be a law in force, fixing the compensation of every county and township officer at the date of his election, and it imperatively forbids any increase of that compensation by a law subsequently enacted. It permits, however, an increase of compensation to the person to be elected to the ensuing term, and, if such increase is provided, it must be by a law which for that limited purpose takes effect long before the expiration of the current term; the old law remaining in the meantime in full effect as to the incumbent. In such a case the operation of the amended law is postponed, not because it is unconstitutional, but because the courts, construing it in the light of the Constitution, hold that such was the intention of the Legislature. It is, in other words, construed as all laws must be, when possible, in a sense which harmonizes it with the Constitution and gives it harmonious effect.

If this were a case of increase of compensation appearing from a comparison of the codifying act with the law previously in force, there could be no doubt that the rights of the plaintiff would be governed exclusively by the old law; but since it does not appear that the new act gives an increased compensation, and since the Legislature has declared that it shall take effect immediately, it is argued that we are bound to presume that the object and effect of the provision in question was to reduce plaintiff's compensation, in which case it would, of course, be free from objection on constitutional grounds. In opposition to this view, appellant calls attention to the fact that, in numerous sections of the new law, salaries of various officers in several classes of counties are plainly and unequivocally raised, and, since it cannot be held that the Legislature intended those parts of the act to be operative on the incumbents of current terms, there is no reason for holding it to be operative upon those officers whose compensation is altered without disclosing whether the result is an increase or reduction of compensation.

This view is, in my opinion, well sustained by the argument of appellant. Since the clause putting the statute into immediate effect clearly does not mean all that it says, it becomes a question of construction how much its real meaning falls short of its literal import. If it was not intended to put in immediate operation provisions raising salaries, upon what ground are we to hold that it was intended to have immediate operation in those instances where it changes the compensation attached to an office without disclosing whether the change effects an increase or reduction, and where, as far as the court can see, it is as likely to be an increase as a reduction? If in one case the old law continues to operate, why not in the other?

These questions it appears to me are answered by the settled rule regarding repeals by implication. Such repeals are not favored. In the absence of an express repeal, an existing statute is not held to be abrogated by the enactment of a new one, unless the provisions of the later act are so inconsistent with the former that the two cannot have a concurrent operation, or unless the later act so fully covers the whole subject-matter of the prior as to afford conclusive evidence that it was intended to supersede it entirely. Here there is no such inconsistency between the codifying act and the county government act of 1897 that they cannot have a concurrent operation as to compensation of county officers in every instance in which they differ, and the fact that in numerous instances of increase of salary they must have a concurrent operation proves that the later act was not intended to supersede in all particulars the pre-existing law.

As to the clause putting the codifying act in immediate effect, it is really a false quantity so far as concerns the main question here involved. If it had not been inserted, the act would have gone into effect 60 days after its approval, and would have presented the same question as to plaintiff's right to salary for June, 1907, and succeeding months, as is here presented in regard to the salary claimed for the month of May. If by reason of the urgency clause it repealed by implication the county government act of 1907, on the 18th of March, 1907, it would have equally repealed it without that clause on the 17th of May, 1907. In truth, the addition of the urgency clause is amply accounted for by the fact that the codifying act revised the whole scheme of county government, including not only the general fee bill, but numerous other matters of grave importance, entirely distinct from official salaries and compensation, by inserting amendments which, if beneficial, it was important to put into immediate effect, and this could be done, as it was done by the urgency clause, without affecting one way or the other the provisions relating to compensation of county and township officers. Considering, then, that the urgency clause in this statute has no necessary reference to any of the provisions altering the compensation of county and township officers, that there are many of those provisions to which it cannot apply, that it has, on the other hand, a full and beneficial operation upon numerous amendments to the Political Code relating to other and wholly independent matters, which may well be deemed to have been regarded as urgent, and for these reasons disregarding it as immaterial in the present discussion, the question which we have to decide is the proper construction of an act which, without repealing the county government act, merely amends it by increasing the salaries of certain officers, and by changing the compensation of other officers from fees to salary, or from salary to fees, in such a manner as to leave the courts no means of determining whether these amendments will operate an increase or reduction of compensation. The true construction of such an act, in my opinion, is to treat all its provisions alike, and, knowing that such of them as increase salaries could have been intended to apply only to officers elected subsequent to the amendment, to conclude, in the absence of express and specific declaration to the contrary, that other amendments which may or may not have the effect of increasing compensation were likewise intended to operate only in favor of or against officers to be thereafter elected. By giving this construction to the present act, and making a precedent for the construction of all future acts of the same character, we insure the efficiency of the constitutional inhibition against increase of compensation to official incumbents without injustice to the plaintiff, or to any person now or hereafter found in the same situation. If the codifying act increases his compensation, it does so by violating the Constitution. If his compensation is thereby reduced, he profits by a construction which holds it inoperative as to him.

The judgment of the superior court is reversed.

We concur: MELVIN, J.; HENSHAW, J.; SLOSS, J.; LORIGAN, J.

SHAW, J. I concur. The point upon which the case is now decided is that the provisions of the act of 1907, in so far as they operate to increase the compensation of officers for terms running at the time the act took effect, are not to be given a retroactive operation; that is, that those provisions do not apply to the compensation for the then existing terms, and that in those cases where the act makes a change in the mode of measuring the compensation, from fees to salaries, and where, consequently, it cannot be ascertained in advance that there is no increase, it is to be presumed, from this uncertainty and the absence of an express statement otherwise, that the Legislature intended thereby to provide only for officers to be elected for subsequent terms. This point was fully argued upon the last hearing before this court, but previously it had been only incidentally suggested. Upon further reflection I am satisfied that this is the better rule to apply, and that it is not contrary to the principles of statutory construction.

A retrospective law "is one which operates upon matters which occurred, or rights and obligations which existed before the time of enactment." A fundamental rule for the construction of statutes is "that they will be considered to have a prospective operation only, unless a legislative intention to the contrary is expressed or necessarily to be implied from the language used or the particular circumstances, especially where to construe the act as retrospective in its operation would render it obnoxious to some constitutional provision." 26 Am. & Eng. Ency. of Law, 692, 693. The act of 1907 is a part of the Political Code. "No part of it is retroactive, unless expressly so declared." Pol. Code, § 3. The act declares that it shall take effect immediately; but this does not necessarily mean that it shall operate retroactively.

The Constitution forbids a legislative increase in the compensation of any county or township officer during his term of office. Article 11, § 9. This prohibition, in effect, and with regard to legislation on the subject, makes the entire term of an office, with the concurrent right of the incumbent to compensation, a matter which occurs and a right which exists as soon as the term begins, and which are thereafter, in that aspect, past transactions. Any legislation affecting the compensation of such officer is to be deemed as operating upon an existing right, and the Legislature will not be presumed to have attempted to change the compensation during the term, unless it expressly so declares. If such intent does not appear, the law will be construed as intended to apply only to officers elected for subsequent terms. This construction is just both to the officer and to the public. If it intends to reduce the compensation of officers in any class of counties, during the pending terms, as it may constitutionally do, the Legislature can say in plain words that the change applies to present incumbents. If it changes from fees to salaries, as it may if it finds that the salary allowed will not increase the compensation, it can declare that there is no increase, and that it is to apply immediately to the present incumbents. Perhaps the fact of no increase would be inferred from the declaration that it should apply to present incumbents; but, where neither statement appears, it is to be inferred that an increase was contemplated and that it was intended to apply prospectively only.

This rule is always followed where the new law shows on its face that there is an increase. In such cases, an increase to incumbents being forbidden and beyond the power of the Legislature, the logical result of any other rule, where the law takes effect during a term, would be that the new law would be unconstitutional and void, and, if so, it might be doubtful if it could ever take effect. It has been said that an unconstitutional law is "as inoperative as though it had never been passed." Norton v. Shelby

Co., 118 U. S. 442, 6 Sup. Ct. 1125, 30 L. Ed. 178; Commissioners v. Kansas City, etc., Co., 5 Kan. App. 43, 47 Pac. 326. But these laws are not held void. Notwithstanding the fact that they have become laws in force, they are construed to be intended only for prospective operation, and hence not void, but only in abeyance until the conditions occur to which they can apply with effect. In the meantime they are not effective, even as an implied repeal of the old law. The old law stands and controls the right to compensation until the time arrives at which, by the Constitution, the new law is permitted to supersede it, and the implied repeal then takes place. The same reasons exist, and the same rule may well be applied, where the increase is not apparent on the face of the two statutes, or from facts of which courts take judicial notice, and there is nothing which declares or implies that the Legislature had determined that there was no increase and intended the change of method to apply to incumbents.

I concur: ANGELLOTTI, J.

HAWKINS v. WARE, County Auditor.

(Civ. 506.)

(Court of Appeal, First District, California. Dec. 4, 1908.)

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Mandamus by A. B. Hawkins against Willett Ware, Auditor of Santa Cruz County. Judgment for defendant, and petitioner appeals. Reversed, with directions to overrule demurrer.

Wyckoff & Gardner, for appellant. Benj. K. Knight, for respondent.

COOPER, P. J. The trial court sustained a demurrer to the petition of appellant for a writ of mandate, whereupon judgment was entered for respondent. This appeal is from the judgment.

The question for determination is as to whether or not the petitioner, who is alleged to be a justice of the peace of Watsonville township in the county of Santa Cruz, was for the times and periods stated in the petition entitled to a salary of $75 per month as such justice of the peace, under the provisions of an act to amend section 170 of the county government act of April 1, 1897, approved March 19, 1903 (St. 1903, p. 227, c. 197). The act provides (section 14, p. 228) that in townships of the first class justices of the peace shall receive $75 per month. The petition shows that Watsonville township is a township of the first class, and that the defendant is county auditor of Santa Cruz county. If the facts stated in the petition are true, the appellant is entitled to the writ as prayed for. The act is not unconstitutional. Smith v. Matthews (Cal.; Nov. 20, 1908).[1]

The judgment is reversed, and the trial court directed to overrule the demurrer.

We concur: HALL, J.; KERRIGAN, J.

155 Cal. 762

DAGGETT v. SOUTHWEST PACKING CO. et al. (L. A. 2,297.)

(Supreme Court of California. June 28, 1909.)

1. Evidence (§ 80*) — Foreign Laws — Presumptions.

Where laws of foreign states are not shown, the presumption is that they are the same as those of this state.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101; Dec. Dig. § 80.*]

2. Corporations (§ 261*)—Stock Subscriptions.

While, where a solvent corporation finds it necessary to call in an additional amount of its subscribed capital stock, and the subscription agreements do not state when or on what conditions it is to be paid, the statutes must be followed, and a call is necessary to the enforcement of a cause of action by the corporation on such subscriptions, this rule has no application to a proceeding in equity by a judgment creditor to subject unpaid subscriptions due to the satisfaction of the judgment, and he may pursue his remedy without first attempting to induce the corporation to enforce assessments.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1071; Dec. Dig. § 261.*]

Department 1. Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by C. B. Daggett against the Southwest Packing Company and others. Judgment for defendants, and plaintiff appeals. Reversed.

Cassius Carter, for appellant. Stearns & Sweet and H. E. Doolittle, for respondents.

SHAW, J. This is an action by a judgment creditor of the corporation defendant, against the corporation and a number of its stockholders, in the nature of a creditor's bill to compel the payment and application upon the plaintiff's judgment of so much of the amounts due from the stockholders to the corporation upon unpaid subscriptions to stock as may be necessary to satisfy the judgment and costs. Demurrers of the defendants to the complaint were sustained, the plaintiff refused to amend, and judgment was then given dismissing the action. From this judgment plaintiff appeals.

The only point presented upon the argument is that the complaint does not aver that there has been any call or assessment upon the alleged unpaid subscriptions for stock, nor that there has been any request or demand upon the directors of the corporation to make such call or assessment. It is claimed by the respondents, and it is said that it was held by the court below, that such call or assessment, or a demand therefor upon the directors and a refusal by them, is a necessary condition precedent to the right of a judgment creditor to maintain an action of this character, and that the complaint is not sufficient unless it shows that this condition has been complied with. We do not so understand the law. Where a solvent corporation finds it necessary in the course of its business to call in an additional amount of its subscribed capital stock, and the subscription agreements do not state when, in what amounts, and upon what conditions it is to be paid, the statute being the measure of the corporate rights in that regard, it is no doubt true that the statute must be followed, and that a call is a necessary condition to the existence of a cause of action by the corporation to recover upon such subscriptions. But this rule has no application to a proceeding in equity by a judgment creditor to subject the unpaid subscriptions due to the corporation to the satisfaction of the judgment. The rule applicable to such cases is thus stated in a note to the case of Thompson v. Reno Savings Bank, 19 Nev. 103, 7 Pac. 68, 3 Am. St. Rep. 811: "While it is essential to the recovery by the corporation itself against the stockholders upon their contracts of subscription that the money should be due and payable, either because the contracts themselves have definitely fixed the times of payment, or because calls had been made by the governing body of the corporation, no such condition is imposed upon the creditors with regard to their right to proceed in equity against the stockholders. No previous call need be shown by the creditors, nor need they show that they have endeavored to induce the corporation to make a call as a prerequisite to a suit in equity to compel stockholders to pay their unpaid subscriptions."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[1] Rehearing granted. For opinion on rehearing, see 103 Pac. 199.

In 2 Morawetz on Corp. § 821, it is said that, while it is true that subscriptions to stock are usually understood to be payable only when calls therefor are made by the corporate authorities, and that, "until this assessment or call has been made, the corporation cannot compel them to pay," nevertheless the rule is that "conditions of this character do not enter into the equitable obligation assumed by the shareholder towards creditors to contribute the company's capital as a fund for their security. In equity, therefore, the shareholders of an insolvent corporation are held to be unconditionally liable to its creditors to contribute the amount of capital stock subscribed by them, although their subscriptions were conditional, as between themselves and the company, upon a regular call or assessment by the board of directors." The right of a creditor to maintain an action of this character is settled in this state by the decision in Baines v. Babcock, 95 Cal. 589, 27 Pac. 674, 30 Pac. 776, 29 Am. St. Rep. 158. See, also, Potter v. Dear, 95 Cal. 579, 30 Pac. 777; Welch v. Sargent, 127 Cal. 84, 59 Pac. 319; Walter v. Merced, 126 Cal. 586, 59 Pac. 136. The following decisions sustain the doctrine of the note in the American State Reports and of Morawetz; Marsh v. Burroughs, 1 Woods 468, Fed. Cas. No. 9,112; Holmes v. Sherwood (C. C.) 16 Fed. 725, 3 McCrary, 409; Crawford v. Rohrer, 59 Md. 599; Thompson v. Reno Savings Bank, 19 Nev. 171, 7 Pac. 870, 3 Am. St. Rep. 881, s. c. 19 Nev. 242, 9 Pac. 121, 3 Am. St. Rep. 883; Sanger v. Upton, 91 U. S. 60, 23 L. Ed. 220; Hatch v. Dana, 101 U. S. 214, 25 L. Ed. 885. The fact that the Southwest Packing Company is an Arizona corporation is immaterial. The laws of Arizona on the subject are not shown, and the presumption is that they are not different from those of this state.

It is said that the court below in giving its decision relied upon the discussion of this subject by Justice Smith of the District Court of Appeal of the Second District in the case of Turner v. Fidelity Loan Concern, 2 Cal. App. 136, 83 Pac. 62, 70. So far as that case refers to this subject, it was not a decision of the court. Allen, J., concurred in the opinion. Presiding Justice Gray concurred specially, and withheld his approval from the portion here referred to. In denying a petition for a rehearing in this court in that case this court took occasion to say that the portions of the opinion of Justice Smith which are here relied on did not constitute the law of the case. Two justices of that court cannot render a judgment. In so far as that opinion appears to sanction the doctrine that an action of this character cannot be maintained until after a demand has been made upon the directors that they should levy an assessment, and the refusal by them to do so, it must be disregarded.

It may be observed further, however, that in all such cases, even if we concede that an assessment or call of some character is a proceeding which the stockholders may insist upon, the only effect of this concession would be that the court in equity, after it had obtained jurisdiction of the defendants, would have authority to make whatever call the law should require in that behalf, and it could thereupon order the respective stockholders to pay into court such amount as it should find necessary to satisfy the demands of the complainants. This order would be a sufficient call to satisfy all that is required by the law in this particular.

The decision in Union Savings Bank v. Leiter, 145 Cal. 702, 79 Pac. 441, to the effect that a cause of action does not arise upon a stock subscription liability until after a call has been made, and that the statute of limitations does not begin to run until there has been such call, has no application to the case. That was an action by the corporation itself to recover upon a call or assessment, and it was the statutory rights of the corporation which were under consideration, not the rights of creditors in a suit in equity to subject the assets of the corporation to their claim by way of a creditor's bill. This applies to the other cases cited by the respondents to the same effect as the Leiter Case. They do not in any respect affect the doctrine that a creditor may pursue his remedy in a court of equity without first attempting to induce the corporation to issue and enforce assessments.

The judgment is reversed.

We concur: SLOSS, J.; ANGELLOTTI, J.

(156 Cal. 13)

FANCHER v. FANCHER et al. (Sac. 1,516.)

(Supreme Court of California. June 30, 1909.)

1. WILLS (§ 456*) — CONSTRUCTION — INTENTION OF TESTATOR.

The court, in construing a will, must ascertain the intention of testator from his language, and the words used must be given their natural significance, unless it appears that they were used with some other meaning.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 974; Dec. Dig. § 456.*]

2. WILLS (§ 466*)—CONSTRUCTION—MEANING OF WORDS—"MONUMENT."

A testator, who sets apart a specified sum from his estate for funeral expenses and proper interment of his remains and a suitable monument to his memory, and requests that his remains be buried on a designated ranch, does not authorize the executors to use a part of the fund for the erection of a free library as a memorial; the word "monument" being used in its natural sense as meaning a shaft, or any structure placed over a tomb or at a grave, and not in its applied sense as meaning a reminder taking any form.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 985; Dec. Dig. § 466.*

For other definitions, see Words and Phrases, vol. 5, p. 4576.]

3. EXECUTORS AND ADMINISTRATORS (§ 109*) —CONSTRUCTION—POWERS OF EXECUTORS.

A testator, who sets apart a specified sum for funeral expenses and proper interment of his remains and a suitable monument to his memory, etc., gives to the executors discretion in the selection of the monument, its form and style, with reference to the amount set apart for the purpose, and the full amount of the fund, or such part as the executors deem fit, may be expended in the erection of a monument.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 435–447; Dec. Dig. § 109.*]

Beatty, C. J., dissenting.

In Bank. Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Jonathan W. Fancher, Jr., against Lee R. Fancher and another, executors of George H. Fancher, deceased. From a judgment for defendants, plaintiff appeals. Reversed, with directions.

Ben Berry, for appellant. J. K. Law, for respondents.

HENSHAW, J. This cause was formerly heard and decided in department. A rehearing having been granted, and the cause having been heard by the court in bank, the department opinion is hereby reaffirmed and adopted. That opinion is as follows:

"The complaint charged that the executors, as trustees of a fund under the will of the deceased, purposed to make an improper use of the fund, and prayed the court to restrain them from so doing, and to direct the proper distribution of the moneys of the trust. The controversy grew out of the following undisputed facts: George Hicks Fancher died testate, leaving an estate of the value of about $500,000. Clauses 14 and 15 of his will are as follows: 'I set apart from my estate for my funeral expenses and proper interment of my remains and a suitable monument to my memory twenty-five thousand dollars. It is my request to have my remains buried on my Bear creek ranch in township seven south, range fifteen east, Mount Diablo meridian.' The body of the deceased was buried upon his ranch as requested. The executors proposed to expend the sum of about $2,000 in the erection of a granite monument at his tomb, and to use the remainder of the fund, about $20,000, in the construction of a building in the city of Merced, which building was to be dedicated to the purposes of a public library. Upon a tablet appropriately placed in said building was to be inscribed 'George H. Fancher Memorial Free Library.' The trial court held that the devotion of the funds to this purpose was within the purview of the trust created by the will, and gave judgment accordingly.

"Appellant contends that the will discloses that the testator's intent was that the monument to his memory should take the form of a memorial shaft, column, or similar structure marking the grave of the deceased, and that the devotion of any of the funds to the purpose of a library building, or for the erection of any other memorial building, was a use wholly beside the testator's intent. In this, as in all other matters pertaining to the construction of a will, the testator's intent is to be derived from his language, and the words employed are to be given their natural significance, unless it be made to appear that they were employed with some other meaning. Looking to the terms of this will, the testator desired that his remains should be buried upon his ranch, and his request that this should be done has been complied with. He left the fund of $25,000 to be used by his executors for funeral expenses for the proper interment of his remains, and for a suitable monument to his memory. There is nothing in this language to indicate that the testator used the word 'monument' in any other than its natural and specific meaning, which is that of 'a pillar, statue, shaft, or any structure placed over a tomb or at a grave.' Standard Dic. In its applied sense a monument, being 'a reminder' may take any form. Napoleon's battles are a monument to his memory. Horace by his poetry 'built himself a monument more enduring than brass,' and Sir Christopher Wren in his oft-quoted epitaph, 'Si Monumentum Requiris, Circumspice,' declares St.

Paul's cathedral to be his monument. Yet, as suggested by the Supreme Court of Rhode Island in Re Ogden, 25 R. I. 373, 55 Atl. 933, if one were to say that he had seen Napoleon's or Horace's or Wren's monument, the mind would call up some memorial shaft or column, and not the victories of one, the poetry of another, or the cathedral of which the third was the architect. So it is said in Society of Cincinnati, 154 Pa. 621, 26 Atl. 647, a monument may take the shape of a memorial hall or other building, but that is not the general sense of the word, and will not be presumed to be its meaning.

"In Re Ogden, supra, the testator left to the town of North Providence $5,000 'to erect a monument to the memory of the soldiers and sailors who fell or died in the late war, enlisting from this part of the town, and my desire is that the monument be erected at the junction of Olney and Fruit Hill avenues in said town, on a triangular piece of land thereat located.' It was proposed there to use the money for the erection of a memorial building. The court held that such a structure was not permissible; that it was not within the natural meaning of the bequest, and involved a strained and forced construction of the language, saying: 'To ascertain the written expression a court does not look so much to the etymological scope of a word as to its common meaning and particular use. The word 'monument' in common usage, when it relates to a memorial for the dead, means a shaft, column, or some structure more imposing than a mere gravestone. If it were said that a monument had been erected to the memory of one who had died, the natural and immediate conception would be that which we have just stated. * * * It may be said that the names and services of soldiers can be as well preserved on the walls of a building as on the sides of a monument. This is true, but would one naturally think that a building was intended by a provision for a monument?' In the case at bar there is nothing to indicate that the testator used the word in any applied or figurative sense, and there is much to indicate that he did not. The juxtaposition of the phrase, the devotion of the single sum of money to the threefold purposes of paying funeral expenses, of proper interment of his remains, and of erecting a suitable monument to his memory, indicate that the monument which he contemplated was one to mark the site of his tomb. He did not design that it should take the form of a charity to be named after him. A public hall, library, hospital, may all be memorials, and a memorial may be a monument, but, saving in a figurative sense, the converse is not true. By a monument is not understood a memorial building. 'Suitable' as here used gives play to discretion upon the part of the executors in the selection of the monument, its form and style, with reference to the amount of money set apart for the purpose. Appeal of Bainbridge, 97 Pa. 482. In thus deciding as we do that a memorial building is without the purview of the testator's bequest, it is not intended that this discretion so vested in the executors is in any other way limited. The full amount of the fund devoted to the purpose, or such part as they deem fit, may be expended in the erection of a monument to the memory of the deceased. It is held merely that the erection of a public building is not within the intent of the testator as expressed in his will."

For the aforesaid reasons, the judgment is reversed, with directions to the trial court to enter its judgment in accordance with the foregoing.

We concur: LORIGAN, J.; ANGELLOTTI, J.; MELVIN, J.

I dissent: BEATTY, C. J.

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155 Cal. 373

PEOPLE ex rel. CHAPMAN v. SACRAMENTO DRAINAGE DIST. et al.

(Sac. 1,634.)

(Supreme Court of California. March 24, 1909.)

1. TAXATION (§ 24*)—POWERS OF LEGISLATURE—TAX ON SPECIFIC LANDS IN PROPORTION TO BENEFITS OF WORK DONE.

The Legislature has the undoubted power, in a proper case, to impose a burden in the nature of a tax on specific lands in proportion to the estimated special benefits which they will receive from work done, though to sustain such a law it must appear that the character of the work is such that its performance confers some general benefit on the public, as well as private benefit on the landowner.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 57; Dec. Dig. § 24.*]

2. DRAINS (§ 68*)—RECLAMATION OF SWAMP AND OVERFLOWED LANDS—IMPROVEMENTS JUSTIFYING TAX ON SPECIFIC PROPERTY.

The improvements contemplated in the act of 1905 (St. 1905, p. 443, c. 368), creating the Sacramento Drainage District for the purpose of reclaiming swamp and overflowed lands throughout certain counties, are of such a character as to confer a general benefit on the public, as well as private benefit on the landowners, so as to justify a tax on specific lands in proportion to the estimated special benefits received from the work.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 72; Dec. Dig. § 68.*]

3. DRAINS (§ 5*)—RECLAMATION OF SWAMP AND OVERFLOWED LANDS—POWER OF STATE—EXTENT OF POWER OF STATE.

So complete is the power of the state over swamp and overflowed lands that its power to provide for reclamation is not limited to those lands the title to which was acquired under the Arkansas act, but exists as to all such lands in the state, even if title was derived from a Spanish or Mexican grant.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 2; Dec. Dig. § 5.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. Statutes (§ 90*)—Drainage Districts—Character as Municipal Corporation—Creation by Special Laws—"Corporation Organized for Municipal Purposes."

The "Sacramento Drainage District," created by the act of 1905 (St. 1905, p. 443, c. 368), for the reclamation of swamp and overflowed lands throughout certain counties, is not a "corporation organized for municipal purposes" within Const. art. 11, § 6, which forbids the creation of such corporations by special laws.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 100; Dec. Dig. § 90.*

For other definitions, see Words and Phrases, vol. 2, pp. 1622, 1623.]

5. Statutes (§ 71*)—Uniformity of Operation of General Laws.

The act of 1905 (St. 1905, p. 443, c. 368), creating the Sacramento Drainage District for the reclamation of swamp and overflowed lands throughout certain counties, does not violate Const. art. 1, § 11, requiring laws of a general nature to have a uniform operation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 74; Dec. Dig. § 71.*]

6. Statutes (§ 76*)—Special Laws—Necessity.

Nor does such act, though a special act, violate Const. art. 4, § 25, forbidding special laws where a general law can be made applicable.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 78; Dec. Dig. § 76.*]

7. Constitutional Law (§ 45*)—Special Laws—Necessity—Determination by Legislature—Conclusiveness.

There must be a clear showing on the face of a law itself that a special act is not required before a court will interfere with the determination of the Legislature as to its necessity.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 42; Dec. Dig. § 45.*]

8. Statutes (§ 58*)—Condemnation for Novelty of Legislation.

The fact that legislation is novel demands that it be scrutinized with special care, but does not dictate its condemnation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 53; Dec. Dig. § 58.*]

9. Navigable Waters (§ 12*)—Improvement of Rivers—Assessment of Adjacent Land for Benefits.

Though it is usual for the state to pay the expense of improving the channels of navigable rivers, it may impose an assessment on adjacent lands specially benefited, as is done by the act of 1905 (St. 1905, p. 443, c. 368), creating the Sacramento Drainage District.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 25; Dec. Dig. § 12.*]

10. Statutes (§ 60*)—Determination of Validity—Questions Considered.

The power to legislate, and not the propriety of legislation, is the only question for determination in considering the validity of a statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 55; Dec. Dig. § 60.*]

11. Statutes (§ 126*)—Expression in Title of Subject of Act—Consideration of Question in Quo Warranto.

Where inquiry is made in quo warranto brought under Code Civ. Proc. § 803, as to the validity of an act depending on whether it embraces a subject not contained in its title, and the legitimate subject-matter of investigation is the usurpation of an office or franchise, it is only in the event that the unexpressed provision, or provisions, may be essential to the law itself, that it becomes material to consider the question.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 195; Dec. Dig. § 126.*]

12. Statutes (§ 105*)—Subjects and Titles of Acts—Purpose of Constitutional Restrictions.

The purpose of Const. art. 4, § 24, declaring that every act shall embrace but one subject, which shall be expressed in its title, was not to hamper legislation, but to check and prevent deception therein.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 117, 118; Dec. Dig. § 105.*]

13. Statutes (§ 123*)—Subjects and Title of Act Relating to Drainage.

The act of 1905 (St. 1905, p. 443, c. 368), entitled "An act to create a drainage district to be called 'Sacramento Drainage District,' to promote drainage therein; to provide for the election and appointment of officers of said drainage district; defining the powers, duties and compensations of such officers and providing for the creation, division and management of reclamation, swamp land, levee, drainage and protection districts within said Sacramento Drainage District, and providing for levying and collecting assessments upon the lands within said drainage district," is broad enough to disclose that its general purpose is to provide a scheme for the betterment of the lands lying within the described area, and the subject-matter of the benefits which might accrue to the land in the event of the rectification and deepening of river channels was subordinate, germane to, and within the general purpose of the title, and did not call for express mention therein, and hence the act does not violate Const. art. 4, § 24, because the title does not expressly mention such subject.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 180; Dec. Dig. § 123.*]

14. Statutes (§ 125*)—Subjects and Title of Act Relating to Drainage.

The creation of the board of river control is not only within the purpose, but within the very title, of the act, and the powers conferred on the officers are in legitimate aid of its general purpose, and as to these subjects there is no violation of such section of the Constitution.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 189; Dec. Dig. § 125.*]

15. Statutes (§ 64*)—Act Creating Drainage District—Validity as Affected by Conferring Excessive Power on Officers.

If the power conferred on the officers as to some specific matter by the act of 1905 (St. 1905, p. 443, c. 368), creating the Sacramento Drainage District, is excessive, it would not tend to destroy the law as a whole.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 61; Dec. Dig. § 64.*]

16. Drains (§ 16*)—Power of Legislature Over Drainage Districts.

The Legislature, with due regard to vested rights, has power to abolish drainage districts and create a board of commissioners to manage future works of reclamation, and that it did less than this by the act of 1905 (St. 1905, p. 443, c. 368), creating the Sacramento Drainage District, by conferring on such a board supervisory control of districts, while continuing their existence, is but an exercise by it of its plenary power.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 4, 5; Dec. Dig. § 16.*]

17. Constitutional Law (§ 48*)—Act Creating Drainage District—Presumption of Constitutionality.

Where the Legislature has itself spoken in the creation of a drainage district, such as the

Sacramento Drainage District, by the act of 1905 (St. 1905, p. 443, c. 368), and where its determination may be deemed to depend on a question of fact, it is conclusively presumed that it took evidence, and the decision which it reached is not subject to review by the courts, which will confine themselves exclusively to questions appearing on the face of the statute itself.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.*]

18. CONSTITUTIONAL LAW (§ 290*)—DUE PROCESS OF LAW—EQUALIZATION OF ASSESSMENTS FOR DRAINAGE.

Though by the act of 1905 (St. 1905, p. 443, c. 368), creating the Sacramento Drainage District, the board of commissioners, in equalizing assessments for benefits, hears complaints and corrects errors, and its determination is declared to be final and may therefore be said to act in this respect judicially, the act does not either create a court or confer judicial powers on executive and judicial officers, in violation of Const. art. 6, §§ 1, 5, and as against a fraudulent exercise of its power recourse may be had to the courts, the requirement of due process of law is satisfied in the creation of such tribunal with the powers conferred on it to hear and correct errors and abuses, on reasonable notice to the property owner.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 875; Dec. Dig. § 290.*]

19. DRAINS (§ 17*)—ASSESSMENTS OF BENEFITS—DISQUALIFICATION OF COMMISSIONERS TO ACT.

The members of the board of drainage commissioners, under the act of 1905 (St. 1905, p. 443, c. 368), creating the Sacramento Drainage District, are apportioned amongst the counties embraced in the territory and are elected by the owners of real property within the district; each owner being entitled to cast one vote for each dollar's worth of property. *Held*, that the members of the board, as thus constituted, were not disqualified to act as a tribunal to hear objections to an assessment for benefits because they are landowners within the district.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 11; Dec. Dig. § 17.*]

20. DRAINS (§ 67*)—DOUBLE TAXATION—ASSESSMENT FOR DRAINAGE BENEFITS.

Special assessments for benefits in a drainage district do not constitute a double tax on the land.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 73; Dec. Dig. § 67.*]

21. CONSTITUTIONAL LAW (§ 121*)—OBLIGATION OF CONTRACTS—ACT CREATING DRAINAGE DISTRICT.

As against an objection that the act of 1905 (St. 1905, p. 443, c. 368), creating the Sacramento Drainage District, impairs the obligation of existing contracts, it is a sufficient answer that the act does not in terms attempt to do so, and that the state has an undoubted right to vary its plans for reclaiming lands, and in so doing to create new or different agents or mandatories, as was done in this case, and if in the operation of its new laws an attempt is made to impair vested rights, the attempt, on proper showing before a court, would be held nugatory.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 309; Dec. Dig. § 121.*]

22. ELECTIONS (§ 60*)—ELECTION OF COMMISSIONERS OF DRAINAGE DISTRICT—PROPERTY QUALIFICATION OF VOTER.

The requirement by the act of 1905 (St. 1905, p. 443. c. 368), creating the Sacramento Drainage District, of a property qualification for a voter in the election of drainage commissioners, does not violate Const. art. 1, § 24, declaring that no such qualifications shall ever be required for any person to vote or hold office.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 60.*]

In Bank. Appeal from Superior Court, Sacramento County; G. W. Nicol, Judge.

Quo warranto by the People, on the relation of one Chapman, against the Sacramento Drainage District and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Arthur C. Huston, W. H. Grant, and U. S. Webb, Atty. Gen., for appellant. Devlin & Devlin and George & Dinsdale, for respondents.

HENSHAW, J. This is a proceeding in quo warranto, brought under section 803, Code Civ. Proc. That section authorizes the Attorney General in the name of the people of the state, upon his own initiative, or upon that of a private person, to prosecute an action against any person "who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within this state."

In 1905 (St. 1905, p. 443, c. 368), the Legislature passed an act entitled "An act to create a drainage district to be called 'Sacramento Drainage District,' to promote drainage therein; to provide for the election and appointment of officers of said drainage district; defining the powers, duties and compensations of such officers and providing for the creation, division and management of reclamation, swamp land, levee, drainage and protection districts within said Sacramento Drainage District, and providing for levying and collecting assessments upon the lands within said drainage district." The provisions of this act, so far as material to the present consideration are as follows: The Legislature created a drainage district, defining the boundaries thereof and the lands embraced therein. These lands are situated in the counties of Sacramento, San Joaquin, Solano, Yolo, Colusa, Sutter, Yuba, Placer, Glenn, and Butte, and this territory embraces in part, lands already organized into reclamation, drainage, swamp land, or levee districts. The act provides for the selection of drainage commissioners, nine in number, apportioned amongst the above-named counties. These commissioners are to be elected by the owners of real property within the district; each owner being entitled to cast one vote for each dollar's worth of property. Provisions are made for the conduct of these elections and the filling of vacancies which may arise in the board. With other powers, the board of drainage commissioners is given supervisory control over the proposed work of reclamation districts within the limits of the drainage district, is empowered "to approve or disapprove any plan of reclamation in any reclamation district, to compel the construc-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion and maintenance of necessary reclamation works in reclamation districts, to appoint trustees of reclamation districts in case of vacancies, and in general, to do all other acts and things necessary or requisite for the full exercise of their powers, or necessary for the promotion of the reclamation of lands within the drainage district." In this connection power is expressly conferred "to supervise and control the formation, consolidation or division of reclamation districts within said drainage district." When necessary, the board may levy an assessment upon the lands within the district, and in the levying of such assessment the board is required to make an estimate of the sum necessary. It is then to appoint three disinterested persons as assessors. These assessors are to assess upon the land within the drainage district the sum so estimated by the board of drainage commissioners, and shall "apportion the same according to the benefits that will accrue to each tract of land in said district respectively by reason of the expenditure of said sums of money." The assessors are required to make their lists, describing the tracts of land assessed, with the names of the owners, if known, and the amount assessed against each tract. These lists are to be filed with the secretary of the board of drainage commissioners, who in turn shall forward to the county treasurer of each county the assessment list for such county, which shall be open to inspection by the public. Thereupon the board of drainage commissioners is to appoint a time and place for each county, when and where it will meet for the purpose of hearing objections to the assessments. Notice is to be given by publication for two weeks in a newspaper in the county published nearest to the district. Any person believing himself to be injured by the assessment may present his grounds of objection thereto, and at its meeting the board of drainage commissioners shall hear the evidence offered touching the correctness or equity of such assessment, "and may modify or amend the same, and the decision of said board of drainage commissioners shall be final, and thereafter said assessment list shall be conclusive evidence that the said assessment has been apportioned according to the benefits that will accrue to each tract of land in said district, and such assessment shall constitute a lien upon the lands so assessed." After thus equalizing the assessment, the moneys called for thereunder are to be paid into the county treasury in installments in such amounts and at such times as the board shall by order direct; 60 days being allowed for payment after such order. The board of drainage commissioners is authorized to begin suit in the superior court of the county where the land is situated for the collection of delinquent and unpaid assessments, and for the foreclosure of the lien upon the property in enforcement of such collection.

A board known as the "Board of River Control" is also created. This board consists of two members, appointed by the Governor of the state, one of whom is to be the president of the board of drainage commissioners, and the other some competent civil engineer. The duties of the board of river control are, for the most part, advisory. This board has supervision of all levees and canals intended to do duty in disposing of flood waters. It is empowered to acquire from private owners or from reclamation, swamp land, or other districts, such rights of way, easements, and property as may be necessary for its purposes. It is the duty of the board to advise and consult with such board or officers as may be appointed by the government of the United States, to devise and construct works for the improvement and rectification of the channels of the Sacramento and San Joaquin rivers and their tributaries. It is its duty also to examine all plans and specifications which may be prepared or adopted for the construction of the works for the controlling of flood waters or improvement of the channels of the rivers and their tributaries, and to submit a copy of all such plans and specifications to the state board of examiners for the latter's investigation and consideration. When called upon, the board is to confer and advise with the state board of examiners upon the matter of these plans.

Within six months after the organization of the board of drainage commissioners, this board is to appoint a committee of three persons to act in conjunction with a similar committee appointed by the Governor of the state of California to determine the proportion to be borne by said district and state, respectively, of the cost of constructing and completing either the work recommended in the report of certain named engineers, or the work called for by such other plan as shall be approved by the state board of examiners. When this cost has been apportioned, and the apportionment approved by the board of drainage commissioners, the latter shall appoint three assessors—disinterested persons—who, in the manner above outlined, shall proceed to assess upon the lands within the drainage district the sum apportioned against said district as its proportion of the cost of the work. All the proceedings for the levying, equalizing, and collecting of such assessment are prescribed as above set forth. It is provided, however, that no part of this assessment shall be called in or collected "until the state of California and the government of the United States, or one of them, shall have made an appropriation, or other legal provision, for the payment of the balance of the sum to be expended jointly with said district in performing the work according to the plans adopted, and in case payment of said sum by the state or by the United States shall not be provided for within five years from the time said assessment shall have been levied, said assessments shall become void, and the lien thereof upon the lands shall expire." Provisions then follow for the formation of new reclamation districts within the area of the drainage district, under the supervision and control of the drainage commissioners, and for the consolidation of existing districts, under like supervision and control. And, finally, it is provided that until legal provision has been made by the state of California or the government of the United States, for the payment of such proportion of the cost of the work as may be charged to them, or either of them, under the adopted plan, the powers of the board of drainage commissioners conferred by the act are suspended, excepting that the board may cause to be levied and collected an assessment, not exceeding the sum of $50,000, to be used in the furtherance of the general plan, and the powers of all boards of supervisors, trustees of reclamation and other districts are continued in force until the general powers of the drainage commissioners shall have become fully effective.

The purpose and scope of the act are clearly discernible from a reading of it. The causes which led to its enactment form a part of the history of the state. Riparian, or in proximity, to the great San Joaquin and Sacramento rivers, are vast tracts of low-lying lands, some strictly swamp lands, others subject to overflow at the usual stages of high water, others liable to inundation in times of extraordinary freshet, but all requiring the expenditure of money in the construction of levees, drainage ditches, and pumping plants for their reclamation and subjection to economic use. Some of these lands, and indeed some embraced within the drainage district thus created, were acquired by the state of California from the United States under the Arkansas act, and in turn were sold into private ownership by the state. Others came into the hands of private owners by mesne conveyances; the original source of such titles being the government of Spain or Mexico, whose grants were confirmed by the United States. Aside from any duty which it may be conceived that the state of California owed to the United States because of the trust upon which it took the lands under the Arkansas act, it was clearly desirable and beneficial to the state that all of these lands should be reclaimed for purposes of husbandry. This improvement would add great wealth to the state, and this improvement therefore would result in a public benefit. Upon the other hand, the specific lands thus reclaimed would be especially benefited by their enhanced and assured productiveness, and it was proper that such lands should bear the cost of the work of reclamation proportioned to the benefits which they would thus receive. Such being the condition, levee districts, drainage districts, and reclamation districts came into existence, some by special legislative enactment, others under general and permissive laws. One and all these laws had in view the same end—the reclamation of the lands from the excess of waters which poured upon them, and the opening of them to uses otherwise impossible, with the increase in settlement, population, and general prosperity which inevitably would follow. In time two impeding difficulties came to be perceived: (1) That, because of the great number of such small districts, each operated independently and under no general plan for the good of all, much money and labor were wasted. Since there was no common and harmonious plan of reclamation, one district frequently worked in antagonism to another. The operations or the neglect of one district might tend to imperil the existence of another; while the extravagant use of money, made necessary because of the lack of concerted action and because each district was obliged to fight not alone the common enemy—the water—but perhaps equally an adjoining district, put burdens upon many of the districts which soon became intolerable, with the result that the districts themselves were sometimes abandoned, and their works fell into disrepair and disuse. (2) Owing to the sediment and débris settling upon the bottoms of these rivers, the plane of their water levels was heightened, to the increased endangerment of the adjacent lands. In times of flood it became more and more difficult for these rivers to carry and discharge their waters through the natural channels, and the condition soon became a matter of state and national concern. The government of the United States primarily, and of the state secondarily, having in them vested the exclusive management and control of navigable waters, were confronted with the corresponding duty of preserving the two great inland water highways of the state. The accomplishment of this called for the deepening and the rectification of the river channels, matters exclusively of federal or state cognizance. In turn, however, such deepening and rectification, by enabling the rivers successfully to carry and dispose of their flood waters, would greatly facilitate the labor of reclamation imposed upon the owners of the adjacent lands. Thus, in outline, is presented the situation with which the state was confronted. Itself, or the federal government, or both, would take charge of the work of widening, deepening, and straightening the river channels. Itself, or the federal government, or both, would provide funds for the payment of this work. Upon the other hand, the lands adjacent to the rivers would be greatly and directly benefited by this work, and should be subject to special assessment to pay for the special benefit thus received. Such being the situation, it was deemed expedient by the state to form one large district, to the end that the commissioners of such district might by exercising supervisoral control over the smaller districts, and by adopting one general plan of reclamation, economize in expenditures, save the extravagant waste of moneys which had been a part of their past history, and by a general assessment over a large area materially lessen, perhaps, the burden which the landowners might otherwise be called upon to bear. These were the obvious reasons actuating the Legislature in formulating the scheme in the act under consideration. It is to be considered whether the expression which they gave to their plan does violence to the Constitution.

1. The question of the power of the Legislature, in a proper case, to impose a burden in the nature of a tax upon specific lands, in proportion to the estimated special benefits which those lands will receive from the work done, may not be doubted. The limitation upon its power, it is well settled, is this: That to sustain such a law it must appear that the character of the work is such that its performance confers some general benefit on the public as well as a private benefit on the landowner; and that the improvements here contemplated are of such character has long been definitely settled. So complete is the power of the state over swamp and overflowed lands that its power to provide for reclamation of them is not limited to those lands the title to which was acquired under the Arkansas act; but it exists as to all swamp and overflowed lands in the state, even if the title was derived from a Spanish or Mexican grant. Hagar v. Yolo Co., 47 Cal. 222; Hagar v. Rec. Dist., 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569; Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 163, 17 Sup. Ct. 56, 41 L. Ed. 369.

2. The act does no violence to article 1, § 11, nor to article 4, § 25, nor to article 11, § 6, of the Constitution of the state. That the district here organized, if it be considered a corporation at all, is not a corporation organized for municipal purposes within the contemplation of article 11, § 6, of the Constitution, must be taken as well settled. People v. Reclamation District 551, 117 Cal. 114, 48 Pac. 1016; People v. Levee District No. 6, 131 Cal. 30, 63 Pac. 676; Reclamation District v. County of Sacramento, 134 Cal. 477, 66 Pac. 668. It is unnecessary to repeat the reasons set forth in the decisions in those cases by which the conclusion there reached was expressed, to the effect that such districts are, in strictness, not corporations at all, but rather governmental agencies to carry out a specific purpose; the agency ceasing with the accomplishment of the purpose. But, additionally, it may be said that the likeness of these agencies to corporations is superficial, and that the similitude—for it is no more than this—ceases if consideration be paid to the fact that the state could accomplish this very work without organizing a district as such at all, and without giving the landowners within the district any voice in the selection of the managers or trustees. Thus it would be perfectly legal and competent for the Legislature, delimiting a tract of land, itself to appoint a commissioner or commissioners to perform all of the functions which, under the existing schemes, are performed by the trustees and the assessors. In fact, historically, such was the original method adopted when, in the reign of Henry VIII, the first statute was passed providing for the construction of sewers, drains, and other improvements designed to reclaim swamp lands (St. 23 Hen. VIII, c. 5, par. 1 [1531]), and such is the method still adopted in many of the states of this nation. It is in accord with the progressive spirit of our government to give to the people, or any part of them, the largest possible control in matters peculiarly affecting them and their interests. It is a concession to this spirit, and not the compulsion of the law, which prompts the Legislature to give the landowners so large a voice in the control of such affairs.

Nor, while a special act, is the law obnoxious to the other sections of the Constitution above cited. The considerations dictating the necessities of a special law are plain as above set forth. It would require a clear showing upon the face of the law itself that a special act was not required, before a court would interfere with the determination of a co-ordinate branch of the government upon this subject, and, generally, as is said in People v. McFadden, 81 Cal. 489, 22 Pac. 851, 15 Am. St. Rep. 66, the determination of such a matter "depends upon questions of fact which this court has no means of investigating, and upon the solution of which it would not attempt to substitute its judgment in place of that of the Legislature."

3. It is argued with much earnestness that no such law as this has heretofore ever been found upon the statute books, and that it should be condemned as unconstitutional, as being a covert attempt upon the part of the state, under the guise of assessment for special benefit, to force upon the unfortunate landowners the cost of the work for which alone the sovereign state should pay—the work of the improving of the channels of its navigable rivers. The fact that legislation is novel demands of a court that it be scrutinized with exceptional care; but it does not dictate its condemnation. It is true that the protection and development of its harbors and waterways (subject always to the paramount right of the United States) are matters of state consideration and control. It is true also that usually, since the work is for the general benefit of all of the people, the expense is met by the state itself; but it does not herefrom follow that in every case it is the legal duty of the state so to bear the burden. Whenever the Legislature has spoken, the question before the court is not the propriety of its legislation, but its power to legislate. The harbor of San Francisco is benefited for purposes of navigation and commerce by a sea wall along the water front. At the same time it will not be questioned that the lands held in private ownership in

close proximity to such sea wall, and which without such sea wall would be inundated "water lots," are especially benefited by this harbor work. The state, if it elects, may pay all the cost; but it will not be denied that the state has the power to impose upon the adjacent lands specially benefited by the work an assessment in proportion to such benefits, to defray a part of the cost. Or, again, in the matter of governmental power and control, the water highways of the state do not differ from the land highways. The power of the state to exact payment for the improvement of its streets from the owners of land adjacent thereto, in proportion to the benefits which their lands receive, is unquestionable and unquestioned. Legislation, which in like manner exacts similar contribution from lands adjacent to the inland waterways for like considerations, stand upon the same ground, and for the same reason may not be successfully assailed. The two classes of legislation are congeneric and have their origin and draw their inspiration from the same power and source—the governmental power of the state to tax, and to especially tax for a public purpose, where the work to be performed will confer a special benefit upon the property of the particular landowner, as distinguished from the general good which it will work to all.

4. It is urged the act does violence to article 4, § 24, of the Constitution, in embracing more than one subject-matter and in not embracing in its title the principal subject-matter. The penalty which the Constitution imposes upon such legislation is to make void the matter which is not expressed in the title. This inquiry being in quo warranto, and the legitimate subject-matter of investigation being the usurpation by defendants into an office or franchise, it may be that the act contains provisions not germane to nor fairly embraced within the subject-matter of the title; but only in the event that such an unexpressed provision or provisions may be essential to the existence to the law itself does it become material to this consideration. If not fatal to the life of the act, such provisions fall, without destruction of the act itself, and their consideration and discussion would have no proper place upon this appeal. The title of the act has been quoted above. It is contended that this title masks, conceals, indeed, omits reference to the principal purpose of the act, which is the improvement of the river channels, and the throwing of the burden of the cost of such improvement upon the private landowner. It may be conceded that the title of the act contains no suggestion that in the promotion of drainage and reclamation of the lands within the district the improvement of the river channels is contemplated; but the title is broad enough in its language to disclose that the general purpose of the act is to provide a scheme for the betterment of the lands lying within the described area. Such aspects of the rectification and improvement of the river channels as are set forth in the act, if falling within and germane to the general purpose announced by the title, did not require expression in that title. The two great purposes of the act, as above suggested, are, first, to bring into harmony under one general board of control the plans and work of existing districts and of the other lands not in them embraced. All this is quite independent of the matter of the improvement of the river channel. The second purpose is contingent upon the action of the state or federal government. It contemplates—still for the general purpose of the promotion of the reclamation of the lands—that it shall be determined what benefit those lands will receive, if and when the government shall undertake this work. It was not the purpose of the constitutional provision here invoked to hamper legislation, but to check and prevent deceptive legislation (Cooley, Const. Lim. [6th Ed.] p. 175; Ex parte Liddell, 93 Cal. 638, 29 Pac. 251; Law v. San Francisco, 144 Cal. 388, 77 Pac. 1014; Beach v. Von Detten, 139 Cal. 462, 73 Pac. 187; People v. Linda Vista Irr. Dist., 128 Cal. 477, 61 Pac. 86), and we hold that the subject-matter of the benefits which might accrue to the land in the event of the rectification and deepening of the river channels was subordinate, germane to, and within the general purpose of the title, and did not call for express mention in that title.

The other considerations presented by appellant as showing that the body of the act contains a multiplicity of subjects foreign to its title may be disposed of collectively. From what has been said, it appears that the creation of the board of river control is not only within the purpose, but within the very title, of the act. The other objections go to the powers conferred upon the officers, and it may be seen that these powers are in legitimate aid of the general purpose of the act. If it should hereafter be found that as to some specific matter excessive power had been conferred, it would be so decreed; but the decision would not tend to destroy the law as a whole. Upon the general subject-matter of the management and control over the existing districts, vested in the board of commissioners of the district here created, it may be suggested that it was within the unquestioned power of the Legislature, with due regard to vested rights, to have put out of existence all of these districts, and, having done so, to have created a board of commissioners to manage future works of reclamation. That it has done less than this, by conferring upon such a board supervisoral control of these districts, while continuing their existence, is but an exercise by the Legislature of less than its plenary power.

5. It is argued that the act in question works a taking of the landowner's property

without due process of law. Herein it is insisted: (a) That the landowner was denied a hearing to which he was entitled upon the question of the inclusion or exclusion of his land; (b) that an illegal and unconstitutional tribunal was created to pass upon and determine the question of the benefits which his land, so improperly included, may receive, in violation of article 6, §§ 1 and 5, of the Constitution.

(a) Where the Legislature has itself spoken in the creation of a district such as this, and where the legislative determination may be deemed to depend upon a question of fact, it is conclusively presumed that the Legislature took evidence in its determination, and the decision which it has reached will not be subject to review by the courts. The latter will confine themselves exclusively to questions appearing upon the face of the statute itself. Stevenson v. Colgan, 91 Cal. 649, 27 Pac. 1089, 14 L. R. A. 459, 25 Am. St. Rep. 230; Lewis v. Colgan, 115 Cal. 529, 47 Pac. 357; Smith v. Mathews (Cal.).[1] Says Judge Cooley (Const Lim. [6th Ed.] p. 220): "If evidence was required, it must be supposed that it was before the Legislature when the act was passed, and if any special finding was required to warrant the passage of the particular act, it would seem that the passage of the act itself might be held equivalent to such finding." This court has said, commenting upon this language: "This view seems to be sustained by the decisions of the highest courts of other states and is in harmony with the central idea of the Constitution in prescribing the independence and equality of the three great departments of the state." Stevenson v. Colgan, supra. Speaking directly upon this subject-matter, the Supreme Court of the United States has said (Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 174, 17 Sup. Ct. 56, 69, 41 L. Ed. 369): "It has been held in this court that the Legislature has power to fix such a district for itself without any hearing as to benefits, for the purpose of assessing upon the lands within the district the cost of a local public improvement. The Legislature, when it fixes the district itself, is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of the benefits to the land included in the district, and the citizen has no constitutional right to any other or further hearing upon that question. The right which he thereafter has is to a hearing upon the question of what is termed the apportionment of the tax, i. e., the amount of the tax which he is to pay."

(b) Upon the amount of the tax which the landowner is to pay, the scheme by which that amount is to be apportioned and assessed has been outlined above. It will be remembered that, after disinterested persons have made their assessment, a notice of the time and place of the sitting of the board of drainage commissioners for the purpose of equalizing the assessment is to be given, the board is to hear complaints and correct errors, and its determination is declared to be final. It is insisted that this either creates a court or confers judicial powers upon executive and administrative officers, in violation of the constitutional provision of article 6, §§ 1 and 5, of the Constitution. That the board sitting to equalize the assessments acts judicially must be conceded. The very purpose for which it sits is to act judicially for the correction of errors and abuses in the original assessment; but to say that for this reason the Legislature has attempted to create a court in violation of the Constitution is a proposition to which assent must be denied. Many acts, judicial in their nature, must of necessity be performed by the executive and administrative officers of the government. The decisions of such officers upon any controverted question, upon any question even in which there is play for discretion, are in their nature judicial; but because this is so, and necessarily so, it does not follow that they are usurping the exclusive functions of the courts of the land, and, if they are not doing so, the power which they exercise may not thus be questioned. City councils and boards of supervisors annually fix the rates which water consumers within their territories shall pay to the quasi public corporations furnishing such water. Here these boards are called upon to consider and decide controverted questions of fact of great moment and of much nicety. Their decrees fixing rates contain many of the elements of a judgment. They are binding determinations upon the water company upon the one hand and upon the consumer upon the other. Yet, the power of these boards to exercise such quasi judicial functions has been upheld. Upon this very subject the Supreme Court of the United States, speaking through Chief Justice Waite, has said: "Like every other tribunal established by the Legislature for such a purpose, their duties are judicial in their nature, and they are bound in morals and in law to exercise an honest judgment as to all matters submitted for their official determination. It is not to be presumed that they will act otherwise than according to this rule." Spring Valley Waterworks Co. v. Schottler, 110 U. S. 347, 4 Sup. Ct. 48, 28 L. Ed. 173. And, after quoting this language, that same court, speaking of the power of the board of supervisors under the irrigation district laws to pass upon the question of benefits, says: "In that case the board was to fix the price of water, while in this it is to determine the fact of benefits to lands. The principle is the same in each case." And, in this connection, it is declared that such a board, having the power to hear and determine the question of benefits, is a proper and sufficient tribunal to satisfy the constitutional requirements of due process of law. Fallbrook Irr. Dist. v. Bradley, 164 U. S. 169, 17 Sup. Ct. 67, 41 L. Ed. 369. And so in Hagar v. Rec. Dist., 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569, where the same subject is under discussion, it is said: "But where a tax is levied on property not specifically but according to its value, to be ascertained by assessors appointed for that purpose upon such evidence as they may obtain, a different principle comes in. The officers in estimating the value act judicially, and in most of the states provision is made for the correction of errors committed by them, through boards of revision and equalization, sitting at designated periods provided by law to hear complaints respecting the justice of the assessments. The law, in prescribing the time when such complaints will be heard, gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law." Against a fraudulent exercise of this power, recourse may, of course, be had to the courts. Irr. Dist. v. Tregea, 88 Cal. 334, 26 Pac. 237. But, otherwise, the requirement of due process of law is satisfied in the creation of this tribunal, with the powers conferred upon it to hear and correct errors and abuses, upon reasonable notice to the property owner.

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[1] Rehearing granted. For opinion on rehearing, see 103 Pac. 199.

6. The members of the board of drainage commissioners, as the board is constituted, are not disqualified by interest to act as a tribunal to hear objections to the assessment by reason of the fact that they are landowners within the district. Members of the boards of supervisors and of city councils, in adjusting water rates, are themselves consumers, and to that extent have an interest in the subject-matter of their decision; but they are not therefore disqualified. The principle is the same in this case. Hamilton, Special Assessments, 138; Hibben v. Smith, 191 U. S. 310, 24 Sup. Ct. 88, 48 L. Ed. 195.

7. Nor is there a double tax upon the land. The special assessment for benefits is upon the theory that, to the amount of such assessment, the land is directly benefited. Such general tax as the land may pay to the state stands upon an entirely different foundation. The owner of land fronting upon a street, who is assessed for special benefits for the street work, does not suffer double taxation when that land is assessed, and is again subject to general tax by the city or state, even though a portion of the money so derived should go to the maintenance of the highway in front of his property.

8. The act in terms does not attempt to impair the obligation of existing contracts. The state has the undoubted right to vary its plans for the reclamation of these lands, and in so doing to create new or different agents and mandatories. If in the operation of its new laws an attempt should be made to impair vested rights, the attempt, upon proper showing before a court, would unquestionably be held nugatory.

9. No violence is done by the act to the constitutional inhibition against requiring a property qualification for a voter. Const. art. 1, § 24. This objection is completely disposed of by People v. Rec. Dist. 551, 117 Cal. 114, 48 Pac. 1016. The assessments are for local improvements, not for general purposes of taxation, and the Legislature permits the landowners to appoint their own agents. The method which it imposes upon the landowners in making the selection is wholly within its control; for, as has been said, it is not compelled to give the landowners any voice in that selection.

We have thus discussed all the points advanced upon appeal and pertinent to this consideration under quo warranto. The questions presented arise upon the rulings of the court in striking out portions of the petition and in sustaining a general demurrer thereto.

For the reasons above given, the rulings complained of were correct, and the judgment appealed from is affirmed.

We concur: MELVIN, J.; SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.

The CHIEF JUSTICE, being a partner interested as a landowner within the boundaries of the Sacramento Drainage District, did not participate in the foregoing.

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155 Cal. 808

PEOPLE v. BRADBURY. (Cr. 1,496.)

(Supreme Court of California. June 30, 1909. Rehearing Denied July 30, 1909.)

1. Indictment and Information (§ 93*)—Requisites.

The particular circumstances necessary to show a complete offense must be pleaded in the indictment charging the offense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 266–268; Dec. Dig. § 93.*]

2. Perjury (§ 24*) — Indictment — Setting Out Testimony.

An indictment charging perjury may allege the perjury in the exact language employed, or in its substance.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 81; Dec. Dig. § 24.*]

3. Perjury (§ 24*)—Indictment—"To Tell."

An indictment for perjury which charges that accused falsely testified that he never went to a bank, and told the bank not to loan to a third person money to meet an obligation, etc., sets forth the perjurious matter as against the objection that it fails to name the bank officer to whom accused made the statement; for, though the words "to tell" import oral communication, they may be employed where the communication is by writing.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 81; Dec. Dig. § 24.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. PERJURY (§ 26*)—INDICTMENT—ASSIGNMENT OF PERJURY—SUFFICIENCY.

The assignment of perjury consists of an express contradiction of accused's statement on oath explained by innuendo, when necessary, and, where the statement charged as false is of a particular fact, it is sufficient in the averment to negative that fact, but, where the statement is general and the existence of a particular fact makes it false, that fact must be alleged positively.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 90–94; Dec. Dig. § 26.*]

5. PERJURY (§ 26*) — INDICTMENT — ASSIGNMENT OF PERJURY—SUFFICIENCY.

An indictment for perjury averring that accused falsely testified that he had never gone to a bank, and told the bank not to loan to a third person money to meet a certain obligation, and that accused had told the bank not to loan any money, is subject to special demurrer for failing to comply with Pen. Code, § 952, subd. 3, providing that the indictment must be direct, as to the particular circumstances of the offense charged, by alleging in the assignment of perjury the name of the bank officer.

[Ed. Note.—For other cases, see Perjury, Dec. Dig. § 26.*]

6. INDICTMENT AND INFORMATION (§ 148*)—PERJURY—DEMURRER—QUESTIONS RAISED.

A demurrer to an indictment charging perjury on the grounds that it did not meet the requirements of Pen. Code, § 952, in that the indictment was not direct and certain as to the particular circumstances of the offense charged, in that it could not be determined whether a designated court was a tribunal having jurisdiction, and whether the oath was duly administered, and that the indictment did not meet the requirements of section 966, declaring that proper allegations of the falsity of the matter on which perjury is assigned shall be made, did not raise the question whether the indictment sufficiently assigned perjury by an express contradiction of accused's statement on oath.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 148.*]

7. CRIMINAL LAW (§ 1032*)—APPEAL—QUESTIONS REVIEWABLE—QUESTIONS NOT RAISED IN TRIAL COURT.

One charged with perjury cannot for the first time on appeal attack the indictment on the ground that the assignment of perjury therein was insufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2627; Dec. Dig. § 1032.*]

8. PERJURY (§ 23*) — INDICTMENT—ALLEGATION OF ADMINISTERING OATH TO ACCUSED.

An indictment for perjury which alleges that accused was duly sworn before the superior court in open court, that the evidence that he should give to the court should be the truth, etc., charges that accused was sworn to testify truly.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 80; Dec. Dig. § 23.*]

9. PERJURY (§ 22*) — INDICTMENT — ALLEGATION OF ADMINISTERING OATH TO ACCUSED.

Since Const. art. 6, § 14, declaring that the county clerks shall be ex-officio clerks of the courts of record for their respective counties, creates the office of clerk of the superior court, an indictment for perjury charging that the oath was administered to accused by a designated person who was the duly appointed, qualified, and acting deputy clerk of the superior court shows that the oath was administered by one authorized so to do.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 76–79; Dec. Dig. § 22.*]

10. CRIMINAL LAW (§ 1137*)—APPEAL—INVITED ERROR.

Accused cannot complain of an instruction given at his own request.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3007–3010; Dec. Dig. § 1137.*]

11. CRIMINAL LAW (§ 1172*)—APPEAL—HARMLESS ERROR.

Accused cannot complain that instructions were confusing to the jury, where such confusion operated to his benefit.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3154–3160; Dec. Dig. § 1172.*]

12. PERJURY (§ 36*)—MATERIALITY OF TESTIMONY—QUESTION FOR COURT.

On a trial for perjury, whether the alleged perjured testimony was material is a question of law.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 133; Dec. Dig. § 36.*]

13. CRIMINAL LAW (§ 1172*)—APPEAL—HARMLESS ERROR.

Accused on trial for perjury cannot complain of the conflict between an instruction submitting the materiality of the alleged false testimony and an instruction that the materiality of the testimony is for the court, since the conflict operated to his benefit, for if the jury were led to believe that they could decide on the materiality of the evidence, and erroneously decided that it was not material, accused would obtain an acquittal to which he was not entitled.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3157, 3160; Dec. Dig. § 1172.*]

14. CRIMINAL LAW (§ 1172*)—APPEAL—HARMLESS ERROR.

That the jury, under an erroneous instruction on a trial for perjury submitting to them the materiality of the perjured testimony, correctly decided that the testimony was material, furnishes no ground for a reversal of the conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3161; Dec. Dig. § 1172.*]

15. PERJURY (§ 29*)—PROOF AND VARIANCE.

An indictment for perjury charging that accused falsely testified that he never went to a designated bank, and told the bank not to loan money to a third person, etc., is sustained by proof that accused made such a request of the then president and of the then teller of the bank.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 97–106; Dec. Dig. § 29.*]

16. PERJURY (§ 32*)—EVIDENCE—ADMISSIBILITY.

On the trial for perjury alleged to have been committed by giving false testimony on the trial of a civil action, the judgment roll in the civil action is admissible in evidence to show the pendency of the proceeding, the jurisdiction of the court, the giving of the testimony, and its materiality.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 110; Dec. Dig. § 32.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; Carroll Cook, Judge.

William Bradbury was convicted of perjury, and he appeals. Affirmed.

James W. Cochrane and Richard P. Henshall, for appellant. U. S. Webb, Atty. Gen., George Beebe, Deputy Atty. Gen., and Thos. P. Boyd, Dist. Atty., for the People.

HENSHAW, J. Defendant was indicted, tried, and convicted of the crime of perjury. He appeals from the judgment and from the order denying his motion for a new trial.

The indictment charged that defendant falsely testified that he "never went to the Marin county bank and told said bank not to loan to J. S. McCue money to meet the obligation that said J. S. McCue would be owing to said William B. Bradbury on the 22d day of October, 1904; that he, the said William B. Bradbury, never told the said Marin county bank not to loan any money to J. S. McCue." The averment of the falsity of these declarations is charged as follows, omitting unnecessary matter: "That the said William B. Bradbury did tell said Marin county bank prior to said 22d day of October, 1904, not to loan any money to said J. S. McCue." A demurrer was interposed to this indictment, and under this demurrer it is argued that the indictment is insufficient in failing to conform to section 952, subd. 3, Pen. Code; that is to say, that it does not allege the particular circumstances which here are necessary to constitute a complete offense. That, where necessary to show a complete offense, the particular circumstances must be pleaded, is, of course, well settled. It is sufficient to refer to such cases as People v. Lee, 107 Cal. 477, 40 Pac. 754; People v. Ward, 110 Cal. 369, 42 Pac. 894; People v. Ammerman, 118 Cal. 23, 50 Pac. 15; People v. Perales, 141 Cal. 581, 75 Pac. 170. Appellant in support of his demurrer argues, first, that the indictment insufficiently alleges the perjurious matter, in this: It avers that Bradbury denied "that he told the Marin county bank" not to loan money to McCue; that the verb "tell" carries the meaning of information or of request orally conveyed to an understanding mind; that a bank, whether a corporation or not, has no mind, and information can be conveyed to it only through some one or another of its officers; that it was necessary, therefore, in connection with this language, to have explained by innuendo the meaning of the language by naming the officer whom Bradbury told or of whom he made his request.

While in its more general use the verb "to tell" does import oral communication, yet, by well-accepted usage, it may be employed where the communication is by writing. "Tell: To recount, orally or in writing." Standard Dictionary. No more force inheres to the objection that the pleader was in error in not making more specific by innuendo the averment of the perjurious matter that defendant "told the Marin county bank." It is always a good pleading to allege the perjury in the exact language or in the substance of the language employed. So far, therefore, as concerns the mere setting forth of the perjurious matter, no demurrer for uncertainty can be taken, since the response of the pleader is that such was the language actually used. Moreover, it is a common practice to address a corporation by its name, and not by direct reference to any particular officer of it. A letter addressed to the Farmers' & Merchants' Bank "telling" them to do so and so would be the ordinary form of a business communication, and, if a witness falsely testified that he did not tell the Farmers' & Merchants' Bank so and so, the pleader in setting forth this perjurious matter would be required only to state the fact as it was, that the witness said that he did not tell the Farmers' & Merchants' Bank. Upon neither of these matters which we have so far considered can the demurrer be held well taken.

But there is another well-recognized principle applicable to the pleading of a perjury. This principle has to do, not with the averment of the perjurious matter which we have just considered, but with the assignment of perjury. The assignment of perjury consists of an express contradiction of the party's statement on oath, when necessary, explained by innuendo. That principle is this: That, if the statement charged as false is of a particular fact, it is sufficient in the averment to negative that fact. But if the statement is general, and the existence of a particular fact makes it false, that fact must be alleged positively. It is in this latter class of cases that the necessity of an averment by innuendo arises. "If the statement be general and the assignment as general in the negative—as if a man swear that he has paid all his debts, and the assignment be that he has not paid all his debts—this would be bad for want of certainty, as it would afford the defendant no information of what was intended to be proved; but the assignment must show in what respect, or in what instances, he has not done so." 2 Archibold's Cr. Pr. & Pl. p. 1737; U. S. v. Morgan, Morris (Iowa) 341, 41 Am. Dec. 234; 2 Wharton, Crim. Law, § 1303; 2 Bishop, New Crim. Law, § 917. Thus, if the perjurious matter in this case had been a statement by defendant that he had not asked any bank to refuse to loan McCue money, it would not be sufficient in the assignment of perjury to have alleged that in truth and in fact he had asked some bank. It would be necessary, further, for the enlightenment of the defendant to have specified the particular bank. The same principle is applicable to this pleading. Defendant was entitled, upon proper demurrer, to have had the pleading made more specific by naming to him the officer of the bank of whom he is said to have made this request. The force of this reasoning and of this rule becomes quite apparent, if an indictment be considered which charged the request as having been made of the Standard Oil Company, coupled with the averment that, in fact, the defendant did make the request of the Standard Oil Company. The agents of the Standard Oil Company are scattered throughout the states of the United States and in foreign countries as well.

Manifestly a defendant under proper demurrer directed to this point would be entitled to be informed whether he was charged with having made the request of an agent in China, in New York, in Texas, or in California, and who the particular agent was. In this respect, therefore, the indictment was obnoxious to a special demurrer for failure to comply with the requirements of section 952, subd. 3, Pen. Code. But the defendant did not direct his demurrer specifically to this matter. He did demur generally upon the ground that the indictment did not conform to the requirements of section 952, and he did demur upon the ground that the indictment was not direct and certain as to the particular circumstances of the offense charged. But in making his demurrer specific upon this point, as good pleading required him to do, he did not direct special or any attention to the matter here pressed for review. The specific grounds of demurrer were merely that the particular circumstances were insufficiently charged, in that it could not be determined (1) whether the superior court of Marin county was a competent tribunal having jurisdiction; and (2) whether the oath was administered according to law. The demurrer also alleges that the complaint does not substantially conform to the requirements of section 966 of the Penal Code, which, dealing with indictments for perjury, declares that "proper allegations of the falsity of the matter on which the perjury is assigned" shall be alleged. But, under this head, the demurrer does not attempt to specify the particular respect in which the indictment fails. That such a special demurrer must be interposed, to the end that the court may be enlightened upon the precise matter on which error is predicated, we think too plain to call for discussion. It is so decided by the Supreme Court of Utah, under provisions of their Criminal Code, conforming in all substantial particulars to the language of our own. People v. Hill, 3 Utah, 334, 3 Pac. 75. Defendant, therefore, may not be permitted here in this court and for the first time to urge this ground of special objection never presented to the trial court. See, also, Tucker v. State, 114 Ga. 61, 39 S. E. 926.

The contention that the indictment is defective in not alleging that the defendant was sworn "to testify truly" (People v. Simpton, 133 Cal. 367, 65 Pac. 834) is not well founded. The indictment charges "that the said William B. Bradbury was then and there duly sworn before the said superior court in open court, that the evidence that he, the said William B. Bradbury, should give to the said court, then and there touching the matters then in question in the trial of said civil action, should be the truth, the whole truth, and nothing but the truth." No precise form of words is exacted, and this language completely fills the requirement that the indictment should contain a statement to the effect that he was so sworn "to testify truly."

The indictment charged that the oath was administered "by F. S. Holland, who was then and there the duly appointed, qualified and acting deputy clerk of the superior court of the county of Marin, state of California." It is urged that this allegation fails to show that the oath was administered by a person authorized so to do. The argument is that there is no such officer known as "clerk of the superior court," and therefore no such officer as a "deputy clerk of the superior court." The Constitution, however, itself declares that the county clerks shall be ex officio clerks of the courts of record in and for their respective counties or cities and counties. Const. art. 6, § 14. Thus the office of clerk of the superior court is created by law, and it needs no citation of authority to the effect that in such matters a deputy may act for his principal.

The court instructed the jury that before it could find the defendant guilty of perjury, it must find "that he knowingly and willfully testified falsely in the manner and form charged in the indictment in this case, *excepting in one particular, which I will come to later.*" It is said that no subsequent instruction of the court explained the meaning of the italicized language, and that the effect of the court's omission in this regard was inevitably to leave the minds of the jurors in a state of confusion. The answers to this objection are threefold: First, it appears by the record that the instruction was one given at the request of the defendant, and therefore he may not complain of it; second, if the result of the court's failure was to leave the minds of the jurors in a confused state, such confusion, under the circumstances, would make for the benefit and not for the injury of the defendant; and, third, from the later instructions of the court the precise matter to which the exception has reference is made clearly to appear. That matter consisted of certain evidence alleged in the indictment to have been given by Bradbury which the court properly, as matter of law, determined was not material, and as to which the court instructed the jury that the defendant would not be guilty of perjury even if he had testified falsely concerning it.

The court instructed the jury that, before the defendant could be convicted of the crime of perjury, there must be established beyond a reasonable doubt and to a moral certainty by the testimony of at least two witnesses, or by the testimony of one witness and corroborating circumstances, certain facts amongst these, "that such testimony so alleged to be false was material to the issue then before the court." In another part of its charge the court declared to the jury: "Whether the testimony alleged to be false was or was not material is a question of law which is for the court to determine and not the jury. The question of the materiality of evidence, no matter when or how it may arise, is always one of law for the court and not of fact for the jury." This latter instruction was unquestionably sound in point of law. People v. Lem You, 97 Cal. 224, 32 Pac. 11; State v. Lewis, 10 Kan. 157; State v. Caywood, 96 Iowa, 367, 65 N. W. 385; U. S. v. Singleton (D. C.) 54 Fed. 488; Gordon v. State, 7 Atl. 476, 48 N. J. Law, 611. Appellant argues that by reason of the conflict in instructions, whereby in one the jury is told it must determine the materiality of the evidence, while in the other it is told that such materiality is always a question of law for the court to decide, should work a reversal of the case. But this conflict could not have been injurious to the defendant and must have made for his benefit; for, if the jury were led to the erroneous belief that they could decide upon the materiality of the evidence and had decided that it was not material, the defendant would have obtained an acquittal to which he was not entitled. The fact that under such an erroneous instruction the jury has decided the question of the materiality correctly, as here it did, furnishes no ground for reversal. Thompson v. People, 26 Colo. 496, 59 Pac. 51; State v. Lewis, supra; 22 Am. & Eng. Ency. of Law, 688. The evidence was sufficient to support the judgment. The materiality of the perjurious evidence is established by McCue v. Bradbury, 149 Cal. 108, 84 Pac. 993. It was shown that the defendant made this request of Mr. Cheda, the then president, and Mr. Hanson, the then teller, of the Marin county bank. This evidence was clearly sufficient to support the charge that the defendant told the bank. The judgment roll in McCue v. Bradbury was properly admitted in evidence, not, as appellant seems to think, for the purpose of establishing the truth or falsity of the testimony, but as tending to show the pendency of the proceeding, the jurisdiction of the court, the giving of the testimony and its materiality. 22 Am. & Eng. Ency. of Law, 692; People v. Lee Fat, 54 Cal. 527; State v. Blaisdell, 59 N. H. 328; People v. Macard, 109 Mich. 623, 67 N. W. 968; Smith v. State, 103 Ala. 57, 15 South. 866.

No other points presented by appellant merit particular mention.

For the foregoing reasons, the judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; SHAW, J.; MELVIN, J.; SLOSS, J.

(156 Cal. 32)

PETERS v. PETERS. (L. A. 2,259.)

(Supreme Court of California. July 3, 1909.)

1. Husband and Wife (§ 205*)—Actions Between—What Law Governs.

Under Pol. Code, § 4468, providing that the common law, not repugnant to the Constitution or statutes, is the rule of decision in the courts of the states, the common-law rule that husband and wife are one person, and that no action at law can be maintained by one against the other, is in force in California, except as modified by statutes.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 744–755; Dec. Dig. § 205.*]

2. Husband and Wife (§ 205*)—Actions for Torts by One Against the Other—Statutes.

Under Civ. Code, §§ 155, 158, 159, 325, 1093, 1094, 1187, providing that either husband or wife may enter into any engagement with the other regarding property, except that they cannot, by any contract with each other, alter their legal relations, except to make a contract for separation, etc., and Civ. Code Proc. § 370, providing that, when a married woman is a party to an action, her husband must be joined with her, except when the action is between herself and husband, etc., neither husband nor wife can sue the other for personal wrongs inflicted during the marriage; the Civil Code relating solely to contracts and property rights, and the Code of Civil Procedure relating only to parties to the single form of action provided by the Code.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 753; Dec. Dig. § 205.*]

3. Appeal and Error (§ 1170*)—Harmless Error—Statutes.

Where the complaint on its face shows that plaintiff cannot, in any event, recover, and that no amendment can cure the defect, the judgment against him will not be reversed for erroneous rulings, which under Code Civ. Proc. § 475, the court must disregard because not affecting the substantial rights of the parties.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1170.*]

4. Appeal and Error (§ 1072*)—Harmless Error.

Where it appears affirmatively from the record that plaintiff has no right to maintain the action, the insufficiency of the evidence to support the verdict against him is immaterial, and the order denying a new trial notwithstanding such insufficiency will be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1072.*]

Department 1. Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Action by Herbert M. Peters against Mary Gird Peters. From an order denying a motion for new trial after verdict and judgment for defendant, plaintiff appeals. Affirmed.

H. S. Utley and Haines & Haines, for appellant. Daney & Lewis, for respondent.

SHAW, J. This is an appeal by the plaintiff from an order denying his motion for a new trial. There is no appeal from the judgment.

The plaintiff and defendant, at the time the alleged cause of action arose, were, and still are, husband and wife. The wife severely wounded the husband by willfully, without just cause or excuse, shooting him in the leg with a shotgun, injuring him so severely that he was confined to his bed for more than a month and was disabled from doing his ordinary work for several months thereafter. The verdict and judgment were in favor of the defendant.

The appellant complains of a number of rulings of the court below upon the introduction of evidence and in the giving and refusing of instructions to the jury. He also assigns as cause for a new trial that the evidence was insufficient to justify the verdict. It is unnecessary to consider these assignments of error in detail. If we should concede that the plaintiff could maintain an action against his wife for battery, we should be compelled to hold that the evidence was wholly insufficient to support the verdict. According to her own testimony, she deliberately and willfully shot her husband in the leg for no other reason than to prevent him from going into a bedroom of the house which she then occupied for the purpose of taking therefrom a small amount of cotton batting which he claimed a right to take. She made no claim that she was in any real personal danger from him at the time, and there is no real foundation for the pretense that she was acting in self-defense. The shooting was entirely unjustifiable as a defense of her right to maintain possession of the cotton batting. The court below, upon its view of the right of the husband to maintain such an action, should have directed the jury to find for the plaintiff in such amount as they should believe from the evidence he was damaged. The defendant may consider herself fortunate that she was not prosecuted criminally for the act, and that such prosecution is now barred by lapse of time.

Notwithstanding this conclusion, we are satisfied that, under the law in this state as it is, an action cannot be maintained by one spouse against the other for a battery committed during the continuance of the marriage relation, and hence that the plaintiff has suffered no substantial injury to his rights by the verdict against him. The question is entirely new in this state, and such cases are rare in other jurisdictions; but there is no case in favor of the right to maintain such an action.

The common law of England is declared to be the rule of decision in all courts of this state, so far as it is not repugnant to or inconsistent with our Constitution and statutes. Pol. Code, § 4468. By the common law the husband and wife were deemed to be one person, and no suit at law of any character could be maintained by one against the other. 21 Cyc. 1517; 10 Ency. of Plead. & Prac. 195; 1 Cooley, Blackstone, 442; Schouler, Dom. Rel. § 52; Phillips v. Barnet, 1 Q. B. Div. 436; Countz v. Markling, 30 Ark. 17; Crowther v. Crowther, 55 Me. 358; Hobbs v. Hobbs, 70 Me. 381. Owing to the modern statutes giving the wife the right to separate property and to make contracts with her husband concerning the same, it is now generally held that an action at law concerning property may be maintained between them. In many of the states such actions are expressly authorized by statute; but even where such actions are allowed, either expressly or by necessary implication, it has been uniformly decided, in the few states where the question has arisen, that neither can sue the other, even after a divorce, for personal wrongs inflicted upon one by the other during the marriage. 21 Cyc. 1519; 15 Am. & Eng. Ency. of Law, 857; Peters v. Peters, 42 Iowa, 182; Main v. Main, 46 Ill. App. 106; Bandfield v. Bandfield, 117 Mich. 80, 75 N. W. 287, 40 L. R. A. 757, 72 Am. St. Rep. 550; Abbe v. Abbe, 22 App. Div. 483, 48 N. Y. Supp. 25; Schultz v. Schultz, 89 N. Y. 644, reversing same case in 27 Hun, 26; Freethy v. Freethy, 42 Barb. 641; Longendyke v. Longendyke, 44 Barb. 366; Chestnut v. Chestnut, 77 Ill. 350; Smith v. Gorman, 41 Me. 405; Abbott v. Abbott, 67 Me. 304, 24 Am. Rep. 27; Heyob v. Her Husband, 18 La. Ann. 41; Moore v. Moore, 18 La. Ann. 613. In New York the statute authorized a married woman to "bring and maintain an action in her own name against any person for an injury to her person or character, as if she were sole." Yet the courts of that state declared that this was not intended to and did not permit a suit by her against her husband to recover damages for battery or slander. Longendyke v. Longendyke, supra; Freethy v. Freethy, supra; Schultz v. Schultz, supra. In the Longendyke Case the court said that to allow such actions is "contrary to the policy of the law and destructive of that conjugal tranquillity which it has always been the policy of the law to guard and protect." In the Freethy Case it was further observed "that, when the Legislature intends to make such a striking innovation of the rules of the common law and so much opposed to public policy and the peace and happiness of the conjugal relation, as would be the case if husband and wife were permitted to sue each other for alleged wrongs to character, it should use such language as will make it clearly manifest, and not leave it to the construction of the courts." These authorities clearly indicate what the rule should be in this state unless we find some statutory provisions to the contrary.

We discover in our statutes nothing that can be construed to show an intention to permit actions for tort between husband and wife. The Civil Code provides: That either husband or wife may "enter into any engagements or transaction with the other, or with any other person, respecting property, which either might if unmarried" (section 158); that they cannot "by any contract with each other, alter their legal relations, except as to property," except to make a written contract for separation (section 159); and that they "contract toward each other obligations of mutual respect, fidelity and support" (section 155); also, that each has the power to manage and dispose of his or her separate property (sections 1093, 1094, 1187, 325, 1273). The Code of Civil Procedure provides that, "when a married woman is a party to an action her husband must be joined with her, except: (1) When the action concerns her separate property, or her right or claim to the homestead property, she may sue alone; (2) When the action is between herself and her husband, she may sue or be sued alone." The third subdivision of this section authorizes her to sue alone when she is living apart from her husband, by reason of his desertion or a separation agreement. Code Civ. Proc. § 370.

The provisions of the Civil Code relate solely to contract and property rights. They recognize the separate property of husband and wife and authorize contracts between them concerning the same. This necessarily implies that actions by one against the other for the protection of such property and the enforcement of contracts relating thereto can be maintained. Our Code system authorizes but one form of action for all cases either in law or equity. Suits between husband and wife have long been permitted in equity, and in actions for divorce the husband and wife were necessarily upon opposite sides of the case. It was necessary therefore, in a Code providing for but one form of action, to make a rule covering all cases. Hence, in the chapter of the Code of Civil Procedure, relating to the parties to the single form of action provided, it was declared that in actions between herself and her husband a married woman can sue and be sued alone. This sufficiently accounts for the presence of that provision. It would be a forced interpretation to attempt to discern in that declaration, or in any of the provisions of the Civil Code, an intent to make a departure from the common law so radical, and so opposed to its general policy, as the authorization of a suit by the husband or wife against the other for injuries to the person or character. In the language of the Supreme Court of Maine in Abbott v. Abbott, supra, the relation of marriage, while it continues, "so to speak, acts as a perpetually operating discharge of all wrongs between man and wife, committed by one upon the other." The only remedies for such wrongs, afforded by our law, as it stands, are to be found in the Penal Code and in the action for divorce or maintenance, with the additional portion of the community property which may be given to the wronged party where cruelty is the cause for which divorce is adjudged.

The appellant contends that, as his appeal is from the order denying a new trial only, and there is no appeal from the judgment, the sufficiency of the complaint cannot be considered, citing Swift v. Occidental M. Co., 141 Cal. 161, 74 Pac. 700. He urges that the only course this court can pursue, inasmuch as there is manifest error in denying the motion for new trial and in the rulings upon the trial, is to reverse the order and remand the case for a new trial. The question whether or not the error complained of has produced substantial injury to the appellant is always a proper question for consideration upon appeal. It is not the rule that in every case where the evidence is insufficient to establish some one or more of the material facts in issue, or where erroneous instructions have been given, and there is no appeal from the judgment, this court must reverse the order denying a new trial and remand the cause, directing the lower court to try the case anew, notwithstanding our conviction that, because of facts admitted by the pleadings and of which there can be no dispute, no different verdict could ever be properly rendered. No error should suffice to reverse a judgment or order, if it appears that the appellant has not been and could not be injured thereby. Where the complaint on its face shows that the plaintiff could not, in any event, recover upon the cause of action set forth therein, and it appears that no amendment could cure it, no erroneous ruling at the trial will justify a reversal of the judgment against him. Gilbert v. Allen, 57 Ind. 524; McPhail v. Buell, 87 Cal. 115, 25 Pac. 266; McCreery v. Wells, 94 Cal. 485, 29 Pac. 877; 3 Cyc. 385; 3 Cent. Dig. cc. 1933, 1934; Code Civ. Proc. § 475. Here it appears affirmatively from the record that the plaintiff was not and could not be injured in any substantial legal right by the verdict against him, and that the greatest injury this court could inflict upon him in the case would be to reverse the order without informing him, or the lower court, of his predicament, and allow him to go through the form of another trial, only to be met ultimately with a decision that he never had the cause of action against his wife for damages upon which he has sued, and that no judgment in his favor therefor could be sustained.

Our conclusion is that, notwithstanding the fact that the evidence is insufficient to support any finding that the defendant was justified in shooting the plaintiff, or any of the defenses set up in the answer, the verdict against the plaintiff is harmless because of the fact that he has no right to maintain the action at all.

The order denying a new trial is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

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155 Cal. 767

YOUNGER v. MOORE et al. (S. F. 4,556.)

(Supreme Court of California. June 28, 1909.)

1. Trusts (§ 171*)—Construction—Scope—"Manage."

Under Civ. Code, § 857, subd. 1, authorizing a trust to sell real property, and apply or dispose of the proceeds, in accordance with the instrument creating the trust, where a trust deed, besides empowering the trustee to sell the property to obtain money for the payment of the indebtedness, also empowered him to manage the same, the word "manage" gave only such control of the property as was proper in the lawful execution of a trust created as security for an indebtedness.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 226; Dec. Dig. § 171.*

For other definitions, see Words and Phrases, vol. 5, pp. 4316, 4317.]

2. TRUSTS (§ 52*)—PARTIAL INVALIDITY.

Under Civ. Code, § 857, subd. 1, authorizing a trust to sell real property, and the application of the proceeds in accordance with the instrument creating the trust, where the main purpose of a trust deed was to convert the property by sale, so far as necessary, to discharge the debt secured thereby, that it unlawfully authorized the trustee to exchange or partition the property did not affect the valid provisions of the instrument.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 72; Dec. Dig. § 52.*]

3. DEEDS (§ 90*)—CONSTRUCTION.

A deed must be interpreted in favor of the grantee, except in case of a reservation in any grant or a grant by a public officer or public body.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 235; Dec. Dig. § 90.*]

4. DEEDS (§ 116*)—CONSTRUCTION—AFTER-ACQUIRED TITLE.

A deed of bargain and sale without words of reservation, or any words showing an intent to make a quitclaim deed, described the property as all of a certain tract. Subsequently the grantor, the grantee, and a third party executed a trust agreement, reciting that the grantor had conveyed all her interest in the property to grantee, and that she would be entitled to a reconveyance on payment of certain sums due the third party. *Held*, that under the rule that, where a grantor purports to grant property in fee simple, and subsequently acquires any claim of title thereto, the same passes by operation of law to the grantee or his successors, the deed passed an interest in the property subsequently acquired by the grantor by inheritance.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 330; Dec. Dig. § 116.*]

5. APPEAL AND ERROR (§ 867*)—ORDER DENYING A NEW TRIAL — QUESTIONS REVIEWABLE.

No question of the sufficiency of the pleadings or of the findings to support the judgment can be considered on appeal from an order denying a new trial, and the claim that defendant in an action for partition waived its right to any lien on the property through failure to set up in its answer the amount due, etc., was not available to plaintiff on appeal from an order denying a motion for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3476; Dec. Dig. § 867.*]

In Bank. Appeal from Superior Court, Santa Cruz County; M. T. Dooling, Judge.

Action by Helen Younger against Helen M. Moore and others. From an order denying a motion for a new trial, Helen M. Moore appeals. Affirmed.

William T. Jeter, Chas. M. Cassin, Benj. K. Knight, and Cassin & Lucas, for appellant. Charles B. Younger and Cushing, Grant & Cushing, for respondent.

ANGELLOTTI, J. This is an appeal by defendant Helen M. Moore from an order denying her motion for a new trial, after the making of an interlocutory decree in an action for partition of certain real property in Santa Cruz county. There is no appeal from the judgment. The only controversy on this appeal as shown by the brief of counsel is between defendant Helen M. Moore and defendant F. A. Hihn Company, a corporation, as to the ownership of an undivided seven-fifteenths of the Moore ranch, exclusive of that portion thereof set apart as a homestead April 26, 1881, to Helen M. Moore and her minor children, by the superior court of Santa Cruz county, in the matter of the estate of William H. Moore, her deceased husband. By its answer, defendant F. A. Hihn Company alleged that it owns in fee simple absolute said undivided seven-fifteenths of said land, having acquired the same by deed dated July 19, 1895. By her answer defendant Helen M. Moore alleged that she is the owner in fee simple absolute of the same undivided seven-fifteenths of said land. She further alleged that she acquired five-fifteenths under the decree of final distribution made July 27, 1891, in the matter of the estate of her deceased husband, who died intestate October 30, 1871, and two-fifteenths under the decree of final distribution made March 1, 1898, in the matter of the estate of her deceased son, William H. Moore, who died intestate May 5, 1896, the owner thereof, all of which is found by the trial court and is here conceded. She further averred that her deed of July 19, 1895, to the F. A. Hihn Company was for only an undivided five-fifteenths, and that the same was executed "as security for the payment of certain promissory notes then and there executed by her, and also as security" for future advances and interest, and, "though absolute in form was and is in fact a mortgage."

The trial court found that on July 19, 1895, said Helen M. Moore executed to the F. A. Hihn Company a deed of grant, bargain, and sale, purporting to convey all of the Moore ranch, that this deed "was intended to be and was a trust deed, and that on July 23, 1895, there was executed by Helen M. Moore, as party of the first part, by F. A. Hihn Company, as party of the second part, and by Charles B. Younger, as party of the third part, a certain declaration of trust relative thereto," subjecting said deed to the provisions of said agreement, which is set forth in the findings. This agreement contained recitals to the effect that on July 19, 1895, Helen M. Moore conveyed to the F. A. Hihn Company "all her right, title, interest, estate and claim" in and to the Moore ranch and other property, that all such interest had been sold at foreclosure sale on March 30, 1895, and said Charles B. Younger had on July 23, 1895, furnished her with the sum of $9,538.16

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to be used for redeeming the same from said sale, that in addition thereto she was indebted to Younger in the sum of $4,933, and that she did on July 23, 1895, execute to Younger, as evidence of her indebtedness to him, her promissory note for $14,471, payable one year after date, bearing interest at the rate of 8 per cent. per annum. It then provided that the F. A. Hihn Company "will manage the premises conveyed to it as aforesaid and will sell, exchange, partition, dispose of and convey" the premises, "either as a whole, or in such subdivisions and at such time or times as it may deem proper," applying the proceeds from "the rents, sales or other disposition of said premises," first, to payment of taxes, insurance, and other necessary expenses in the management and protection of the property, including necessary litigation; second, to payment to the F. A. Hihn Company of a commission of 5 per cent. on all proceeds; third, to payment to the F. A. Hihn Company of interest on all sums expended by it under the contract; fourth, to payment to the F. A. Hihn Company of all money expended by it under the contract; fifth, to payment to Younger of $14,471, with interest; sixth, the surplus, if any, to be paid to Helen M. Moore, her heirs or assigns. It was further provided that when Younger and the F. A. Hihn Company had been fully paid all sums due, with interest, said F. A. Hihn Company "shall, on demand by said party of the first part, reconvey to said party of the first part all its right, title and interest, estate and claim in and to the premises conveyed to it as aforesaid by said party of the first part, or such part thereof as shall then remain undisposed of by it." The court further found that the title to the two-fifths acquired by Helen M. Moore as of May 15, 1896, from her deceased son, passed by operation of law to the F. A. Hihn Company by virtue of her deed of July 19, 1895, subject to the agreement last specified.

It was further found in terms that the F. A. Hihn Company was the owner of this seven-fifteenths of the Moore ranch, excepting that portion thereof constituting the Moore homestead, "subject, however, to the agreement executed July 23, 1895," hereinbefore described, and that the other eight-fifteenths were owned, two-fifteenths by plaintiff and Charles D. Younger, two-fifteenths by Charles Moore, two-fifteenths by Stella Moore, and two-fifteenths by Alice Hoffmann. The interlocutory judgment was in accord with the terms of this finding; it further decreeing that Helen M. Moore had no interest in any of said property other than such as she had under said agreement. Appellant's statement on motion for a new trial contains the evidence and admissions of the parties, showing all the facts as to the acquirement by Helen M. Moore of the seven-fifteenths from her husband and her son, being the same facts in regard thereto stated in the findings of the trial court. It further contains the deed of July 19, 1895, from Helen M. Moore to the F. A. Hihn Company, and the agreement of July 23, 1895, hereinbefore described. This, it is stipulated in the statement, constituted all of the evidence given on the trial. It is conceded here that the findings of the trial court in regard to the ownership of this property were sustained by the evidence, if the instruments executed by Mrs. Moore, the F. A. Hihn Company, and Younger are to be regarded as a deed of trust to secure the indebtedness of Mrs. Moore described therein, as distinguished from a mere mortgage, and if the undivided two-fifteenths acquired by Mrs. Moore from her deceased son subsequent to the execution thereof passed by operation of law to the grantee for the purposes of the trust.

The deed of July 19, 1895, and the trust agreement of July 23, 1895, must be considered as parts of a single transaction, and so construed. There is no escape from the conclusion that the deed of Helen M. Moore to the F. A. Hihn Company "was intended to be * * * a trust deed," as found by the trial court, and was not intended as a mortgage. It is urged that it was not a valid trust deed, inasmuch as it was for some purposes not authorized by section 857, Civ. Code, defining the purposes for which express trusts in relation to real property may be created. If we were compelled to hold that it was not a valid deed of trust, doubtless the rights of the parties could be preserved by holding the instruments to constitute an equitable mortgage or lien. Earle v. Sunnyside Land Co., 150 Cal. 214, 227, 88 Pac. 920. But we see no difficulty in sustaining it as a valid trust deed. Primarily, the trust expressed was solely by way of security for the indebtedness of Mrs. Moore, with interest, expenses of protecting the property, and compensation of the trustee. The validity of trust deeds given as security for loans is established in this state by a long line of decisions. As was said in Sacramento Bank v. Alcorn, 121 Cal. 379, 385, 53 Pac. 813, these decisions "practically hold that they are authorized by section 857 of the Civil Code, * * * which rulings, long acquiesced in, have become a rule of property. * * *" Section 857, subd. 1, Civ. Code, authorizes a trust "to sell real property, and apply or dispose of the proceeds in accordance with the instrument creating the trust." Appellant's claim is that the instrument before us goes beyond the scope of the ordinary trust deed, in that, besides empowering the trustee to sell the property in order to obtain money for the payment of the indebtedness, etc., it purports to empower the trustee to "manage" the same, and to "exchange" or "partition" it. So far as the word "manage" is concerned, there can be no difficulty. The word must be construed as intending only such control of the property as is proper in the lawful execution of a trust created as security for an indebtedness. It may be that the conveyance in trust is invalid in so far as it purports to authorize the trustee to "exchange" or "partition" the property; but, if this be so, it seems apparent to us that the invalidity should not be held to affect the valid provisions. The main and ultimate purpose of the trust created by these instruments was to convert the trust property by sale so far as necessary into money wherewith to discharge the indebtedness secured thereby, and the power to exchange or partition was merely incidental, and not at all essential thereto. If the trustee could not be legally authorized to exchange or partition the property, the provisions in that behalf can be disregarded without interfering with and changing the main scheme of the grantor. See Sacramento Bank v. Montgomery, 146 Cal. 745, 81 Pac. 138. In other words, there was no such inseparable scheme that the attempted power to exchange or partition cannot be disregarded without affecting or interfering with the main purpose of the parties. If the trustee should attempt to exchange or partition the trust property, the question of the validity of these provisions would become material, but we do not consider it material here.

Upon the point that the instrument before us must be considered a valid trust deed, rather than a mortgage, the case of More v. Calkins, 85 Cal. 177, 184, 24 Pac. 729, and 95 Cal. 435, 437, 30 Pac. 583, 29 Am. St. Rep. 128, is squarely in point.

Upon the question whether the undivided two-fifteenths owned by her son at the time of the execution of the deed and subsequently acquired by Mrs. Moore by inheritance, passed by operation of law to the grantee for the purposes of the trust, the District Court of Appeal said in the decision in this case: "It is not seriously contended that the deed of grant, bargain, and sale made by appellant on July 19, 1895, describing the Moore ranch would not, in the absence of any other agreement to the contrary, have conveyed the after-acquired title to the grantee therein named. It is fundamental that where a grantor, by proper instrument, purports to grant property in fee simple, and subsequently acquires any title or claim of title thereto, the same passes by operation of law to the grantee or his successors. The effect of such deed as matter of law is the same as if it were written upon the face that the grantor conveyed all the estate which he then possessed, or which he might at any time thereafter acquire. Civ. Code, § 1106; Clark v. Baker, 14 Cal. 612, 76 Am. Dec. 449; Defrieze v. Quint, 94 Cal. 653, 30 Pac. 1, 28 Am. St. Rep. 151; Merrill v. Clark, 103 Cal. 367, 37 Pac. 238. Appellant contends that the trust agreement made and executed four days after the execution of the deed should be read in connection with the deed, and as a contemporaneous agreement relating to the same subject-matter. We are inclined to agree with the contention. It is further contended, however, that when thus read, the agreement shows that the appellant intended to and did convey only her undivided one-third interest in and to the Moore ranch which she then owned, and that the agreement so limited and modified the granting clause in the deed as to clearly show that the deed was only a quitclaim deed of the interest and title then owned by the grantor. This contention cannot be supported by a logical analysis of the deed and agreement when read together. A deed must be interpreted in favor of the grantee except in case of a reservation in any grant, or a grant by a public officer or public body. Now the deed contains the usual words of grant, bargain, and sale of 'all that certain tract of land lying and being situate in said county of Santa Cruz in said state of California known as and called the "Moore Ranch," and further described as bounded on the northerly by land of Dwight Younglove, by land of Henry Cowell, and by land formerly of John W. Chance but now of the Bank of Santa Cruz County, a private corporation; on the easterly by said last-named land and by the land of Dwight Younglove and by land formerly of Richard H. Hall, but now of Margaret Hall; on the southerly by the Pacific Ocean; and on the westerly by land of Delos D. Wilder, by land of Dwight Younglove and by Meder Creek, containing an area of about eight hundred and sixty acres of land.' In the deed are no words of reservation, nor any words in any way limiting the interest conveyed, or tending to show the intent to make a quitclaim deed only. The agreement commences by a preliminary recital as follows: 'That whereas said party of the first part did on the 19th day of July, 1895, convey to said party of the second part, all her right, title, interest, estate and claim in and to the Pacific Ocean House property; in and to the Moore ranch situated in the county of Santa Cruz in the state of California.' The agreement further provided that when the party of the third part 'shall have been fully paid in United States gold coin said sum of $14,471, with interest thereon in like gold coin, at the rate of eight per cent. per annum compounding quarterly, said party of the second part shall on demand by said party of the first part reconvey to said party of the first part all its right, title, and interest, estate and claim in and to the premises conveyed to it as aforesaid by said party of the first part, or such part thereof as shall then remain undisposed of by it. The recital in the agreement as to the deed of July 19th was merely for the purpose of identification. The statement that whereas the appellant had theretofore done a certain thing—that is, made and executed the deed—was merely for the purpose of identifying the deed. The deed shows what was in fact done; and it would require a very plain and unambiguous statement in such an agreement to show that as a matter of fact the appellant intended to do a different thing from what it appeared by the written deed she did do. It is stated that on a certain day the appellant had conveyed all her right, title, estate, and claim in and to the Moore ranch, and so she had. She had conveyed all the title, estate, and interest she then had, and she, as matter of law, conveyed the title she subsequently acquired. In any ordinary grant, bargain, and sale deed the grantor conveys all the right, title, estate, and claim he has in and to the property. The agreement does not show that the granting clause in the deed was in any way limited or changed by the agreement, nor that it was intended that it should be. In fact, we may presume that the appellant was honest; that she intended to secure the indebtedness due Younger. She had no thought of reserving anything or conveying anything except as security. She had only to pay her indebtedness and the property would be conveyed back to her. She has now only to pay such indebtedness, and it will be reconveyed to her. The after-acquired title passed by her deed, and it will again vest in her by proper deed upon her indebtedness being paid. To this she cannot object unless she desires to avoid the payment of her indebtedness." We are satisfied that this is in all respects correct, and adopt the same as our views on the question.

The claim that the F. A. Hihn Company must be deemed to have waived its rights to any lien by reason of failure to set up in its answer the original amount due and the amount remaining due, with a statement as to the nature and extent of security, was not available to appellant on motion for new trial, or on appeal from an order denying her motion, even if we assume that there is any foundation for such a claim. As we have said, there is no appeal from the judgment. No question of the sufficiency of the pleadings, or of the findings to support the judgment, is involved or can be considered on an appeal from an order denying a new trial (Great Western, etc., Co. v. Chambers, 153 Cal. 307, 310, 95 Pac. 151, and cases there cited), and the point made by appellant in this regard is not otherwise presented by the record before us. Nor is there anything in the point that the trial court has failed to make any finding as to the amount of the indebtedness, etc. There was no issue made by the pleadings on this matter, and the court did find squarely on every material issue made.

As was substantially said by the District Court of Appeal, the rights of Mrs. Moore are fully protected by the findings and judgment to the effect that the ownership of the F. A. Hihn Company is subject "to the said agreement executed July 23, 1895."

The order denying the motion for a new trial is affirmed.

We concur: SHAW, J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.; HENSHAW, J.

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156 Cal. 38

SAN JOSE SAFE DEPOSIT BANK OF SAVINGS v. BANK OF MADERA et al. (Sac. 1,533.)

(Supreme Court of California. July 3, 1909.)

1. Limitation of Actions (§ 46*)—Accrual of Cause of Action.

Where a second mortgagee obtained money from a bank with which to redeem the property from a sale under foreclosure of the first mortgage, pursuant to an agreement to repay on the bank obtaining the sheriff's deed and binding the bank to reconvey on such payment, the obligation to repay did not mature until after the right to the sheriff's deed had accrued and a reasonable time thereafter had elapsed within which the bank could procure it, and limitations did not begin to run until that time.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 240–253; Dec. Dig. § 46.*]

2. Action (§ 62*)—Premature Action.

Plaintiff advanced money to the second mortgagee to redeem the property from a sale under foreclosure of the first mortgage, pursuant to an agreement to repay on plaintiff's receiving the sheriff's deed. The sheriff's sale occurred on December 12, 1894, and the time for redemption expired on June 12, 1895. An action to recover the money advanced was begun on August 29, 1898; but the sheriff's deed was delayed until December 5, 1904, by the wrongful interference of the mortgagee. Plaintiff was not clearly apprised of his rights for a considerable period after the right to the deed had accrued. *Held* to justify a finding that the action was not prematurely brought, but that a reasonable time had elapsed after the right to the deed had accrued.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 718–723; Dec. Dig. § 62.*]

3. Limitation of Actions (§ 46*)—Accrual of Cause of Action—Evidence.

The court was justified in finding that the obligation to repay the money matured within two years before the beginning of the action, so that it was not barred by limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 46.*]

4. Appeal and Error (§ 1201*)—Proceedings in Trial Court After Remand—Amendments to Pleadings.

The court, after the reversal of an action to enforce the lien of plaintiff advancing money to the second mortgagee to redeem the property from a sale under foreclosure of the first mortgage, pursuant to an agreement to repay, may allow plaintiff to amend the complaint, so as to allege the special agreement as to the time of maturity of the obligation to repay by changing it from an obligation to repay it immediately to an obligation to repay on the execution of the sheriff's deed under the foreclosure.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4673–4683; Dec. Dig. § 1201.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

5. PLEADING (§ 248*)—AMENDMENTS—CHANGING CAUSE OF ACTION.

An amendment to a complaint, in an action to enforce the lien of plaintiff advancing money to the second mortgagee to redeem the property from a sale under foreclosure of the first mortgage, which merely changes the allegations as to the contract under which the money was advanced, by showing a different time of maturity of the obligation to repay, does not change the cause of action.

[Ed. Note.—For other cases see Pleading, Cent. Dig. §§ 686–709; Dec. Dig. § 248.*]

6. MORTGAGES (§ 27*) — EQUITABLE MORTGAGE.

One advancing money to the second mortgagee to redeem the property from a sale under foreclosure of the first mortgage pursuant to an agreement binding the second mortgagee to repay on the former obtaining the sheriff's deed as security, acquires a lien on the land which is sufficiently evidenced by his receiving the certificate of redemption until the execution of the deed, and the lien is enforceable against persons having notice of the facts.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 45–48; Dec. Dig. § 27.*]

In Bank. Appeal from Superior Court, Madera County; H. C. Gesford, Judge.

Action by the San Jose Safe Deposit Bank of Savings against the Bank of Madera and others. Judgment for plaintiff, and defendants appeal. Affirmed.

M. K. Harris and S. L. Strother, for appellants. F. A. Fee and Frank H. Short, for respondent.

SHAW, J. The defendants appeal from a judgment in favor of the plaintiff. The complaint states a cause of action to foreclose an equitable mortgage or lien.

The main question presented by the record is the question whether or not the cause of action is barred by the statute of limitations. This question depends upon the terms of the agreement between the parties with respect to the event which should make absolute and immediate the obligation of the defendant Mary Dworack to repay to the plaintiff the moneys advanced by plaintiff in her behalf. The case has been before this court on several previous occasions. 121 Cal. 539, 54 Pac. 83, 270; 121 Cal. 543, 54 Pac. 85; 144 Cal. 574, 78 Pac. 5. Upon the last appeal the judgment of the lower court was reversed, and the cause remanded for a new trial, upon the ground that the action was barred by the statute of limitations. In the complaint before the court in that case there was no allegation with respect to the time of maturity of the obligation to repay the money constituting the debt which the plaintiff sought to recover, and the court treated it as a debt which was due immediately upon its creation, and decided the case upon the theory that the statute of limitations immediately began to run.

The following statement of the facts alleged in the complaint, all of which are found to be true by the trial court upon sufficient evidence, will suffice to present the question involved in the case. Charles A. Dworack was the original owner of the land involved. In 1893 he executed a mortgage thereon for the sum of $3,000, which was duly recorded. In July, 1894, he executed a second mortgage thereon to the defendant Mary Dworack, who was his mother, for the sum of $8,500. The first mortgage was foreclosed in an action to which Mary Dworack was made a party defendant. An order of sale was issued, and the land was sold upon this foreclosure for the sum of $3,515.20. In January, 1895, Mary Dworack, as a second mortgagee, desired to redeem the property from this sale. She had no money with which to effect such redemption, and thereupon applied to the plaintiff for the same. The plaintiff agreed that it would advance to her the money necessary for that purpose upon the arrangement that she should assign to the plaintiff all the rights which she would acquire in the land by reason of such redemption, that the certificate of redemption should be assigned to the plaintiff, and, if no other redemption was made, the plaintiff should obtain the deed of said property by such sale from the sheriff of the county and hold the same as security for the money advanced. It was further, at the time, and as part of the same transaction, agreed between the plaintiff and said Mary Dworack that, as soon as the sheriff's deed was received by the plaintiff, the said Mary Dworack would repay to the plaintiff the money advanced by it for her, and that thereupon the plaintiff would convey, or cause to be conveyed, to her the interest in the property which it would have acquired under the said sheriff's deed. The redemption was effected in pursuance of this arrangement; the money therefor being advanced by the plaintiff. The certificate of redemption was first taken in the name of one Moultrie, who immediately transferred the same to plaintiff. No other redemption was made, and the right to a sheriff's deed under the foreclosure, by reason of the sale and the subsequent redemption, had accrued to the plaintiff. Thereupon the plaintiff applied to the sheriff for a deed of the property. Mary Dworack and Charles A. Dworack and the defendant the Bank of Madera conspired together for that purpose, objected to the execution of said deed by the said sheriff, and interfered with and prevented the sheriff from executing the said deed as he otherwise would have done, and by such interference and objections, and in spite of the diligent attempts of the plaintiff to procure a deed, they delayed the execution of such deed by the sheriff until December 5, 1904. At the time the redemption was effected, Mary Dworack had become the owner of the legal title to the property by conveyance from Charles A. Dworack. Afterwards she conveyed the same to the defendant the Bank of Madera. This action was begun on August 29, 1898.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The claim of the appellants is that the obligation to repay the money to the plaintiff matured at the time that the plaintiff became entitled to a sheriff's deed under the redemption. The sheriff's sale occurred on December 12, 1894, and under the law then in force the time for redemption expired on June 12, 1895. The action was begun more than three years after the latter date, and, if this claim is correct, the action was barred by the statute of limitations. We are of the opinion, however, that, under the facts found to be true by the court with respect to the agreement between the parties, the obligation to repay the money did not become absolute at the time of the expiration of the period of redemption. The agreement was that she should repay the money as soon as the sheriff's deed was received, and that thereupon—that is, upon the payment of the money—the plaintiff would convey the property to her. The obligation to repay therefore did not mature until after the right to the sheriff's deed had accrued and a reasonable time thereafter had elapsed within which the plaintiff could have procured it. The receipt of this sheriff's deed by the plaintiff was delayed for more than nine years by the groundless objections and wrongful interference of Mary Dworack herself. The plaintiff could not justly be compelled to await the nine years for the repayment of the money advanced. Mary Dworack had no more right in equity thus to postpone the time of payment, than the plaintiff would have had to postpone it by an unreasonable delay in applying for a deed. She would have had the right, in the latter case, to offer payment after the lapse of a reasonable time, or perhaps at any time, and the plaintiff had the right, in the former event, to demand payment after she had wrongfully delayed the execution of the deed for an unreasonable time. What such reasonable time would be, under the circumstances of the case, would be a question of fact for the trial court. In making its decision it had the right to consider the record in the case. That record, including the opinions of this court upon the former appeals, shows that the plaintiff was not clearly apprised of its rights for a considerable period after the right to the deed had accrued. These circumstances had an important bearing upon the question. In view of these and all the other circumstances hereinbefore recited, we are satisfied that the court did not err in holding that the action was not premature, and that the obligation of Mary Dworack to repay the money to plaintiff did not mature until within two years before the beginning of the action.

It is also claimed by the appellants that the court erred in allowing the plaintiff to amend its complaint, after the reversal by the decision in 144 Cal. 574, 78 Pac. 5, so as to allege the special agreement with respect to the time of maturity of the obligation of Mary Dworack to repay the money, changing it from an obligation to repay it immediately upon its advancement, to an obligation to repay plaintiff upon the execution of the sheriff's deed under the foreclosure. We do not think the court erred in this respect. The amendment was made in the furtherance of justice, and, as the events showed, in accordance with the actual facts of the case.

A further claim is made that by this amendment the cause of action was changed, and that, in effect, a new action was begun upon the date of the filing of the last-amended complaint. We do not think the amendment changed the cause of action. It still remained, as before, a cause of action to enforce the lien of the plaintiff upon the land of the defendants to secure the payment of the original debt caused by the advancement of the money by the plaintiff to redeem from the foreclosure sale. The mere change of the allegations with respect to the contract, showing a different time of maturity, did not change the cause of action.

It is again urged, although without much insistence, that the transaction between Mary Dworack and the plaintiff did not invest the plaintiff with any lien upon the land for the payment of the money. We cannot agree with this contention. The money was paid upon an arrangement by which the plaintiff was to obtain the sheriff's deed as security for its money. It received the certificate of redemption which, until the deed was executed, was a sufficient evidence of its lien upon the property and preserved its rights. The defendants all had notice of the entire proceedings, and their rights are subject to those of the plaintiff.

The judgment is affirmed.

We concur: SLOSS, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

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156 Cal. 27

MILLER v. IMPERIAL WATER CO., NO. 8.
(L. A. 2,311.)

(Supreme Court of California. July 2, 1909.)

1. MANDAMUS (§ 136*) — ENFORCEMENTS OF RIGHTS OF STOCKHOLDERS.

Mandamus lies to enforce the plain rights of stockholders of corporations, in the absence of any other adequate remedy.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 136.*]

2. MANDAMUS (§ 125*) — ENFORCEMENTS OF RIGHTS OF STOCKHOLDERS.

Mandamus lies to restore to a member of a corporation his corporate rights, where he has been improperly disfranchised or irregularly removed from his connection with the corporation, though his rights rest wholly on his contract of membership; the rule that mandamus will not be used for the enforcement of contract rights of a private or personal nature not being applicable.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 125.*]

3. MANDAMUS (§ 138*) — ENFORCEMENTS OF RIGHTS OF STOCKHOLDERS.

Mandamus lies to compel a corporation, organized to secure a supply of water for irrigation purposes and distribute the same among its stockholders for use on lands owned by them, to deliver water to a member for use on his land for irrigation, for he has no adequate remedy at law, and his rights to have water furnished on his land is an inseparable adjunct to his membership, and a plain duty rests on the corporation to furnish the water.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 138.*]

4. WATERS AND WATER COURSES (§ 252*)—IRRIGATION COMPANIES—RIGHTS OF MEMBERS —"OWNED."

One in possession of unsurveyed public land, with intent to procure title thereto and preparing the land for cultivation and planting a crop thereon, is the owner of the land within the articles of incorporation of a corporation organized to secure a supply of water for irrigation purposes, and to distribute the same among its stockholders for use on lands "owned" by them, for the word "owned" means held or occupied, and the words "owning," "owner," and "owned" being general terms, and their precise meaning depending on the nature of the subject-matter and the connection in which they are used (quoting Words and Phrases, vol. 6, p. 5134).

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 252.*]

In Bank. Case Transferred from District Court of Appeal, Second District.

Petition in the District Court of Appeal by J. J. Miller for a writ of mandate against the Imperial Water Company, No. 8. A demurrer to the petition was sustained, and the case transferred to the Supreme Court. Demurrer overruled, with leave to answer.

Conkling & Brown, for petitioner. Eshleman & Swing and Stephens & Stephens (John M. Eshleman and Haines & Haines, of counsel), for respondent.

ANGELOTTI, J. This is an application for a writ of mandate originally made to the District Court of Appeal for the Second District. That court sustained a demurrer to the petition and denied the writ upon the ground that the alleged right sought to be enforced rests wholly upon contract, and that mandamus will not lie to enforce contractual duties. The matter was ordered transferred to this court after decision by the District Court of Appeal.

As stated in the opinion of the District Court of Appeal: "The petition alleges that respondent is a corporation organized for the purpose of securing a supply of water for irrigation, domestic, and other purposes from a named source, and to distribute the same at cost among its stockholders for use upon lands owned by them within certain defined boundaries. That in carrying out such purpose respondent acquired a perpetual right to a certain quantity of water sufficient to furnish four acre feet of water per annum for each outstanding share of the capital stock of respondent, and by the same contract provided for the construction of canals and ditches through which to deliver said water for irrigation purposes to the lands of its stockholders throughout the territory described, and that such canals and ditches pass through the lands of petitioner. That since the completion of these canals and ditches the other stockholders of respondent have been accustomed to receive and do receive from it water for the irrigation of any and all lands occupied by them within the said territory. That petitioner occupies a tract of land situate * * * within the exterior boundaries described, the same being unsurveyed public lands belonging to the United States, and which land petitioner has entered with intent to procure government title thereto (describing the land), has prepared the land for cultivation, planted a crop thereon, and the same is ready for irrigation, and if not irrigated speedily the crop will perish and be lost. That he is the owner of 320 shares of stock of the respondent corporation which entitle him to water to irrigate 320 acres of land, has demanded said water, has offered to pay all proper charges therefor, and is now ready and willing to pay the same, and that he is not receiving any water by reason of his ownership of said stock elsewhere, but that respondent refuses to deliver him any water. He asks for a writ of mandate from this court commanding respondent to deliver water to him upon his lands so occupied for the same price and upon the same terms as it delivers water to its other stockholders."

We are of the opinion that the general rule that the writ of mandate will not be used for the enforcement of contract rights of a private or personal nature, and that obligations which rest wholly upon contract, and which involve no question of trust or official duty, cannot be enforced by mandamus (High's Extra. Legal Remedies, § 25), does not preclude the remedy upon the facts alleged. Assuming for the moment that plaintiff is the "owner" of the land upon which he desires water from defendant, within the meaning of that term as used in the articles of incorporation of defendant, we have the case of a member of a corporation who is improperly precluded by the corporation from participating in the only practical right resulting from such membership, that of having water available for the purpose furnished at cost upon his land, in proportion to the amount of stock held by him. He is seeking to enforce a plain right based entirely upon his membership in a mutual water company, deprivation of which right would practically exclude him for the time from all privileges of membership, in a case where it must be held under the decisions, there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It is one of the well-recognized offices of the remedy by mandamus to enforce the plain rights of stockholders or members of corporations in the absence of any other adequate remedy. See High's Extra. Legal Remedies, § 276; Clark & Marshall on Priv. Corp. § 265c; Purdy's Beach on Priv. Corps. § 575. While a duty giving the right is often expressly imposed by statute on a corporation for the benefit of its members and stockholders, such rights are often in a sense based upon contract alone, where clearly they are not based on contract in the sense contemplated by the rule to which we have heretofore referred. For instance, nothing is more thoroughly established than the rule that mandamus will lie to restore to his corporate rights a member of a corporation who has been improperly disfranchised or irregularly removed from his connection with the corporation, and yet his right in this regard generally rests wholly on his contract of membership. The same rule appears to us to be applicable where the member is being excluded from participation in the benefits afforded by the corporation to its members, and there is no other adequate remedy. In the case at bar, the stockholder's rights to have water furnished on his land is not based on any special contract entered into by him with the corporation, but is an inseparable adjunct of his membership, and it is a plain duty resting on the corporation in the exercise of its corporate functions to furnish him such water.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The main point made by defendant on the merits is that the petition does not show that plaintiff is the "owner" of the land upon which he desires water to be furnished, and that, according to the petition, stockholders are entitled under the articles of incorporation only to water on lands "owned" by them. As we have seen, the petitioner alleges that "he occupies" the land, and that the same is "unsurveyed public land belonging to the United States," which he "has entered with intent to procure government title thereto." According to the petition, the limitation as to lands in the articles of incorporation is in the statement of the purposes of the corporation, and is as follows: To obtain the water, "and to distribute the same at cost among its stockholders for use upon lands owned by them within the following exterior boundaries, namely," etc. The terms "owning," "owner," and "owned" depend somewhat for their signification upon the connection in which they are used. They are not technical, but general terms, and are therefore liberally construed; "the precise meaning depending upon the nature of the subject-matter and the connection in which" they are used. See 28 Am. & Eng. Ency. 233; 6 Words & Phrases, p. 5134 et seq. We are of the opinion that, upon the facts alleged, the plaintiff must be held to be the owner of the land for which he desires water, within the meaning and intent of the articles of incorporation. The absolute ownership thereof is, of course, in the United States; but the plaintiff is in the undisputed possession thereof, having settled upon the same with intent to procure a government title when it can be obtained, and he is deemed the owner and entitled to maintain his possession and use of the land as against all except the government, or some one hereafter deriving title from the government. See Page v. Fowler, 37 Cal. 111; Doran v. C. P. R. R. Co., 24 Cal. 257. According to a statement in the brief of counsel for plaintiff, which is not disputed by counsel for defendant, the present status of all the land in the district described in the articles of incorporation is the same as of that occupied by plaintiff, viz., unsurveyed government land as to which a survey has been ordered, and as to which no legal entry can as yet be made. The plain object of the limitation as to use was simply to confine the use of water to be furnished at cost to any stockholder to land within the district devoted to his exclusive use. The whole purpose of the formation of the corporation was to provide a system by which all those possessing and occupying the land in the described district might obtain water with which to irrigate their respective holdings, equitably apportioning the expense thereof, and the word "owned" as used in the articles of incorporation means no more than the word "held" or the word "occupied" would have meant. Considering the nature and object of the defendant corporation, this appears to us to be clear.

In all other respects we are of the opinion that the petition makes out a sufficient case for mandamus as against the general demurrer. In the District Court of Appeal, the defendant asked leave to file an answer; but no ruling was made on such application in view of the conclusion on demurrer.

The demurrer to the petition for writ of mandate is overruled, with leave to defendant to answer within 10 days after this decision becomes final.

We concur: SLOSS, J; SHAW, J; LORIGAN, J; MELVIN, J; HENSHAW, J.

(156 Cal. 31)

McNAIR v. IMPERIAL WATER CO., NO. 1.
(L. A. 2,312.)

(Supreme Court of California. July 2, 1909.)

In Bank. Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by James McNair against the Imperial Water Company, No. 1. From a judgment denying an application for a writ of mandate, plaintiff appeals. Reversed and remanded.

Conkling & Brown, for appellant. Eshleman & Swing and Stephens & Stephens (John M. Eshleman and Haines & Haines, of counsel), for respondent.

ANGELLOTTI, J. This is an appeal from a judgment of the superior court of Imperial county, denying an application for a writ of mandate. The judgment was entered after an order sustaining a general demurrer to the petition and the refusal of plaintiff to amend.

The facts alleged in the petition show, in effect, the same grounds for relief, and in substantially the same form, as those considered in an opinion this day filed by this court in a proceeding entitled J. J. Miller v. Imperial Water Company, No. 8 (L. A. 2,311) 103 Pac. 227. For the reasons therein stated, we are of the opinion that the demurrer to the petition in this case was improperly sustained by the trial court.

The judgment of the superior court is reversed, and the cause remanded, with directions to the lower court to overrule the demurrer of defendant, with leave to answer if it be so advised.

We concur: SLOSS, J.; SHAW, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

155 Cal. 797

RAGGIO et al. v. PALMTAG et al.

(S. F. 4,844.)

(Supreme Court of California. June 29, 1909. On Rehearing, July 29, 1909.)

1. Quieting Title (§ 14*)—Conditions Precedent.

A mortgagee, who becomes the purchaser at a void foreclosure sale, and who enters into occupation of the property under a deed improperly executed and delivered by the commissioner, is a mortgagee in possession, and the mortgagor's assignee cannot quiet title to the property against the mortgagee without paying, or offering to pay, the debt secured by the mortgage, though such debt is barred by limitations.

[Ed. Note.—For other cases, see Quieting Title, Dec. Dig. § 14.*]

2. Mortgages (§ 294*)—Mortgagee in Possession.

The mortgagee of homestead and other lands presented to the administrator of the deceased mortgagor a claim, giving the date of the mortgage, and setting out the note secured thereby, but without giving the book and page of the record in which the mortgage was recorded, or the names of the mortgagor and mortgagee. The claim was allowed by the administrator, and approved by the court. After the death of the mortgagor's wife, who had joined in the mortgage, the court made an order for the sale of the real estate, and the mortgagee purchased the same, and entered into possession thereof. *Held*, that the mortgagee was a mortgagee in possession, though the claim presented to the administrator did not comply with Code Civ. Proc. § 1497.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 294.*]

3. Homestead (§ 141*)—Descent.

On the death of one making a declaration of homestead on described land, the title thereto vests in his surviving wife, subject to a mortgage by him in which she joined.

[Ed. Note.—For other cases, see Homestead, Dec. Dig. § 141.*]

4. Homestead (§ 153*)—Death of Mortgagors—Foreclosure.

Where one making a declaration of homestead on described land executed a mortgage thereon, in which the wife joined, and then died, leaving the wife surviving, the mortgagee could, after the death of the wife, foreclose the mortgage on the property, as authorized by Code Civ. Proc. § 1500, by waiving recourse against any other property of the wife, without presenting a claim against her estate, under section 1475, notwithstanding section 1485, relating to the rights of persons succeeding to the rights of homestead owners, for on the death of the wife the homestead ceased to exist.

[Ed. Note.—For other cases, see Homestead, Dec. Dig. § 153.*]

5. Mortgages (§ 459*) — Foreclosure — Issues.

Where the cross-complaint, praying for the foreclosure of a mortgage, alleged that designated persons claimed an interest in the premises, which was subject to the mortgage, and the designated persons in their answer denied that their claims were subject to the mortgage, the

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issue required the designated persons to prove their right of priority, and on failure so to do, they could not complain of a finding against them, for the cross-complainant made out a prima facie case by proving the execution and delivery of the note and mortgage securing it, and the other formal matters required by statute.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 459.*]

6. Executors and Administrators (§ 227*)—Presentation of Claims—Sufficiency—"Int."—"& Int."

A claim presented to an administrator for a specified sum "& int.," allowed by the administrator and approved by the court in similar language, is a claim for the specified sum and interest, the abbreviation, under Code Civ. Proc. § 186, standing for the word "interest."

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 227.*

For other definitions, see Words and Phrases, vol. 4, p. 3682.]

7. Executors and Administrators (§ 241*)—Claims—Interest.

A holder of a note secured by mortgage, who, on the death of the debtor, presented a claim based on the note and mortgage to the administrator, and obtained the allowance of interest up to a specified time, was not deprived of future interest.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 241.*]

On Rehearing.

8. Executors and Administrators (§ 228*)—Presentation of Claims—Sufficiency.

A claimant presented to the administrator of the deceased debtor a verified claim, and gave the date of the mortgage securing it, without giving the names of the parties thereto, and incorrectly describing one of the parcels of the land mortgaged. The claim was presented in a sealed envelope containing the original note and mortgage. *Held* that, as the note and mortgage were made a part of the claim, it was sufficiently presented within Code Civ. Proc. § 1497, relating to claims against decedents.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 228.*]

In Bank. Appeal from Superior Court, San Benito County; M. C. Sloss, Judge.

Action by Luis Raggio and others against Fredericka Palmtag and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Briggs & Hudner, for appellants. H. W. Scott and F. H. Gould, for respondents.

MELVIN, J. In 1868, Luis Raggio made a declaration of homestead upon the S. W. ¼ of section 4, township 13 S., range 4 E., Mt. Diablo Base and Meridian, containing 160 acres of land. The document was duly recorded in Monterey county, and was transcribed according to law in the records of San Benito county after that county was created. In December, 1894, Luis Raggio and Maria Ynezia Raggio, his wife, mortgaged said land, together with other lands adjoining, making in all about 475 acres, to Fredericka Palmtag, to secure the payment of a certain promissory note of $4,000, executed by both of them, payable four years after date, with interest at the rate of 10 per cent. per annum, compounding semiannually. In 1895 Luis Raggio died, leaving as his survivors his wife, Maria Ynezia Raggio, several children, and the children of a deceased daughter. A son, Luis Raggio, one of the plaintiffs in this action, and William Palmtag, were duly appointed and qualified as administrators of the estate. They filed an inventory of the property, including the tract described in the declaration of homestead, but failed to mention the fact that the homestead estate existed. Within the time prescribed by law, however, Fredericka Palmtag presented a purported claim based upon her note and mortgage. This was allowed by the administrator, and approved by the court. In October, 1896, Maria Ynezia Raggio died, leaving the same surviving children and grandchildren as did her husband, Luis. In February, 1897, after her death, the administrators of Luis Raggio's estate obtained an order of court to sell all the property of the estate, which consisted solely of the real estate subject to the mortgage of Fredericka Palmtag. This land was finally sold to the mortgagee for the sum of $5,318, being $218 in excess of the amount of her claim. She was induced to make this bid by the administrators, as the estate owed $218 more than the money on hand. The real value of the property as found by the court was at that time, and at the time of the trial of this action, $3,000. In February, 1899, this action was commenced by Luis Raggio, who had acquired all of the interests of his brothers and sisters. He was joined in the action by his minor nephews and nieces, represented by their guardian. Defendant Johnson was a tenant under Fredericka Palmtag, and it is not necessary for the purposes of this case to discuss his interest. Defendant Palmtag answered, and by cross-complaint set up the existence of her note and mortgage and the proceedings in the estate of Luis Raggio, deceased. She prayed that the note and mortgage be restored and reinstated, and that the mortgage be foreclosed. Judgment was given in favor of defendant and cross-complainant. This appeal is from the judgment, and from an order denying a new trial.

The trial court found that Fredericka Palmtag was a mortgagee in possession, and the most serious problems in this case arise out of the discussion of this finding. Appellants contend that the claim presented against the estate of Luis Raggio, deceased, by Fredericka Palmtag was so deficient as to be a nullity. Section 1497, Code Civ. Proc., prescribes the requisites for such a claim as follows: "If the claim or any part thereof be secured by mortgage, or other lien which has been recorded in the office of the recorder of the county in which the land affected by it lies, it shall be sufficient to describe the mortgage or lien, and refer to the date, volume and page of its record. If, in any case, the claimant has left any original voucher in the hands of the executor or administrator, or suffered the same to be filed in court, he may withdraw the same when a copy thereof has been already, or is then, attached to his claim. A brief description of every claim filed must be entered by the clerk in the register, showing the name of the claimant, the amount and character of the claim, rate of interest, and date of allowance."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

In the purported claim here considered the property is not accurately described. The date of the mortgage is given but not the book and page of the record in which it is copied; and, although the note is set out in the claim, the names of the mortgagors and mortgagee are not given. In relation to this claim the court below found: "That at the time of the presentation of the said claim described in said cross-complaint, and presented with and accompanying the same, said Fredericka Palmtag did present and leave with the said administrators of the estate of Luis Raggio, deceased, the original note described in said cross-complaint, and the original mortgage described and set out in said cross-complaint, and that there was at that time indorsed on said mortgage, the place, date, volume, and page of its record in the records of San Benito county; that, except as herein found, said claim did not refer to the date, volume, or page of such record. That at the time of the sale of the real estate, described in, and set forth in, the answer and cross-complaint of Fredericka Palmtag by said administrators, to defendant Fredericka Palmtag, plaintiff Luis Raggio, then one of the administrators of the estate of Luis Raggio, deceased, had actual notice that the homestead, described in the cross-complaint of Fredericka Palmtag herein, had been declared upon the property therein described."

Appellants' theory is that the jurisdictional prerequisites of the presentation of a claim in due form having failed, the lien of the mortgage was forever lost, citing Estate of Turner, 128 Cal. 388, 60 Pac. 967, and other cases. Whatever might be the force of such a theory in a direct appeal involving the order of sale or other matters in the estate of Luis Raggio, deceased, we think that, under the settled law in California, the respondent was properly found to be a mortgagee in possession. It has been held that, where the mortgagee becomes the purchaser at a void foreclosure sale, and enters into occupation of the property under the deed improperly executed and delivered by the commissioner, he is nevertheless a mortgagee in possession, and the mortgagor's assignee cannot quiet his title to the property against such mortgagee without paying, or offering to pay, the debt for the security of which the mortgage was created. Burns v. Hiatt, 149 Cal. 621, 87 Pac. 196, 117 Am. St. Rep. 157. The same rule applies even when the debt secured by the mortgage is barred by the statute of limitations. Brandt v. Thompson, 91 Cal. 461, 27 Pac. 763. See, also, Spect v. Spect, 88 Cal. 437, 26 Pac. 203, 13 L. R. A. 137, 22 Am. St. Rep. 314; Booth v. Hoskins, 75 Cal. 276, 17 Pac. 225; Grant v. Burr, 54 Cal. 298; Zellerbach v. Allenberg, 99 Cal. 69, 33 Pac. 786; Peshine v. Ord, 119 Cal. 311, 51 Pac. 536, 63 Am. St. Rep. 131.

In Ions v. Harbison, 112 Cal. 260, 44 Pac. 572, this court held that a purchaser at a probate sale cannot be deprived of possession by the grantee of the surviving mortgagor without full payment of the debt, even though certain proceedings preliminary to the sale were not in accordance with statutory requirements. That case presents some resemblance to this. In that case, as in this, the homestead property had been mortgaged, and the title to the homestead vested in the surviving husband upon the death of his wife, subject, however, to the mortgage which had been executed by both husband and wife to secure payment of a certain promissory note. The property was sold to satisfy the mortgage, and to defray expenses of administration. In that case the court says: "Under these circumstances the plaintiff contends that the property in question was not subject to administration, and that therefore the court 'had no jurisdiction of the subject-matter administered upon.' But section 1475 of the Code of Civil Procedure provides that, 'if the homestead selected and recorded prior to the death of the decedent, be returned in the inventory appraised at not exceeding five thousand dollars in value, or was previously appraised as provided in the Civil Code, and such appraised value did not exceed that sum, the superior court must, by order, set it off to the persons in whom title is vested by the preceding section,' and also provides for the payment of existing liens thereon. It is therefore clear that the court has jurisdiction over the homestead for some purposes; and it seems to follow that, if the court, from ignorance of the fact that it was a homestead, or by inadvertence, or mistake of law, made an order not authorized by the statute, its proceedings, however erroneous, would not be without jurisdiction, and hence would be valid as against a collateral attack." In that case plaintiff, a grantee of the surviving husband, stood in the same position as that occupied by the plaintiffs here. There, as here, it was asserted by appellant that the order of sale was made without the proper performance of acts giving the court jurisdiction. The requirements of section 1537 of the Code of Civil Procedure were not strictly followed. In commenting upon this objection the court said: "There were many errors and irregularities in the proceeding; but, as was said in Burris v. Kennedy, supra, 108 Cal. 331, 41 Pac. 458, 'if the court had jurisdiction, errors in the exercise of it, however gross, would not render the decision invalid.'" Appellants' counsel frankly admit the force of the rule as announced in Ions v. Harbison, but insist that the doctrine of that case cannot be upheld. We can see no reason for recalling or changing anything in that case, particularly in view of the conclusions reached in the decision of the later case of Burns v. Hiatt, supra. Nor is the force of the decision in Ions v. Harbison abated by the finding here that the plaintiffs became the owners of the fee. In that case it was directly held that the title to the homestead vested in the surviving husband upon the death of his wife, subject to the lien of the mortgage, and the source of plaintiffs' title was created in identically the same manner.

The lower court correctly held that Mrs. Palmtag was a mortgagee in possession, and it is therefore unnecessary to consider in detail the suggestion of respondents that plaintiff Luis Raggio, having as administrator approved Mrs. Palmtag's claim, and having participated in the transaction whereby she was induced to pay $218 in money, and to accept $3,000 worth of land in satisfaction of a legitimate claim of more than $5,000, was estopped in a court of equity from asserting a legal title to her prejudice. We think, however, that as to him there is merit in this contention; and, whether the estoppel would extend only to his one-sixth interest in his mother's estate (as his counsel declare it could only do in any event), or to the after-acquired additional four-sixths as well, he can hardly be looked upon as a suitor to be highly considered by a court of equity.

The title to the mortgaged property having vested in the widow of Luis Raggio, deceased, on his death, subject to the mortgage, it follows that Mrs. Palmtag had the right to foreclose her mortgage upon that property. This she proceeded to do under section 1500 of the Code of Civil Procedure, waiving recourse against any other property of the estate of Maria Ynezia Raggio, deceased. Appellants contend that such suit could not be brought without the presentation of a claim against the estate. It is admitted that the homestead ceased to exist upon the death of Mrs. Raggio. See Estate of Fath, 132 Cal. 609, 64 Pac. 995. But appellants maintain that, inasmuch as, under section 1485 of the Code of Civil Procedure the homestead descends from the successor thereto, and is taken by her heirs, having "all the rights and benefits conferred by law" upon such "successor," therefore the heirs had the same right conferred upon them as in cases where the homestead does not cease to exist upon the death of one of the parents, to have the property other than the homestead first applied to the payment of the debt that was secured by the mortgage. But when the homestead ceased to exist there could obviously be no necessity for the application of section 1475 of the Code of Civil Procedure. If we grant that the property which had been the homestead could not under section 1485 of the Code of Civil Procedure, be subjected to the ordinary debts of the estate, nevertheless it might, under section 1500 of the Code of Civil Procedure, be subjected to foreclosure of a lien upon that very property, by a waiver of recourse against the other assets of the estate. During her lifetime Mrs. Raggio might have mortgaged the homestead, which had come to her by succession, without any existing liens; and the mortgage might have been satisfied out of the very property upon which she had voluntarily placed it. Having joined in the mortgage before this succession, which took place upon her husband's death, she stood in the same position which she would have occupied had the incumbrance been placed upon the property by her single act after his demise. By the application of section 1500 of the Code of Civil Procedure the property is disposed of just as it would have been if foreclosure had occurred during her lifetime. If, on the contrary, we should hold that section 1475 of the Code of Civil Procedure must be followed, we would be giving to her heirs greater privileges than she enjoyed in her lifetime, instead of the same "rights and benefits conferred by law."

In the cross-complaint there was an allegation in the usual form that N. C. Briggs and J. L. Hudner had, or claimed to have, some interest or estate in the premises described in Mrs. Palmtag's mortgage, but that such claims or interests were subject and subordinate to the Fredericka Palmtag mortgage and the lien thereof. In their answer to the cross-complaint they merely deny that their claims are subsequent to those of the cross-complainant. The rights of Messrs. Briggs and Hudner do not seem to have been litigated. No specific claim or lien, or demand of any kind, was set up by them, either by pleading or in any other manner. We think that the issue demands that whatever rights they had should have been asserted by Messrs. Briggs and Hudner, and proof as to the priority of their claims should have been introduced by them. Having failed to present any such proof, they cannot now complain of the finding against them. The demandant makes out a prima facie case when he proves the execution and delivery of the note and mortgage, and the other formal matters required by the statute. 2 Jones on Mortgages, § 1295; Burridge v. Fogg, 8 Cush. (Mass.) 183.

In the case of Foster v. Bowles, 138 Cal. 451, 71 Pac. 495, there was an allegation in the complaint that one of the defendants had, or claimed to have, some "right, title," etc., to said mortgaged lands. This averment was met by a denial of defendant in the answer. At the trial this defendant defaulted; and, as no proof was offered or made with respect to the allegations of the answer, these averments are found to be untrue, a finding which was sustained by this court. See, also, Sichler v. Look, 93 Cal. 608, 29 Pac. 220.

Objection is made to the amount of the judgment, on the ground that interest was waived at the time of the presentation of the claim of Fredericka Palmtag against the estate of Luis Raggio, deceased. The demand was for $4,000 "& int." The approval by the administrators and the allowance by the court were both expressed in the same manner, using the abbreviation "int." It is contended that this is a meaningless collocation of letters, not sufficient to support the demand, the approval, or the allowance. Section 186 of the Code of Civil Procedure provides that: "Such abbreviations as are in common use may be used, and numbers may be expressed by figures or numerals in the customary manner." The very form used in this demand has been recognized by the Supreme Court of Illinois as "beyond question an abbreviation of the word 'interest.'" Belford v. Beatty, 145 Ill. 414, 34 N. E. 254. We think the lower court very properly recognized it as representing that word.

There is no merit in the contention that because the allowance of interest was made on August 13, 1895, no further interest could be claimed after that date. There is nothing in Jones v. Waldon, 145 Cal. 523, 78 Pac. 1046, in conflict with this theory, nor does the case of Consolidated Nat. Bank of San Diego v. Hayes, 112 Cal. 75, 44 Pac. 469, announce any different doctrine. In the former case the claim itself was allowed for a small fraction of the original demand, and that was held to be a rejection of the balance; in the latter case the allowance was for the principal only, and that was held to be a rejection of the claim for accrued interest, which barred its collection, after the running of section 1493 of the Code of Civil Procedure, without the commencement of suit.

There are no other specifications of error that require special attention.

The judgment and order are affirmed.

We concur: HENSHAW, J.; SHAW, J.

ANGELLOTTI, J. I concur in the judgment. I am of the opinion that it should here be held that there was a sufficient presentation of the mortgage claim against the estate of Luis Raggio, deceased, to save the rights of the mortgagee, and that it was not necessary to present any claim against the estate of Maria Ynezia Raggio.

On Rehearing.

PER CURIAM. The petition for a rehearing is denied. In response to the points therein presented we think it proper to give as an additional reason for the affirmance of the judgment; that stated in the concurring opinion of Justice ANGELLOTTI. The court below held, in effect, that the mortgage claim was duly presented for allowance against the estate of Luis Raggio, deceased. This was fully established by the findings, and also by the evidence, which is not contradicted, and which is somewhat more specific than the findings. The claim was properly verified. It attempted to state the contents of the mortgage, and the statement was amply sufficient to identify it, except for the fact that the names of the mortgagor and mortgagee were not given, and that one of the parcels of land mortgaged was incorrectly described; the mistake being obviously a mere clerical inaccuracy. But the claim was presented to the administrator in a sealed envelope, and with it were inclosed the original note and mortgage, mentioned in the statement of the claim. The provisions of section 1497, Code Civ. Proc., regarding the reference to the record of the mortgage, in the statement of a claim secured thereby, are enabling, and not restrictive or exclusive. The purpose of the reference is to afford means whereby the administrator may ascertain the terms of the mortgage and the land it covers, and the statute allows a mere reference to the record, instead of the full statement of its terms which might otherwise be necessary. It is plain that, although any other mode of statement which fully informs the administrator of the terms of the mortgage would be sufficient, the claimant did not, in the present case, make the required reference to the book and page of the mortgage record, but instead thereof she afforded much more satisfactory means of information of its contents. She inclosed with the claim the original note and mortgage, all being in the same envelope and sealed. This made the note and mortgage as effectually parts of the claim as if they had been attached or fastened thereto in the ordinary manner, and it gave the administrator full knowledge of its contents. This was the object to be attained by the citation to the record. It was thus fully accomplished by more satisfactory evidence, and the presentation was complete. Estate of McDougald, 146 Cal. 193, 79 Pac. 878. The description of the land as set forth in the statement of the claim did not purport to be anything more than a copy of the description contained in the mortgage, and the clerical error therein was completely controlled and corrected by the original mortgage which accompanied it. Such an error so entirely cured would not invalidate the claim.

156 Cal. 82

OLCESE v. JUSTICE'S COURT OF FIRST JUDICIAL TP., CONTRA COSTA COUNTY, et al. (S. F. 5,194.)

(Supreme Court of California. July 7, 1909.)

1. CERTIORARI (§ 5*)—REMEDY BY APPEAL.

Under Const. art. 6, § 4, empowering the Supreme Court to issue writs of certiorari, and Code Civ. Proc. § 1068, providing that the writ may be granted when an inferior tribunal has exceeded its jurisdiction and there is no appeal, the Supreme Court will not issue certiorari to review the judgment of a justice; there being right of appeal from it to the superior court, one of common-law jurisdiction, which can itself, in a proper case, issue certiorari.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 5, 6; Dec. Dig. § 5.*]

2. CERTIORARI (§ 5*)—REMEDY BY APPEAL.

Where a judgment of a justice has been appealed to and affirmed by the superior court, such judgment of affirmance is res judicata of the matter, and estops any review by the Supreme Court, on certiorari, of the judgment of the justice, leaving only the remedy of reviewing by certiorari, the judgment of the superior court, from which there is no appeal.

[Ed. Note.—For other cases, see Certiorari, Dec. Dig. § 5.*]

3. APPEARANCE (§ 9*)—GENERAL APPEARANCE.

There is, in effect, a general appearance, waiving informalities in the service of process, where, in addition to a motion to quash the service, in which defendant's appearance was special, he demurred to the complaint, not only on the ground of want of jurisdiction of the person, when such demurrer plainly would not lie, but also on the ground of want of jurisdiction of the subjects.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 42-52; Dec. Dig. § 9.*]

Beatty, C. J., dissenting.

In Bank. Petition of G. B. Olcese for writ of review, directed against the Justice's Court of the First Judicial Township, County of Contra Costa, State of California, and C. H. Hayden, justice of the peace in and for said township. Writ discharged.

William M. Cannon, for petitioner. C. H. Marks, for respondents.

HENSHAW, J. An action upon contract was brought in the justice's court for the First judicial township of the county of Contra Costa against petitioner, Olcese. The complaint was in all respects sufficient to show jurisdiction in the justice's court of the subject-matter of the action. Code Civ. Proc. § 832, subd. 7. It failed to allege, however, that the defendant's contract was in writing; and while, under the provision of the Code last above cited, jurisdiction of the subject-matter is in the justice's court, whether the contract be oral or in writing, yet, by the provisions of section 848, Code Civ. Proc., as amended in 1907, service upon the defendant may not be had outside of the county in which the action is brought, unless the contract be in writing. Service in this case was had upon the defendant in the city and county of San Francisco. He appeared in the justice's court by motion, supported by affidavit, to quash the service of the summons for the reason above indicated, and at the same time demurred; his demurrer reading as follows: "The defendant in the above-entitled action, specially appearing for said purpose, demurs to the complaint in said action, on the ground that the court has no jurisdiction of the person of this defendant or of the subject-matter of said action. Wherefore said defendant prays to be hence dismissed, with his costs herein incurred." The justice's court denied the motion, and overruled the demurrer; and, this petitioner declining to proceed further, judgment by default was entered against him. From that judgment in due time he prosecuted his appeal to the superior court of the county of Contra Costa upon questions of law. The superior court of Contra Costa affirmed the judgment of the justice's court. Thereafter this petitioner sued out certiorari to review the judgment, not of the superior court, but of the justice's court. The first question presented is whether or not petitioner has mistaken his remedy—that is to say, whether his right to a certiorari, if certiorari should be issued at all, is not limited to a review of the judgment of the superior court—second, upon the merits whether or not, conceding that petitioner was improperly served in the city and county of San Francisco, his appearance by demurrer did not constitute a general appearance so as to waive the irregularity in the service of summons.

The Constitution (article 6, § 4) vested this court with power to issue writs of certiorari. At the time this constitutional provision was passed, it was well settled and well understood that certiorari was not a writ of right, that the granting or refusing to issue it rested in the discretion of the court, and that by modern common-law usage, and by the rules laid down by the decisions of this state under its earlier Constitution, the writ would not be issued where the matter sought to be reviewed could be heard and determined upon appeal. "The remedy of defendant is by appeal, and not by writ of review. The latter lies only when the former does not." People v. Shepard, 28 Cal. 115; Comstock v. Clemens, 19 Cal. 80; Clary v. Hoagland, 13 Cal. 173. When the judges declared that certiorari would not issue when there was an appeal, and when, following this, the Code of Civil Procedure (section 1068) provided that a writ of review may be granted when an inferior tribunal, exercising judicial function, has exceeded the jurisdiction of such tribunal and there is no appeal, this language was not limited to the case where no appeal lay to the court petitioned for certiorari, but where no appeal lay to a court of general common-law jurisdiction, such a court as could itself, in a proper case, issue certiorari. Comstock v. Clemens, supra. That the superior court is such a court, with the fullest common-law and equity jurisdiction, is not questioned, and, moreover, it is a court which the Constitution vests with power to issue this writ. Article 6, § 5. By the same Constitution is vested in the superior court appellate jurisdiction "in such cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law." The law has provided for an appeal such as was taken in this case from the justice's court to the superior court, with full power and jurisdiction in the latter court to determine the question of law whether or not the justice's court acquired jurisdiction over the person of the defendant. The complete controversy here presented for review was presented to the superior court, and by the judgment of that court of general jurisdiction was determined adversely to this petitioner's contention.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The question which thus arises then is, May petitioner ignore a judgment of a court of general jurisdiction given upon this matter, and here seek by certiorari to have the judgment of the justice's court reviewed, or will the judgment of the superior court estop him from so proceeding, leaving open to him, as his proper method of redress, an application for a writ of certiorari from the judgment of the superior court, from which judgment the law had provided no appeal? We think, beyond doubt, that the judgment of the superior court so operates as an estoppel. It is the judgment of a court of general jurisdiction, fully empowered to pass upon the law and the facts. Having done so, the matter becomes res judicata, with all the binding force and effect by way of estoppel which attaches to any other judgment. It is no argument against this to say that the effect is that the Legislature deprives this court of its constitutional power to review, under certiorari, the judgment of a justice's court, by providing that an appeal may be taken from such judgment to the superior court. Certiorari to check excesses in jurisdiction was not employed where there was an appeal. The fact of an appeal relieved from the necessity of, and denied the right to, certiorari. That the judgment of the superior court is in all respects a judgment by a competent court, and one of general jurisdiction, is not questioned. It may not be ignored in any succeeding effort to assail the judgment of the justice's court. It raises an estoppel against any such effort until it itself shall be overthrown. This, since an appeal from it is denied, may be undertaken under certiorari. But so long as the judgment of the superior court stands unassailed, that judgment, formally decreeing the validity of the judgment of the justice's court, cannot be ignored, nor in another proceeding swept aside. The appeal from the judgment of the justice's court, heard and determined by the superior court, was in all respects the equivalent of a writ of error, and the application to this court for certiorari is but an attempt to obtain a second writ of error, directed, not against the appellate judgment, but against the judgment of the justice's court, upon matters adjudicated by a court of general jurisdiction under the first appeal or writ of error. It is well settled that this cannot be done. Says the Supreme Court of Massachusetts (Hayes v. Collins, 114 Mass. 54): "If the judgment upon the former petition had passed upon the merits, it might well be held to be a conclusive adjudication that the petitioner was not entitled to have the original judgment reviewed, just as the affirmance of the judgment upon a writ of error is held to be a bar to a second writ of error for any cause which existed at the time of that judgment." State v. Water Com'rs, 30 N. J. Law, 247; Illingworth v. Rich, 58 N. J. Law, 507, 34 Atl. 757.

Such are the general principles, and the recognized practice in such a case as this has been to seek a review of the judgment of the superior court. Sherer v. Sup. Ct., 94 Cal. 354, 29 Pac. 716; Buckley v. Sup. Ct., 96 Cal. 119, 31 Pac. 8. This court has never recognized the right of a petitioner to a writ of certiorari to review the judgment of a justice's court after appeal taken and determined in the superior court. It has reviewed the judgment of a justice's court only under such exceptional circumstances as those indicated in Elder v. Superior Court, 136 Cal. 364, 68 Pac. 1022, where petitioner's power to appeal was lost by reason of the fact that he was never notified of the day set for trial, or the rendition of judgment against him.

But if consideration be paid the merits of this controversy, petitioner is not entitled to a judgment at our hands upon certiorari. For, notwithstanding the alleged defect in the service on him of the summons, if he made a general appearance in the justice's court, he will be bound by that appearance as having waived the informality of his summons. Pleas based upon lack of jurisdiction of the person are in their nature pleas in abatement, and find no especial favor in the law. They amount to no more than the declaration of the defendant that he has had actual notice, is actually in court in a proper action, but, for informality in the service of process, is not legally before the court. It is purely a dilatory plea; and, when a defendant seeks to avail himself of it, he must, for very obvious reasons, stand upon his naked legal right, and seek nothing further from the court than the enforcement of that right. He will not be heard to ask of the court anything further than an adjudication upon his plea, and if he does ask anything further, then, by logic of the fact, he must necessarily have waived the irregularity of his summons before the court. Here is one reason for the well-settled rule that, if a defendant wishes to insist upon the objection that he is not in court for want of jurisdiction over his person, he must specially appear for that purpose only, and must keep out for all purposes except to make that objection. Another reason, equally valid, is that if such defendant shall ask for any relief other than that addressed to his plea, he is seeking to gain an unconscionable advantage over his adversary, whereby, if the determination of the court be in his favor, he may avail himself of it, while, if it be against him, he may fall back upon his plea of lack of jurisdiction of the person. So it is well settled that, if a defendant, under such circumstances, raises any other question, or asks for any relief which can only be granted upon the hypothesis that the court has jurisdiction of his person, his appearance is general, though termed special, and he thereby submits to the jurisdiction of the court as completely as if he had been regularly served with summons. In re Clark, 125 Cal. 388, 58 Pac. 22; Security, etc., v. Boston, etc., 126 Cal. 418, 58 Pac. 941, 59 Pac. 296. In the present case the defendant made his motion to quash the service of the summons. In this his appearance was undoubtedly special, as he limited it solely to a request for this specific relief. But he also demurred to the jurisdiction of the court over his person and over the subject-matter of the action. In this case plainly a demurrer to the complaint for lack of jurisdiction over his person could not lie. If in any conceivable case it could lie, such a demurrer also would be treated as a special appearance. But here he went further, and demurred to the jurisdiction of the court over the subject-matter of the action, a request for relief which the court could not grant him, saving upon the theory that he was regularly before the court. It was relief, moreover, independent and apart from his plea to the jurisdiction of the person, and, if successful, would have worked a dismissal of the action upon an entirely distinct legal ground. That in so demurring he waived the question of the jurisdiction of his person, and submitted himself to the jurisdiction of the court, is abundantly settled. Section 1014, Code Civ. Proc.; Zobel v. Zobel, 151 Cal. 98, 90 Pac. 191; 2 Ency. Plead. & Prac. p. 625; 3 Cyc. p. 505.

For the foregoing reasons, the writ is discharged.

We concur: SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.

I dissent: BEATTY, C. J.

156 Cal. 68

TURNER v. MARKHAM. (L. A. 2,212.)

(Supreme Court of California. July 6, 1909.)

1. Appeal and Error (§ 1180*)—Reversal—Effect—Supplementary Proceedings.

Proceedings supplementary to execution fall with the reversal of the judgment on which the proceedings are founded, and an unexecuted order in such proceedings must, after reversal of the judgment, be set aside by the superior court, though the order was affirmed prior to such reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4627, 4628; Dec. Dig. § 1180.*]

2. Appeal and Error (§ 1179*)—Reversal—Restitution.

Under Code Civ. Proc. § 957, authorizing the court reversing a judgment to make restitution of property lost by the erroneous judgment, a judgment debtor, who complies with an order in supplementary proceedings requiring him to pay a specified sum to the judgment creditor, may, on the reversal of the judgment on which the proceedings were founded, recover the sum paid.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4621–4625; Dec. Dig. § 1179.*]

3. Appeal and Error (§ 781*)—Questions Reviewable—Immaterial Questions.

The Supreme Court will not retain an appeal, where its consideration and disposition of the merits will not affect any substantial right of the parties, though liability for costs of appeal may be involved.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 781.*]

In Bank. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by W. D. Turner against H. H. Markham and others. From an order in proceedings supplementary to execution defendant H. H. Markham appeals. Dismissed.

See, also, 102 Pac. 272.

Joseph R. Patton, for appellant. Porter, Sutton & Cruickshank and Hunsaker & Britt, for respondent.

SLOSS, J. The plaintiff above named recovered a judgment in the superior court of Los Angeles county against H. H. Markham and George H. Coffin for $116,842.81 and costs. Thereafter he instituted in said court proceedings supplementary to execution, and these proceedings culminated in an order requiring Markham to pay over to the judgment creditor the sum of $4,800 found by the court to be in his hands and under his control. From this order Markham appeals.

If the judgment recovered by the plaintiff were still subsisting, we would be required to examine the points made by the appellant in order to determine whether the court below properly ordered him to make payment of the $4,800. But since the present appeal was taken, we have, in Turner v. Markham (Cal.) 102 Pac. 272, reversed the judgment upon which the execution and the proceedings supplementary to execution were founded. The proceedings to enforce the judgment must fall with the judgment itself. Even if Markham had already complied with the order here appealed from, he would, on reversal of the judgment, have been entitled to recover from the respondent the sum paid. Code Civ. Proc. § 957; Ward v. Sherman (Cal.) 100 Pac. 864. The order being still unexecuted, it is the duty of the superior court, upon reversal of the judgment, to set it aside. And this would be so, even if the order had been affirmed prior to the reversal of the main judgment

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The disposition of this appeal is therefore a matter of indifference to the parties. An affirmance will neither benefit the respondent nor harm the appellant. A reversal will add nothing to the security of the appellant, who can obtain complete relief by a mere request to the court below to vacate the order appealed from. This court has often decided that it will not retain an appeal where its consideration and disposition upon the merits will not affect any substantial right of the parties. The mere fact that liability for costs of appeal may be involved does not affect this conclusion. Estate of Blythe, 108 Cal. 124, 41 Pac. 33; Nelson v. Nelson, 153 Cal. 204, 94 Pac. 880.

The appeal is dismissed.

We concur: SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

(156 Cal. 58)

LINFORTH v. SAN FRANCISCO GAS & ELECTRIC CO. (S. F. 4,838.)

(Supreme Court of California. July 6, 1909. Rehearing Denied Aug. 5, 1909.)

1. Damages (§ 111*)—Injury to Buildings—Measure of Damages.

The rule that the measure of damages for injury to a building by a trespass is the cost of restoring it to its former condition, and the loss of rental during the time required to make the repairs, is the rule established by Civ. Code, § 3333, defining the measure of damages for breach of a noncontract obligation.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 274–278; Dec. Dig. § 111.*]

2. Evidence (§ 571*)—Injury to Property—Opinion Evidence.

The jury, in making an award of damages for injuries to a building by trespass, are not bound by expert opinions as to the cost of restoring the building but they may proceed on the description thereof as they find it from the testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2398; Dec. Dig. § 571.*]

3. Damages (§ 138*)—Injury to Building—Excessive Damages.

A $30,000 building was injured by an explosion of gas. It was severely jarred and thrown out of plumb. The owner expended $1,120 in temporary repairs. An estimate that it would cost $6,000 more to restore it did not include many details, and the building would not be in as good condition as before. The building rented for about $400 a month, and the owner had lost $680 in rent, and the building had not been repaired. *Held*, that a verdict of $10,000 for injuries to the building, and $800 for loss of rent, was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 397, 398; Dec. Dig. § 138.*]

4. Damages (§ 174*)—Injury to Building—Evidence—Admissibility.

In an action for injuries to a building by an explosion of gas, evidence of the original cost of the building, and that it was as good as new at the time of the accident, was admissible on the issues of the condition of the building, and whether restoration could be made at a reasonable allowance by way of damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 462; Dec. Dig. § 174.*]

5. Gas (§ 20*)—Injury to Building—Similar Damage.

In an action for injuries to a building by explosion of gas negligently permitted to escape between the walls, floors, and studdings thereof evidence of the effect of the explosion on another building in the neighborhood was inadmissible.

[Ed. Note.—For other cases, see Gas, Dec. Dig. § 20.*]

6. Evidence (§ 194*)—Demonstrative Evidence.

Where, in an action for injuries to a building by explosion of gas escaping from defective pipes, couplings, etc., the evidence showed that three couplings, one of which was defective, was found in the meter room after the explosion, that three new couplings, similar to the three found, had been put in the meter room, and that on the morning of the explosion, and within a short time thereafter, the owner had observed an employé of the gas company in the meter room with couplings, the court properly admitted the couplings in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 679; Dec. Dig. § 194.*]

7. Witnesses (§ 388*)—Impeachment—Foundation.

Where, in an action for injuries to a building by an explosion of gas escaping through defective pipes, a witness on direct examination testified for defendant to finding a hole in a meter after the explosion, that the hole was covered with soap, and that on pushing his hand over it, his nail went into the hole, and the gas came out of it, a question on cross-examination as to whether the witness had not stated to the owner of the building that the trouble was due to a pin hole in the meter was proper as laying a foundation for impeachment by proof of contradictory statements, as authorized by Code Civ. Proc. § 2052.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1233–1242; Dec. Dig. § 388.*]

8. Negligence (§ 141*)—Instructions—Misleading Instructions.

An instruction that defendant's claim of contributory negligence presupposes the existence of negligence of defendant, and if there was no negligence of defendant, there could be no contributory negligence of plaintiff, is not erroneous, as leading the jury to infer that the defense of contributory negligence is a confession of defendant's negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 382–399; Dec. Dig. § 141.*]

9. Damages (§ 210*)—Instructions.

An instruction that, if the jury found for plaintiff, they would award him such damages as would compensate him for "the injuries complained of" was not erroneous, as leading the jury to award other damages than for the injuries proved.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 537, 538; Dec. Dig. § 210.*]

10. Trial (§ 351*) — Special Issue — Refusal to Submit.

It is not error to refuse to submit a special issue conceded by the adverse party.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 351.*]

11. Trial (§ 351*)—Special Issue—Refusal to Submit.

It is not error to refuse to submit a special issue covered by other special issues actually propounded.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 834; Dec. Dig. § 351.*]

12. Trial (§ 188*)—Instructions—Invading Province of Jury.

An instruction, in an action for injury to a building by an explosion of gas, that if defendant's pipes, meters, and connections were free from any leak in a week, or less, before the explosion, the presumption is that they were in such condition at the time of the accident, and unless this presumption is removed, the jury must find for defendant, invades the province of the jury, by directing them as to the inferences which they may draw from facts proved.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 412; Dec. Dig. § 188.*]

13. Appeal and Error (§ 981*)—Discretion of Trial Court—Rulings of Motion for a New Trial.

The granting of a new trial for newly discovered evidence is largely discretionary with the trial court, and its rulings will not be disturbed unless manifestly abused.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3876; Dec. Dig. § 981.*]

14. Appeal and Error (§ 528*)—Record on Appeal—Affidavits on Motion for New Trial.

Affidavits on a motion for new trial, not authenticated by bill of exceptions, are not properly in the record on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2374, 2385; Dec. Dig. § 528.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by Walter H. Linforth against the San Francisco Gas & Electric Company. From a judgment for plaintiff, defendant appeals. Affirmed.

See 99 Pac. 716.

Page, McCutchen & Knight, for appellant. Samuel M. Shortridge and Peter F. Dunne, for respondent.

HENSHAW, J. Plaintiff sued to recover damages for injuries to his property, a building in the city and county of San Francisco. The defendant supplied illuminating gas to the building. Its negligence, as alleged, was in its failure to maintain in suitable condition its pipes, meters, connections, and couplings. By reason of this failure gas was permitted to, and did, escape, and collected in large quantities between the walls, floors, and studding in the building, and finally exploded, with consequent injury to the building. The answer does not raise a direct issue, to the effect that the explosion was not occasioned by escaped gas, but denies that the explosion was occasioned through the alleged, or any, negligence of the defendant in allowing gas to escape from its pipes. In separate defenses the answer also charged that the explosion was occasioned by plaintiff's contributory negligence, and by the contributory negligence of plaintiff's tenants. Trial was had before a jury, to which special issues were submitted. The verdict of the jury was in the amount prayed for, $10,800, and from the judgment which followed, and from the court's order denying its motion for a new trial, defendant appeals.

The greater part of the briefs of appellant and respondent is devoted, upon the one hand, to argument that the explosion was not occasioned by gas at all; upon the other hand, to a showing that the evidence adequately establishes that it was so occasioned. (In explanation it should be said that a very unusual circumstance happened, in this: After trial had and judgment rendered one Harry Orchard, alias Frank Berry, imprisoned in a jail in the state of Idaho, awaiting trial for murder, confessed that he caused the explosion by a dynamite bomb placed at one of the entrances of the building [the building consisting of flats], for the purpose of killing Frederick Bradley, a tenant of one of these flats.) But upon this a review of the evidence at length would not be profitable. It must suffice to say that the evidence of plaintiff was directed to showing that the explosion was occasioned by gas; that the tenants, previous to the explosion, had noticed and complained of the odor of escaping gas, and the defendant company had been notified. Plaintiff's evidence was further directed to showing that the point, or points, of escape were in the meters of one or another of the tenants, and in couplings which were defective. In brief, the evidence which plaintiff presented upon these matters was sufficient to justify the submission of the cause to the jury, and to warrant the jury's finding, as it did, that the explosion was occasioned by gas furnished to the building by defendant, and by it being negligently permitted to escape. Indeed defendant's own testimony nowhere seeks to controvert the proposition that the explosion was occasioned by gas. Thus Professor Lowe, called as an expert upon these matters, and testifying on behalf of the defendant, says: "I was familiar with the accident at the time it happened. I saw that the building was pretty badly injured, and knew that a gas explosion had taken place." Professor O'Neil, likewise an expert for the defendant, expresses his belief that the explosion was occasioned by gas, and that it required but a small quantity to produce the result.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The fire marshal, Towe, also a witness for the defendant, testifies: "It was a very simple question to determine the cause of that (the explosion). It was the confining of the gas that caused the explosion. If you fill this room with gas, you are not going to explode it, unless you fill it full, but if you confine it in the wall, you are going to have an explosion." Defendant's evidence was addressed to the proposition that it had been in no way remiss in its duty of inspection and care of its pipes, meters and couplings, and that, not being negligent, either the accident belonged in the category of casualties happening in the exercise of due care, and for which, therefore, the law imputes no blame and charges no liability, or else that it was an accident due to the negligence of one or another of plaintiff's tenants in allowing their gas fixtures or gas grates to become so out of repair that leaks resulted and the explosion followed.

The jury awarded plaintiff $10,000 damages for injuries to the building, and $800 damages loss of rents. The measure of damages in cases such as this is well settled, and is thus expressed by Joyce on Damages: "Where a building has been injured by a trespasser, it has been determined that the measure of damages in an action against him therefor will be the cost of repairing or restoring the building to its former condition where the injury is of such a character that this may be done at a reasonable cost, an allowance also being made for loss of rental during the reasonable time required to make such repairs." This rule has met with general acceptance. Sutherland on Damages, § 1018; Colton v. Onderdonk, 69 Cal. 155, 10 Pac. 395, 58 Am. Rep. 556; Fitzsimmons v. Braun, 199 Ill. 390, 65 N. E. 249, 59 L. R. A. 421; Helbing v. Allegheny Cemetery Co., 201 Pa. 171, 50 Atl. 970; Parish v. Baird, 160 N. Y. 302, 54 N. E. 724; Cincinnati, etc., Co. v. Falconer (Ky.) 97 S. W. 727; Whipple v. Wanskuck Co., 12 R. I. 321; Bradley v. Iowa Cent. Ry. Co., 111 Iowa, 562, 82 N. W. 996; Knight v. Chicago, etc., R. R. Co. 122 Mo. App. 38, 98 S. W. 81; Choctaw, etc., R. R. Co. v. Alexander, 7 Okl. 591, 54 Pac. 421. This rule allowing compensation for the cost of restoration to the original condition when this can be done at a reasonable expense, together with compensation for the loss of the use of the property, is in precise accord with section 3333 of the Civil Code.

The building had cost $30,000. The damage to it was estimated by the jury, and assessed at $10,000, and this, under the evidence, was not excessive. Besides the actual destruction of the building, it was shown that it was severely wrenched, jarred, and in many places thrown out of plumb. Plaintiff had been compelled to expend $1,120 in patchwork and temporary repairs. A contractor testified, in effect, that it would cost $6,000 more to restore it, and that, even then, it would not be in as good condition as before the explosion, and his estimate did not include many details of additional work, the cost of which the jury was competent to appraise, and did appraise. In making this award they were not even bound by the expert opinions as to the cost. Sutherland on Damages (3d Ed.) § 456, says: "So far as the amount of the verdict depends upon opinion, the jurors are to determine it upon their own judgment. They should proceed upon the description of the subject as they find it from the testimony, and avail themselves of such aid as is afforded to be given them. They are not obliged, however, to yield their own judgment, and should not conform their verdict to such opinions. Their findings may be more or less in amount than that stated by any witness." See, also, City of Springfield v. Darby, 139 Ill. 35, 29 N. E. 860; Dammann v. St. Louis, 152 Mo. 186, 53 S. W. 932; Thompson v. De Weese & Co., 25 Colo. 243, 53 Pac. 507; Smith v. Frio County (Tex. Civ. App.) 66 S. W. 711. Nor can it be said that the amount allowed for loss of rents was excessive. Loss to the amount of $680, it was shown, plaintiff had already suffered. The building brought in a rental of about $400 a month. The difference between $680, loss actually sustained, and $800, the amount allowed, was doubtless considered by the jury to be the reasonable prospective loss which would be occasioned when the permanent repairs on the building were undertaken, loss resulting from the necessary suspension of tenancy during the progress of the work.

Evidence of the original cost of the building was admitted. Under the circumstances it was proper so to do. This evidence of original cost, standing alone, would, of course, have slight or no weight in determining the award of damages. It would be of value only in determining whether restoration could be made at a reasonable allowance by way of damages. As the award of damages would be based upon the amount necessary to restore the building to its condition before injury, evidence of the original cost would not at all tend to show what that condition was. But, taken with other evidence in the case, such as was here introduced, it did tend to show the condition of the building at the time of the injury. There was the evidence of a painter, who repainted and overhauled the building less than two months before the explosion, and who testified to its condition then, to the effect that he found it "then practically as good as when it was new." The evidence was not admissible as a criterion of damage, and was not admitted for that purpose. But it was admitted, and was admissible, as a bit of data, which, taken with other evidence, tended to enable the jury to formulate their conclusion upon the condition of the building at the time of the injury.

The court permitted plaintiff to testify, over defendant's objection, to the effect of the explosion upon another building in the immediate neighborhood. Evidence to the effect that the force of the explosion was such as to injure adjoining houses other than that of the plaintiff is held competent in Monroe v. Pac. Dredging Co., 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248. In Fitzsimmons & Connell Co. v. Braun, 199 Ill. 390, 65 N. E. 249, 59 L. R. A. 421, which was an action for injuries to a building by an explosion of dynamite, a witness, in testifying to the damage done to plaintiff's building, was allowed to state, without objection, the damage done to his own building. When defendant produced a witness to testify that the latter's building was not damaged by the explosion, the Supreme Court of Illinois declared that the fact that other buildings at various distances from that of the appellee's were not injured would not be competent, and would tend to introduce collateral issues likely to mislead and confuse the jury. The case is clearly not in point. The damage that was actually done by an explosion is one thing; the damage that was not done is quite another. Proof of it, as the Supreme Court well said, would tend to establish nothing, since the extraordinary freaks of high explosives are well recognized, and would serve to confuse the jury.

Three couplings, one of which was defective, were found in the meter room under the meters, on the Sunday following the explosion. These couplings were produced at the trial. They belonged to the defendant, and fitted its meters. After the explosion, and before these couplings were found, three new couplings similar to the three in question had been put in the meter room connecting some of the meters. On the morning of the explosion, and within a short time thereafter, the plaintiff had observed an employé of the gas company in the meter room near the meters, with some couplings in his hand. Whether they were the actual couplings produced he could not state, though in appearance they were the same. An employé of the defendant was doing some work about the meters, and, when asked by the plaintiff what he was doing, made no response. The superintendent of the defendant, who was present at the time, told the employé to let things alone. Defendant produced evidence to the effect that the couplings in question were old and defective couplings, which had been left by its employés in the meter room long prior to the accident. The couplings produced, under the circumstances, were properly admitted, but that the defense successfully explained away any inference which could be drawn from them, and the faulty condition of one of them, is shown by the special finding of the jury, which eliminates these couplings, or any of them, as the cause of the leakage.

Witness Kelly, called by defendant, on his examination in chief testified to finding a hole in the back of one of the meters after the explosion. His testimony, in effect, was that the hole when found was covered largely, if not entirely, with soap, and, on pushing his hand over it, his nail "went into the hole, and gas came out pretty strong." On cross-examination he was asked that, if in the presence of certain persons named, at the time of his finding the leak, he did not say to the plaintiff that the trouble was due to a pin hole in the meter, caused by rust or defect in the tin. This question, as laying the foundation for impeachment, was proper. If the cause of the leak was due to a pin hole, his statement that his nail went into the hole, and the gas came out pretty strong, was not true. Code Civ. Proc. § 2052; 10 Am. & Eng. Ency. of Law, 281.

With other instructions, the court charged the jury that: "Defendant's claim of contributory negligence on the part of plaintiff or some of his tenants presupposes the existence of negligence on the part of defendant; for, if there was no negligence on the part of the defendant, there could be no contributory negligence on the part of plaintiff, or any of the said tenants. Contributory negligence is that degree of negligence," etc. Against this instruction it is urged that it would "naturally lead a not overintelligent jury to infer that the defense of contributory negligence was tantamount to a confession of negligence by the party asserting the defense. That the instruction is sound in point of law may not be questioned. 7 Am. & Eng. Ency. of Law (2d Ed.) 373; Kentucky Railroad Co. v. Thomas' Adm'r, 79 Ky. 160, 42 Am. Rep. 208; Kansas City Railroad Co. v. Crocker, 95 Ala. 412, 11 South. 262; Ruter v. Foy, 46 Iowa, 132. Moreover, the instructions, taken as a whole, were fair and quite understandable upon the question. If, as appellant seems to contend, the jury, through ignorance, did not understand them, the fault lies not with the law.

As a part of one of these instructions the court declared to the jury: "If, however, you find that the plaintiff is entitled to recover, you will award him with such damages within the amount claimed as will, in your opinion, compensate him for all the injuries complained of." Standing by itself, and construed as appellant would construe it, the instruction is manifestly erroneous. The plaintiff would be entitled to recover damages only for the injuries complained of and proved. But throughout the instructions the true rule is clearly and repeatedly stated. Reading the particular instruction as a part of the whole, it cannot be believed that the jury could have been misled to appellant's detriment.

There was no error in refusing to submit the special issues proposed by defendant. The first, "Was the hole that now appears in the meter of 1402 Washington street caused by gas, or was it otherwise made?" was not in issue. It was conceded by plaintiff that the hole as it then appeared was not caused by gas. The second, "Did gas escape from any of defendant's meters, pipes, or their connections, on and just prior to the 17th day of November, 1904? If so, specify the source of the leak"—was fully covered by other special issues actually propounded.

Defendant proposed an instruction as follows: "If you shall find that defendant's pipes, meters, and their connections were free from any leak a week or any less time before the explosion, then the presumption is that they were in such condition at the time of such accident; and, unless this presumption is removed by evidence sufficient to convince you to the contrary, you must find that the presumption is true, and your verdict must be given to the defendant." This instruction was properly refused. It invaded the province of the jury, by directing them as to the inference of fact which they should draw from other proven facts. Stone v. Gyser Q. M. Co., 52 Cal. 315; Frazier v. Lynch, 97 Cal. 370, 32 Pac. 319; Omaha, etc., Ass'n v. Mo. Pac. R. R. Co., 42 Neb. 105, 60 N. W. 330; 1 Greenleaf, Ev. (16th Ed.) § 48.

Upon motion for a new trial affidavits were presented touching newly discovered evidence. This evidence was a confession of Harry Orchard that he had occasioned the explosion by dynamite in his attempt to kill Bradley. Orchard's affidavit was not presented, but there are found the affidavits of others to whom his confession was made, and reason is shown why the affidavit of Orchard could not be procured. Counter affidavits were presented in opposition to this. The court denied the motion, and it may not be said that it abused its discretion in so doing. The granting of a new trial on the ground of newly discovered evidence is largely discretionary with the trial court, and the exercise of its discretion will not be disturbed, except in a case of manifest abuse. Harralson v. Barrett, 99 Cal. 610, 34 Pac. 342; Hausmann v. Sutter St. R. R. Co., 139 Cal. 174, 72 Pac. 905; People v. Sing Yow, 145 Cal. 4, 78 Pac. 235; People v. Jailles, 146 Cal. 301, 79 Pac. 965. Moreover, in strictness, these affidavits may not here be considered at all. They are not authenticated by bill of exceptions, and are therefore not properly before the court. Herrlick v. McDonald, 80 Cal. 472, 22 Pac. 299; Somers v. Somers, 81 Cal. 608, 22 Pac. 967; White v. White, 88 Cal. 430, 26 Pac. 236; Ramsbottom v. Fitzgerald, 128 Cal. 76, 60 Pac. 522; People v. Terrill, 131 Cal. 112, 63 Pac. 141; Esert v. Clock, 137 Cal. 533, 70 Pac. 479; Estate of Dean, 149 Cal. 487, 87 Pac. 13.

For the foregoing reasons, the judgment and order appealed from are affirmed.

We concur: MELVIN, J.; LORIGAN, J.

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PIERCE v. STABLEMEN'S UNION, LOCAL NO. 8,760, et al. (S. F. 4,092.)

(Supreme Court of California. July 6, 1909.)

1. Injunction (§ 101*) — Interference by Employés with Business of Former Employer.

That certain of the acts, charged in a complaint for an injunction against a labor union's illegal interference with plaintiff's business, amount to crimes, or threatened crimes, does not prevent the granting of the relief; for, while equity will not restrain the commission of a crime as such, the fact that an act threatening irreparable injury to property rights is of itself criminal does not deprive equity of its right to enjoin its commission.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 175; Dec. Dig. § 101.*]

2. Injunction (§ 48*)—Grounds—Trespasses.

While equity will not enjoin a trespass as such, yet when the acts committed and threatened are in the nature of a continuing trespass, working irreparable injury, they will be enjoined.

[Ed. Note.—For other cases, see Injunction Cent. Dig. § 101; Dec. Dig. § 48.*]

3. Constitutional Law (§ 87*)—Protection of Property Rights—Statutes—Validity.

St. 1903, p. 289, c. 235, providing that no combination to procure any act to be done in furtherance of any trade dispute between employers and employés shall be restrained, etc., if construed to prevent the court from restraining a labor union from illegal interference with the business of a former employer, is violative of the constitutional right to acquire, enjoy, and protect property.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 87.*]

4. Statutes (§ 82*)—Special Legislation.

The act so construed is invalid as special legislation, in violation of Const. art. 4, § 5, subds. 3, 33, for it legalizes a combination in restraint of trade, entered into by a trade union, which would be illegal if entered into by any other persons or associations.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 82.*]

5. Constitutional Law (§ 205*)—Privileges and Immunities.

The act so construed grants privileges and immunities to certain citizens, or classes of citizens, which are not granted on the same terms to all citizens, in violation of Const. art. 1, § 21.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 205.*]

6. Injunction (§ 101*)—Interference with Employers—"Boycott."

A "boycott" may adopt illegal means, and thus become a conspiracy and illegal, in which case injunction lies to restrain it, or a boycott may employ legal means and methods, and be merely a legitimate combination by a number of men to accomplish a legal result, in which case equity will not restrain it.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 174, 175; Dec. Dig. § 101.*

For other definitions, see Words and Phrases, vol. 1, pp. 855, 856; vol. 8, p. 7592.]

7. Conspiracy (§ 8*) — Interference with Employers—"Strike."

In the absence of a contract obligation, an organized union of employés may strike, which is done by their ceasing their employment by concerted action, and the "strike" may be based on the refusal of the employer to comply with the employés' demand for the betterment of wages, conditions, hours of labor, the discharge of one employé, the engagement of another, or other considerations which in good faith may be believed to tend toward the advancement of the employés.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 7–10; Dec. Dig. § 8.*

For other definitions, see Words and Phrases, vol. 7, p. 6698.]

8. INJUNCTION (§ 101*)—INTERFERENCE WITH BUSINESS OF EMPLOYERS—"PRIMARY BOYCOTT"—"SECONDARY BOYCOTT."

An organized union of employés may, by concerted action, cease dealing, either socially or in a business way, with a former employer, and this act is a "primary boycott," and such employés may, by fair oral or written persuasion, induce others interested in, or sympathetic with, their cause to withdraw their social intercourse and business patronage from the employer, and they may request another to withdraw his patronage from the employer, and may use the moral coercion of threatening a like boycott against him if he refuses to do so, and the latter act is the "secondary boycott," but any act which passes beyond moral suasion, and plays by intimidation on physical fears, is unlawful, and will be restrained by injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 174, 175; Dec. Dig. § 101.*]

9. CONSPIRACY (§ 8*)—STRIKES.

Employés who have struck occupy no contract relation with their former employer, and have no right to coerce him, or attempt to coerce him, by the employment of any other means than those which are equally open to any other individual, or association of individuals.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 7–10; Dec. Dig. § 8.*]

10. INJUNCTION (§ 101*)—STRIKES—LEGAL INJURY.

The inconvenience which the public may suffer by a boycott lawfully conducted is not a legal injury, but the public's rights are invaded the moment the means employed are calculated to, and naturally do, incite riot and disturbance of the peace, and equity will restrain such means.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 174, 175; Dec. Dig. § 101.*]

11. INJUNCTION (§ 101*)—STRIKES—LEGAL INJURY.

Striking union employés may not maintain pickets about their former employer's place of business, for a picket tends to physical intimidation to deter other men from seeking employment in the places vacated by the strikers, and tends to disturbance of the peace, and equity will restrain the strikers from picketing.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 174, 175; Dec. Dig. § 101.*]

Shaw, J., dissenting in part.

In Bank. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by E. G. Pierce against the Stablemen's Union, Local No. 8,760, and others. From a judgment for plaintiff, defendants appeal. Modified and affirmed.

Maguire, Lindsay & Wyckoff and Houx & Barrett, for appellants. Bush Finnell, for respondent.

HENSHAW, J. The plaintiff went into equity seeking an injunction to restrain the defendants from illegal interference with its business. Plaintiff conducted a livery, board, and feed stable in the city and county of San Francisco. The officers and representatives of defendant made request of him to "unionize" his stable by discharging his nonunion employés, and employing union men in their places. Upon his refusal a strike of the union men was declared. Following the strike, a boycott was decreed. A patrol about plaintiff's place of business was established, and, under the findings, these representatives of the defendants, the pickets, "called forth in loud, threatening, and menacing tones to the patrons and customers of plaintiffs not to patronize plaintiffs in their said business. Defendant, the Stablemen's Union, through its agents and representatives, has stated to, and threatened, patrons and customers and other persons dealing with plaintiffs that, if said patrons and customers and other persons continued to patronize and do business with plaintiffs, said Stablemen's Union would cause them respectively to be boycotted in their business." Menacing terms and threatening language were made use of by the agents, representatives, and pickets of the union toward the employés of the plaintiff, such as: "Unfair stable, union men locked out, and nonunion men put in. Look at this stable; the only unfair stable on Market street; the stable that always was, and always will be, unfair. This is a scab stable. When we catch you outside, we will finish you. We will get you yet. It is a scab stable, full of scabs. We will fix you yet. It is a matter of time when we will get you all right. You will never get out of the stable alive. We will break you in half. We will beat you to death. When we catch you outside, we will finish you." A judgment for an injunction followed upon these findings, and that judgment by its terms commanded the defendant, its agents, and employés to desist and refrain "from in any wise interfering with, or harassing, or annoying, or obstructing plaintiffs in the conduct of the business of their stable, known as the 'Nevada Stables,' and situated at No. 1350 Market street, in the city and county of San Francisco; or from in any wise molesting, interfering with, threatening, intimidating, or harassing any employé or employés of plaintiffs; or from intimidating, harassing, or interfering with any customer or customers, patron or patrons, of plaintiffs in connection with the business of plaintiffs, either by boycott or by threats of boycott, or by any other threats; or by any kind of force, violence, or intimidation, or by other unlawful means, seeking to induce any employé or employés of plaintiffs to withdraw from the service of plaintiffs; or by any kind of violence, threats, or intimidation inducing, or seeking to induce, any customer or customers, patron or patrons, of plaintiffs to withdraw their patronage or business from them, or from stationing or placing in front of said plaintiffs' place of business any picket, or pickets, for the purpose of injuring, obstructing, or in any wise interfering with, the business of plaintiffs, or for the purpose of preventing any customer or customers, patron or patrons, of plaintiffs from doing business with them; or from in any other way molesting, intimidating or coercing, or attempt to molest or intimidate or coerce, any customer, patron, or employé of plaintiffs now or hereafter dealing with, or any employé now or hereafter employed by or working for, plaintiffs in their said business." This appeal is from the judgment.

The findings are not attacked. Certain objections to the complaint are presented upon demurrer, and these may be briefly disposed of. The complaint is sufficient to invoke the interposition of a court of equity. It is in this respect similar to the complaint considered in Goldberg-Bowen Co. v. Stablemen's Union, 149 Cal. 429, 86 Pac. 806, 8 L. R. A. (N. S.) 460, 117 Am. St. Rep. 145. The complaint alleges specific acts calling for preventive relief, and is not confined to mere generalities, as was the case in Davitt v. American Bakers' Union, 124 Cal. 99, 56 Pac. 775. The fact that certain of the acts charged amount to crimes, or threatened crimes, does not offer reason why equity will refuse to restrain them. While equity will not attempt to restrain the commission of a crime as such, the fact that an act threatening irreparable injury to property rights is of itself criminal does not deprive a court of equity of its right and power to enjoin its commission. In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092; Sherry v. Perkins, 147 Mass. 212, 17 N. E. 307, 9 Am. St. Rep. 689; Vegelahn v. Guntner, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443. In like manner, while equity will not enjoin against a trespass as such, yet when the acts committed and threatened are in the nature of a continuing trespass, working irreparable injury, they will be enjoined. Boston R. R. v. Sullivan, 177 Mass. 230, 58 N. E. 689, 83 Am. St. Rep. 275; Lembeck v. Nye, 47 Ohio St. 336, 24 N. E. 686, 8 L. R. A. 578, 21 Am. St. Rep. 828.

Appellants' principal contentions upon the appeal, however, are the following: First, that, as the controversy between these parties arises from and over a trade dispute, the court is powerless to grant any injunction, under the language of "An act to limit the meaning of the word 'conspiracy' and also the use of restraining orders and injunctions as applied to disputes between employers and employés in the state of California approved March 20, 1903 (St. 1903, p. 289, c. 235; Pen. Code, p. 581)"; second, that the boycott is a legal weapon in a trade dispute, and therefore an injunction should not issue to restrain its use, or threatened use; third, that "picketing" as an adjunct to the boycott is itself legal, and may not be forbidden.

1. As to the first of these contentions, this court had occasion in Goldberg, etc., Co. v. Stablemen's Union, 149 Cal. 429, 86 Pac. 806, 8 L. R. A. (N. S.) 460, 117 Am. St. Rep. 145, to consider the statute above referred to and relied upon by appellants, and declared that, if the construction there contended for (and here contended for) was the proper construction, this provision of the act was void. Not only would it be void as violative of one's constitutional right to acquire, possess, enjoy, and protect property, but as well would it be obnoxious to the Constitution in creating arbitrarily and without reason a class above and beyond the law, which is applicable to all other individuals and classes. It would legalize a combination in restraint of trade or commerce, entered into by a trades union, which would be illegal if entered into by any other persons or associations. It would exempt trades unions from the operation of the general laws of the land, under circumstances where the same laws would operate against all other individuals, combinations, or associations. It is thus not only special legislation, obnoxious to the Constitution (article 4, § 25, subds. 3, 33), but it still further violates the Constitution in attempting to grant privileges and immunities to certain citizens, or classes of citizens, which, upon the same terms, have not been granted to all citizens (article 1, § 21).

2. In considering the second proposition, whether or not a court of equity may enjoin a "boycott," the meaning of the word is of primary importance. It is defined in 4 Am. & Eng. Ency. of Law (2d Ed.) p. 85, as follows: "The boycott is a conspiracy, the direct object of which is to occasion loss to the party or parties against whom the conspiracy is directed, and the means commonly used is the inducing of others to withdraw from such party or parties their patronage and business intercourse by threats that, unless they so withdraw, the members of the combination will cause, directly or indirectly, loss of a similar character to them." Appellants announce their willingness to accept this definition, substituting the word "confederacy" or "combination" for "conspiracy." But the definition, even as so amended, it will be noted is not complete. The "means commonly used" are specified, but other means may be, and frequently are, employed. A boycott may adopt illegal means, and thus become a "conspiracy," a word which imports illegality; or a boycott may employ legal means and methods, and thus be merely a legitimate combination by a number of men to accomplish, within the law, a legal

result. The crux of the question and the strain in every case turns, then, upon the means employed.

We think that to-day no court would question the right of an organized union of employés, by concerted action, to cease their employment (no contractual obligation standing in the way), and this action constitutes a "strike." We think, moreover, that no court questions the right of those same men to cease dealing by concerted action, either socially or by way of business, with their former employer, and this latter act, in its essence, constitutes the primary boycott. But what acts organized labor may do, and what means it may adopt to accomplish its end, without violation of the law, have presented questions of much nicety, over which the courts have stood, and still stand, widely divided. It would not be profitable to discuss and analyze these widely divergent cases. It is sufficient to formulate briefly the principles adopted in this state many of which have recently found elaborate expression in the case of Parkinson v. Building & Trades Council of Santa Clara (Cal.) 98 Pac. 1040. The right of united labor to strike, in furtherance of trade interests (no contractual obligation standing in the way) is fully recognized. The reason for the strike may be based upon the refusal to comply with the employés' demand for the betterment of wages, conditions, hours of labor, the discharge of one employé, the engagement of another—any one or more of the multifarious considerations which in good faith may be believed to tend toward the advancement of the employés. After striking, the employé may engage in a "boycott," as that word is here employed. As here employed, it means not only the right to the concerted withdrawal of social and business intercourse, but the right by all legitimate means—of fair publication, and fair oral or written persuasion—to induce others interested in, or sympathetic with, their cause to withdraw their social intercourse and business patronage from the employer. They may go even further than this, and request of another that he withdraw his patronage from the employer, and may use the moral intimidation and coercion of threatening a like boycott against him if he refuse so to do. This last proposition necessarily involves the bringing into a labor dispute between A., and B. C., who has no difference with either. It contemplates that C., upon the request of B., and under the moral intimidation lest B. boycott him, may thus be constrained to withdraw his patronage from A., with whom he has no controversy. This is the "secondary boycott," the legality of which is vigorously denied by the English courts, the federal courts, and by the courts of many of the states of this nation.

Without presenting the authorities, which are multitudinous, suffice it to state the other view, in language of the president of the United States, but recently uttered: "A body of workmen are dissatisfied with the terms of their employment. They seek to compel their employer to come to their terms by striking. They may legally do so. The loss and inconvenience he suffers he cannot complain of. But when they seek to compel third persons, who have no quarrel with their employer, to withdraw from all association with him by threats that, unless such third persons do so, the workmen will inflict similar injury on such third persons, the combination is oppressive, involves duress, and, if injury results, it is actionable." President Taft, McClure's Magazine, June, 1909, p. 204. Notwithstanding the great dignity which attaches to an utterance such as this, which, as has been said, is but the expression of numerous courts upon the subject-matter, this court, after great deliberation, took what it believed to be the truer and more advanced ground, above indicated and fully set forth in Parkinson v. Building Trades Council, etc., supra. In this respect this court recognizes no substantial distinction between the so-called primary and secondary boycott. Each rests upon the right of the union to withdraw its patronage from its employer, and to induce by fair means any and all other persons to do the same, and, in exercise of those means, as the unions would have the unquestioned right to withhold their patronage from a third person who continued to deal with their employer, so they have the unquestioned right to notify such third person that they will withdraw their patronage if he continues so to deal. However opposed to the weight of federal authority the views of this court are, that they are not unique may be noted by reading National Protective Association v. Cumming, 170 N. Y. 315, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648; Lindsay v. Montana Federation of Labor, 37 Mont. 264, 96 Pac. 127, 18 L. R. A. (N. S.) 707, where the highest courts of those states formulate and adopt like principles.

It has been said that it is important to any correct understanding of, or adjudication upon, such questions that a definition of the word "boycott" should be first stated. Thus, to say that a boycott is a "conspiracy" immediately implies illegality, and puts the conduct of the boycotters under the ban of the law. So also does the definition which describes boycotting as "illegal coercion," designed to accomplish a certain end. As we have undertaken to define boycott, it is an organized effort to persuade or coerce, which may be legal or illegal, according to the means employed. In other jurisdictions where a definition is given to a boycott which imports illegality, the injunction will of course lie against boycotting as such. In this state the injunction will issue depending upon the circumstance whether the means employed, or threatened to be employed, are legal or illegal.

3. We are thus brought to consider the method of "picketing," the use of which appellants contend is a legal weapon in their hands. So far in this discussion we have dealt exclusively with the respective rights of the employer and of the employé. There are other parties, however, whose rights are entitled to equal consideration, and whose rights always become involved and imperiled when picketing is adopted as a coercive measure in aid of a boycott.

If the strikers have the right, as above indicated, to withdraw patronage themselves, and by fair publication, written and oral persuasion, to induce others to join in their cause, and finally by threat of like boycott, to coerce others into so doing, their rights go no further than this. It is the equal right of the employer to insist before the law that his business shall be subject at the hands of the strikers to no other detriment than that which follows as a consequence of the legal acts of the strikers so above set forth. It is not to be forgotten that when the employés have struck, they occupy no contractual relationship whatsoever to their former employer, and have no right to coerce him, or attempt to coerce him, by the employment of any other means than those which are equally open to any other individual, or association of individuals. No sanctity attaches to a trades union which puts it above the law, or which confers upon it rights not enjoyed by any other individual or association. The two classes of persons to whom we have adverted, and whose rights necessarily become involved where a picket or patrol is established, are, first, the rights of those employed, or seeking employment, in the place of the striking laborers; and, second, the rights of the general public. It is the absolute, unqualified right of every employé, as well as of every other person, to go about his legal business unmolested and unobstructed, and free from intimidation, force, or duress. The right of a labor association to strike is no higher than the right of a nonunion workman to take employment in place of the strikers. Under the assurance and shield of the Constitution and of the laws, the nonunion laborer may go to and from his labor, and remain at his place of labor, in absolute security from unlawful molestations, and wherever such protection is not fully accorded, their execution, and not the laws themselves, is to be blamed. In this country a man's constitutional liberty means far more than his mere personal freedom. It means that, among other rights, his is the right freely to labor and to own the fruits of his toil. Ex parte Jentzsch, 112 Cal. 468, 44 Pac. 803, 32 L. R. A. 664. Any act of boycotting, therefore, which tends to impair this constitutional right freely to labor, by means passing beyond moral suasion, and playing by intimidation upon the physical fears, is unlawful.

The inconvenience which the public may suffer by reason of a boycott lawfully conducted is in no sense a legal injury. But the public's rights are invaded the moment the means employed are such as are calculated to, and naturally do, incite to crowds, riots, and disturbances of the peace. A picket, in its very nature, tends to accomplish, and is designed to accomplish, these very things. It tends to, and is designed by physical intimidation to, deter other men from seeking employment in the places vacated by the strikers. It tends, and is designed, to drive business away from the boycotted place, not by the legitimate methods of persuasion, but by the illegitimate means of physical intimidation and fear. Crowds naturally collect; disturbances of the peace are always imminent and of frequent occurrence. Many peaceful citizens, men and women, are always deterred by physical trepidation from entering places of business so under a boycott patrol. It is idle to split hairs upon so plain a proposition, and to say that the picket may consist of nothing more than a single individual, peacefully endeavoring by persuasion to prevent customers from entering the boycotted place. The plain facts are always at variance with such refinements of reason. Says Chief Justice Shaw, in Commonwealth v. Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346: "The law is not to be hoodwinked by colorable pretenses; it looks at truth and reality through whatever disguise it may assume." If it be said that neither threats nor intimidations are used, no man can fail to see that there may be threats, and there may be intimidations, and there may be molesting, and there may be obstructing, without there being any express words used by which a man should show violent threats toward another, or any express intimidation. We think it plain that the very end to be attained by picketing, however artful may be the means to accomplish that end, is the injury of the boycotted business through physical molestation and physical fear, caused to the employer, to those whom he may have employed, or who may seek employment from him, and to the general public. The boycott having employed these means for this unquestioned purpose is illegal, and a court will not seek by overniceties and refinements, to legalize the use of this unquestionably illegal instrument. Vegelahn v. Guntner, supra; Crump v. Commonwealth, 84 Va. 927, 6 S. E. 620, 10 Am. St. Rep. 895; Union Pacific v. Ruef (C. C.) 120 Fed. 124; 18 Ency. of Law (2d Ed.) p. 85.

In conclusion, then, and applying these principles to the injunction here under consideration, it appears that, while the injunction was properly granted, it was broader in its terms than the law warrants. It was, for example, too broad in restraining defendants from "in any wise interfering with" plaintiff's business, since the interference which we have discussed, of publication, reasonable persuasion, and threat to withdraw patronage, is legal, and such as defendants could employ. So, also, was the injunction too broad in restraining defendants from "intimidating any customer by boycott or threat of boycott" since, as has been said, the secondary boycott is likewise a legal weapon. In all other respects, however, the injunction was proper.

The trial court is directed to modify its injunction in the particulars here specified, and in all other respects the judgment will stand affirmed.

We concur: BEATTY, C. J.; LORIGAN, J.; MELVIN, J.

ANGELLOTTI and SLOSS, JJ. We concur in the judgment. The modification of the judgment is in line with the views announced in the Parkinson Case. So far as "picketing" is concerned, while we are not prepared to hold that there may not be acts coming within that term, as it is accepted and understood in labor disputes, that are entirely lawful, and should not be enjoined, we believe that, as to such "picketing" as is described in both findings and judgment in this case, the views expressed in the opinion of the court are correct.

SHAW, J. I agree with all that is said by Justice HENSHAW in his opinion, except the part relating to the so-called "secondary boycott" and the attempt to draw a distinction between the compulsion of third persons caused by picketing and the compulsion of third persons produced by a boycott. My views concerning the "secondary boycott" are expressed in my dissenting opinion in Parkinson v. Building Trades Council (Cal.) 98 Pac. 1040. The means employed for the coercion or intimidation of a third person in a "secondary boycott" are unlawful whenever they are such as are calculated to, and actually do, destroy his free will, and cause him to act contrary to his own volition in his own business, to the detriment of the person toward whom the main boycott or strike is directed; in other words, whenever the means used constitute duress, menace, or undue influence. Whether this coercion or compulsion comes from fear of physical violence, as in the case of picketing, or from fear of financial loss, as in the "secondary boycott," or from fear of any other infliction, is, in my opinion, immaterial, so long as the fear is sufficiently potent to control the action of those upon whom it is cast. I can see no logical or just reason for the distinction thus sought to be made. There is no such distinction in cases where contracts or wills are declared void, because procured by duress, menace, or undue influence. There should be none where actual injury is produced or threatened through such means acting upon third persons. Nor do I believe any well-considered case authorizes any such distinction. The opinions in the case of National Protective Association v. Cumming, 170 N. Y. 315, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648, are devoted to a discussion of the right to strike, and the limitations of that right, and not to a discussion of the "secondary boycott." A close analysis of the cases on the subject will, as I believe, show that this court stands alone on this point.

For these reasons I do not agree to that part of the judgment directing a modification of the injunction. I believe that it should stand in the form as given by the court below.

156 Cal. 103

GERVAISE v. BROOKINS. (L. A. 2,208.)

(Supreme Court of California. July 7, 1909.)

1. VENDOR AND PURCHASER (§ 128*) — CONTRACT—TITLE.

A contract, by which one "agrees to sell" to others "all his right, title and interest" in lots, and, on payment of the full price, to "execute a deed of grant, bargain and sale of said lots free and clear of all incumbrances," binds the vendor to convey a good title in fee.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 234–237; Dec. Dig. § 128.*]

2. VENDOR AND PURCHASER (§ 170*)—OFFER OF PERFORMANCE BY PURCHASER.

The offer of performance by the purchaser, under a contract requiring the vendor to give good title on payment of price, is good, where, the purchase-money notes being payable on or before certain dates, he offers to pay all of them immediately, on condition that he receive at the same time a conveyance of good title, he having a right, under Civ. Code, § 1498, to make his offer dependent on performance of this concurrent condition.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 344–348; Dec. Dig. § 170.*]

3. VENDOR AND PURCHASER (§ 182*)—DEFAULT OF PURCHASER.

Though a purchaser makes a good offer of performance by offering to pay all the remaining purchase money on condition of receiving concurrently a conveyance of good title, yet, the contract providing that he shall only be entitled to remain in possession so long as he makes payments as agreed, he is in default by remaining in possession without making a payment due, not desiring to rescind, but refusing to pay except on condition of receiving a good title, when the vendor has no title, and can give none.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 182.*]

4. VENDOR AND PURCHASER (§ 296*)—RECOVERY OF LAND BY VENDOR.

The vendor can recover the land in ejectment of the purchaser who, contrary to the provision of the contract, remains in possession after default in deferred payment, the purchaser not desiring to rescind, but refusing to pay except on condition that he receives good title, when the vendor has no title and can give none; the purchaser being estopped while retaining the possession received from his vendor to deny his title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 832; Dec. Dig. § 296.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

In Bank. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Alberta Gervaise, executrix of Lillian Mae Book, deceased, against George W. Brookins. Judgment for plaintiff. Defendant appeals. Affirmed.

See, also, 103 Pac. 332.

Edwin A. Meserve, for appellant. W. C. Batcheller, for respondent.

SHAW, J. This is an appeal from a judgment, which, it is claimed, is not supported by the findings. The action was begun by Lillian M. Book to recover possession of three lots of land, and damages for the withholding thereof. The defendant claims the right of possession under a contract for the sale of said land by one W. P. Book to Brookins and one Kirkwood. After the execution of the contract W. P. Book conveyed to Lillian M. Book all his interest in the land, and transferred to her all his rights under the said contract for the sale thereof, and Kirkwood transferred all his rights under the contract of purchase to Brookins. Upon the death of Lillian M. Book, pending the action, the present plaintiff was substituted in her place. The transfer from Kirkwood to Brookins occurred soon after the execution of the contract. Brookins took possession immediately, as the contract provides. The complaint alleges that Brookins failed and refused to pay the balance of the agreed price when due, that plaintiff Lillian M. Book thereupon demanded possession of the lots, which Brookins refused to yield, and that he still holds possession thereof. The right of the plaintiff to recover possession is based on the alleged failure and refusal of Brookins to pay the price specified in the contract of sale.

The contract was made on February 3, 1900. The price for the lots sold was therein fixed at $15,000, of which $3,000 was paid on April 15, 1900, and notes were given for the remaining $12,000. There were 10 notes, each for $1,200, payable respectively, on or before the 15th day of April of each year for 10 consecutive years, beginning with the year 1901. Brookins paid the three installments falling due in the years 1901, 1902, and 1903, and interest amounting to $1,944, making in all $8,544 which he paid upon the price, leaving $8,400, with accruing interest, unpaid. Prior to the time of making the contract of sale W. P. Book had conveyed the land to the Rex Oil Company. Neither he nor Lillian M. Book ever afterwards acquired or possessed any title thereto. The contract states that Book "agrees to sell" to the vendees "all his right, title and interest in" the lots, and that, upon payment of the full price, he will "execute a deed of grant, bargain and sale of said lots [describing them] free and clear of all incumbrances." The effect of these provisions is that Book was bound to convey to the vendees, upon payment, a good title in fee to the lots. Easton v. Montgomery, 90 Cal. 314, 27 Pac. 280, 25 Am. St. Rep. 123; Wilcox v. Lattin, 93 Cal. 594, 29 Pac. 226. Brookins did not discover the want of title until after the payment of April 15, 1903, was made. The transfer to Lillian M. Book occurred prior to January 1, 1904. The contract further provides that the vendees "shall only be entitled to remain in possession of said premises so long as they make the payments as agreed."

Brookins has not unconditionally refused to make the payments. Before the installment of 1904 became due, Lillian M. Book told him that she did not expect him to make further payments until she could secure title, or arrange to have the same conveyed to him. He thereupon offered to pay all the notes immediately, upon the condition that he should concurrently receive a conveyance of the land transferring to him the title therein, and he refused to make any payment, except upon that condition. Each installment being made payable on or before the date named, at his option, he had the right to declare it all due, and to make an offer of full performance at any time. He was entitled to the performance of this concurrent condition, and he had a right to make his own offer dependent thereon. Civ. Code, § 1498. He was then, and ever since has been, ready, able, and willing to pay the whole price upon the condition stated. His offer was therefore a good offer of performance under the law and the contract, and he is not in default, unless he has become so by reason of his retaining possession while refusing to make payments and accept such title as his vendor can give. On August 4, 1904, after the defendant's offer was made, she demanded of him the immediate possession of the land, basing that demand upon his refusal to pay. She did not offer to comply with the demand that she convey the title, nor did she offer to rescind the contract, and return the money previously paid upon the price. Prior to the discovery of the want of title Brookins had made improvements on the land of the value of $3,000. The land has increased in value since the purchase, and ever since April, 1904, it has been worth $30,000, including the improvements.

The case depends upon the law as to the rights of a vendee in possession of land under a contract which entitles him to a conveyance of the fee thereof, who has paid a substantial part of the price, and who is able, ready, and willing to pay the whole thereof upon receipt of a good title, and who has made an offer to do so, against the vendor who has no title, and who is unable to transfer the title, where the vendee does not wish to rescind, but refuses to pay except on condition that he receives a good title, the contract providing that he can remain in possession only so long as he makes the payments as agreed. It appears to be well established that under such circumstances, the vendee cannot retain possession of the land while neglecting to pay the price when due, and that the failure of the title does not give him the right to continue in possession by merely keeping good an offer to perform on his part conditioned upon performance by the vendor. The reasons for this rule are thus stated by the Supreme Court of the United States in Burnett v. Caldwell, 9 Wall. 293, 19 L. Ed. 712: "If the contract stipulates for possession by the vendee, or the vendor puts him into possession, he holds as a licensee. * * * The case comes within the category of a license. In such cases the vendee cannot dispute the title of the vendor any more than the lessee can question the title of his lessor. The assignee of the vendee is as much bound by the estoppel as the vendee himself. Upon default in the payment of any installment of the purchase money, the possession becomes tortuous, and the vendor may at once bring ejectment." In that case the court further held that the fact of want of title in the vendor, and the fact that the vendee had paid a large part of the price, were alike immaterial as defenses to an action of ejectment by the vendor.

These principles have been many times affirmed in this state. In Hoen v. Simmons, 1 Cal. 120, 52 Am. Dec. 291, an action by the vendor of land against the vendee for possession, the court says: "The defendants, having entered into possession claiming under the plaintiff and in subordination to his title are estopped from questioning it." The same rule is stated in Ellis v. Jeans, 7 Cal. 416, Walker v. Sedgwick, 8 Cal. 402, O'Keiffe v. Cunningham, 9 Cal. 589, Hicks v. Lovell, 64 Cal. 20, 27 Pac. 942, 49 Am. Rep. 679, Coates v. Cleaves, 92 Cal. 430, 28 Pac. 580, and McLeod v. Barnum, 131 Cal. 608, 63 Pac. 924. In Hicks v. Lovell, supra, an action by the vendor against the vendee to recover possession of the land, the defendant, as to one of the parcels of land in controversy, had entered under a contract of sale with the plaintiff, and "was ready and able to perform his agreement whenever he could have a good and sufficient deed of conveyance of said lands, but, as the plaintiff had no title to the same, he could not comply with the agreement on his part." The defendant asked him that the contract be canceled, the effect of which would be to leave him in possession. With regard to this the court says: "By his own showing he abandoned the purchase of one of the contracts, and disclaimed the title of his vendor; but, having entered into possession under the title and in subordination to it, he was estopped from denying it"—and proceeds to hold that the want of title in the vendor is no defense. In Rhorer v. Bila, 83 Cal. 54, 23 Pac. 275, upon similar facts the court says: "A purchaser cannot remain in possession of lands under a contract, and at the same time refuse to pay the purchase price. * * * So long as the purchaser retains possession he waives all previous objections, whether of defect of title or delay in completing it, and is bound to accept title according to the terms of the contract, if offered while he still retains possession." In Gates v. McLean, 70 Cal. 50, 11 Pac. 492, 493, the court says: "Even where the contract provides for the vendee taking possession, the remedy of the purchaser, where the title of the vendor fails, or he is unable to make conveyance as stipulated in the contract, is to rescind the contract, or offer to, and to restore the possession, in which case he may recover the purchase money advanced and the interest, together with the value of his improvements, deducting therefrom such sum as the use of the premises may reasonably have been worth. If, on the other hand, the purchaser chooses not to rescind, but to retain possession under the contract, he can do so only on the condition that he pays the purchase money and interest according to the contract. In the latter case it is considered that he is willing to receive such title as the vendor is able to give." This doctrine is also approved in Garvey v. Lashells, 151 Cal. 531, 91 Pac. 498, Keller v. Lewis, 53 Cal. 118, Haynes v. White, 55 Cal. 41, Central P. Co. v. Mudd, 59 Cal. 590, Whittier v. Stege, 61 Cal. 241, Hannan v. McNickle, 82 Cal. 126, 23 Pac. 271, Worley v. Nethercott, 91 Cal. 517, 27 Pac. 767, 25 Am. St. Rep. 209, Hill v. Den, 121 Cal. 46, 53 Pac. 642, and Haile v. Smith, 128 Cal. 419, 60 Pac. 1032.

These doctrines dispose of the case. Brookins is estopped from denying the title of Book while he retains the possession, which he obtained from Book in pursuance of the contract of sale. Hence he cannot set up the want of title as an excuse for nonperformance on his part. The proffered defense to the action for possession founded on the failure and inability of the vendor's successor in interest to comply with Brookins' demand for a good title must be disregarded, because of the fact that he received his possession from Book, from whose successor he would now withhold it. His retention of the possession thus received binds him to pay the price and accept the vendor's title, such as it is.

It is claimed that the decision in Haile v. Smith, 113 Cal. 659, 45 Pac. 872, is made upon facts identical with those here presented, and that it lays down a rule which would require a judgment in favor of Brookins in this case. The facts are similar to those here involved, except in one important particular, namely, the want of title in the vendor. That case was twice before this court, the first decision being in the 113th volume of the reports at page 656, 45 Pac. 872, and the second in 128 Cal. 415, 60 Pac. 1032. The decision in the first case did not present the question of the vendor's title or want of title. It disposed of the case upon the theory that the title of the vendor was good; that the vendee was willing to accept it, and had offered full payment, and demanded a conveyance according to the contract; that this had been refused by the vendor; and that the vendee continued able, ready, and willing to pay upon receipt of the vendor's deed. Under such circumstances it was said the unaccepted tender of the vendee released the lands from any further claim by the vendor, and remitted him to an action for the recovery of the balance of the price, and that the vendee, so long as he stood thus able, ready, and willing to pay the money and accept the title, could retain possession of the land, and insist upon performance by the vendor. This decision goes so far as to hold that this release of the land from the vendor's claims is final, and that a subsequent tender of a conveyance by the vendor, with a demand of payment and a refusal by the vendee to pay and accept the deed, would not revive the right of the vendor to recover possession. This remark was obiter, and it is not necessary to approve it here. The opinion expressly declares that the question of the effect of the want of title in the vendor, or of a refusal by the vendee to accept his title, is not involved. In the decision upon the second appeal (128 Cal. 415, 60 Pac. 1032) the question of want of title in the vendor was directly presented, and the doctrines set forth in the quotations from the opinions heretofore given were fully approved.

The defendant complains that this would leave him divested of possession, and with no remedy for the recovery of the money expended by him in payments upon the price and in the improvements upon the land. We cannot perceive that this misfortune in which he is placed can affect the legal propositions we have stated. The query might arise whether he may not have a lien on such estate as the vendor, or his successor, possessed in the land, for the securing of the repayment of the money expended, or that by lapse of time since he got possession, and the continuation of that possession adversely to the Rex Oil Company, it may be that the title of Lillian M. Book, his possession inuring to her benefit, may now have become good; but these questions are not involved, and must remain unanswered. We can decide only the case before us. The defendant must find his own way out of the difficulty without repudiating the authority upon which he obtained his possession.

The judgment is affirmed.

We concur: SLOSS, J.; MELVIN, J.; ANGELLOTTI, J.; HENSHAW, J.; LORIGAN, J.

156 Cal. 110

GERVAISE v. BROOKINS. (L. A. 2,226.)

(Supreme Court of California. July 7, 1909.)

1. Ejectment (§ 69*)—Pleading—Answer—Denial of Damages.

The complaint for recovery of land and damages for retention alleged that the value of the rents and profits of the land was $10 per day, and that by the withholding of possession plaintiff had been deprived thereof to his damage in the sum of $10 per day. *Held*, that the denial that the withholding of possession had caused plaintiff damage "in the sum of $10 per day," or in any other sum, while a sufficient traverse of the allegation of damages, was not technically a denial of the allegation of the value of the rents and profits, which constitutes the measure of that damage.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 69.*]

2. Appeal and Error (§ 171*)—Objections Not Raised.

It appearing from a finding of fact, and other matters in the record, that on the trial the answer was regarded as a good denial of certain averments of the complaint, and that the case was tried on such theory, plaintiff may not contend on appeal, for the first time, that it was not such a denial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053–1069, 1161–1165; Dec. Dig. § 171.*]

In Bank. Appeal from Superior Court, Los Angeles County, Charles Monroe, Judge.

Action by Alberta Gervaise, executrix of Lillian Mae Book, deceased, against George W. Brookins. From a judgment awarding plaintiff only a certain sum, she appeals. Affirmed.

See, also, 103 Pac. 329.

W. C. Batcheller, for appellant. Edwin A. Meserve, for respondent.

SHAW, J. This action was brought to recover the possession of certain real property situated in Los Angeles county, together with damages for its withholding. Judgment was given in favor of the plaintiff, awarding to her the possession of the land, together with $10 damages. The plaintiff has appealed from so much of the judgment as awards to her the sum of $10 damages; her contention being that she was entitled to a greater amount.

The sole contention of this appellant is that the finding of the court that she had been damaged by the withholding of the possession of the premises in the sum of $10 is in conflict with the facts admitted by the pleadings, and that on those admitted facts she was entitled to judgment for the sum of $10 per day from the filing of the complaint to the rendition of the judgment. The complaint alleged "that the value of the rents and profits of said land and premises is the sum of $10 per day, and that by reason of the unlawful withholding of the same by the defendant, as aforesaid, plaintiff has been deprived of said rents and profits since the 16th day of April, 1904, and by the continuance of defendant's possession thereof will be deprived of the use and occupation of the same to plaintiff's loss and damage in the sum of $10 per day so long as such occupation and use by the defendant continues." The answer as to these allegations is as follows: "This defendant denies that he wrongfully or unlawfully withholds the possession of said premises from the plaintiff to plaintiff's injury or damage in the sum of $1,000, or in any other sum whatsoever, or at all, and denies that the plaintiff, by reason of the withholding of the premises by this defendant, has been deprived of the rents or profits of said property since the 16th day of April, 1904, or at all, and denies that because this defendant withholds the possession of said premises from plaintiff. plaintiff has been damaged in the sum of $10 per day for any length of time, or for any other sum whatsoever, or at all; and this defendant alleges that he, at all times since the 15th day of April, 1900, has been, and now is, in the lawful and rightful possession of said premises, and in the use and enjoyment thereof."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The defendant here denies that the withholding of possession by him has caused the plaintiff damage "in the sum of $10 per day for any length of time, or for any other sum whatsoever, or at all." This denial is a sufficient traverse of the allegation of damages, but it is not, technically, a denial of the allegation of the value of the rents and profits, which constitutes the measure of that damage. There was a finding that the rents and profits were worth only $20 a month. This implies that evidence was given upon that subject as if it were a fact in issue, and that this evidence was sufficient to support the finding. From this and other parts of the record we think it appears with reasonable certainty that upon the trial the answer was regarded as a good denial of all the averments of the complaint on the subject of rents and profits, and that the case was tried upon the theory that the answer put in issue the value thereof. This being so, the plaintiff will not be allowed to raise the point on appeal. "It is well settled that, where the parties have proceeded to trial upon a pleading, without objection to its sufficiency to raise a particular issue, and evidence has been received of the fact, and the issue found upon, the party whose duty it was to object will not be heard in this court to say that the finding is not within the issues." Illinois T. & S. Bank v. Pacific Ry. Co., 115 Cal. 297, 47 Pac. 60. In that case the presence in the record of a finding of the fact, which it was claimed was not in issue, was considered a sufficient showing that the cause was tried upon the theory that the fact was in issue. On the same subject see Reniff v. The Cynthia, 18 Cal. 669; Davis v. Davis, 26 Cal. 39, 85 Am. Dec. 157; King v. Davis, 34 Cal. 106; Huges v. Wheeler, 76 Cal. 232, 18 Pac. 386; Sukeforth v. Lord, 87 Cal. 403, 25 Pac. 497; Willey v. Bank, 141 Cal. 518, 75 Pac. 106.

In the case of F. A. Hihn Co. v. Fleckner, 106 Cal. 95, 39 Pac. 214, where the absence of a denial of a similar allegation as to the value of rents and profits was discussed, the point that the plaintiff had waived the admission of the value by going to trial upon the theory that it was in issue was not raised or considered. That case is not contrary to the decisions above cited.

The judgment is affirmed.

We concur: SLOSS, J.; ANGELLOTTI, J.; MELVIN, J.; HENSHAW, J.; LORIGAN, J.

156 Cal. 43

SANFORD v. BERGIN et al. (S. F. 4,897.)

(Supreme Court of California. July 3, 1909. Rehearing Denied by Supreme Court Aug. 2, 1909.)

1. Limitation of Actions (§ 118*) — Commencement of Action—Filing Answer.

An answer in partition setting up a mortgage, and asking that it be declared a lien on the land, and its payment provided for, is equivalent to an action to foreclose, and the question of the bar of limitations or of laches decided as if the action was begun when the answer was filed.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 527; Dec. Dig. § 118.*]

2. Limitation of Actions (§ 87*) — Contracts.

Code Civ. Proc. §§ 312, 339, bar an action on a contract or liability, not founded on a writing, or founded on a writing executed out of the state, two years after the cause of action shall have accrued. A debt secured by deed executed out of the state was due when the deed was executed, December 11, 1875. The debtor came into the state early in 1876, and remained there until his death. *Held*, that any action on the debt or mortgage deed was barred December 11, 1877.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 458; Dec. Dig. § 87.*]

3. Limitation of Actions (§ 167*)—Bar of Debt as Affecting Security.

Under Civ. Code, § 2911, extinguishing a lien after lapse of the time within which an action can be brought on the principal obligation, a mortgage is extinguished by lapse of the time within which an action can be commenced upon the debt secured.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 651–653; Dec. Dig. § 167.*]

4. Limitation of Actions (§ 151*)—Bar of Debt as Affecting Security—Effect of New Promise.

Where a debt secured by mortgage is acknowledged before the action is barred, the original contract being thereby kept alive, the mortgage is not extinguished by lapse of the period of limitation after the cause of action first accrued, and a suit may be maintained thereon within the new period initiated by such acknowledgment; but, where the acknowledgment occurs after the debt is barred and the mortgage extinguished, the new promise, express or implied, becomes the basis of the cause of action, and it does not revive or renew the mortgage.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 619; Dec. Dig. § 151.*]

5. Limitation of Actions (§ 80*)—Suspension of Statute—Death.

The want of an administration upon an estate does not suspend the statute of limitations upon a mortgage in favor of such estate.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 424, 425; Dec. Dig. § 80.*]

6. Executors and Administrators (§ 128*)—Succession to Powers of Administratrix.

An executor of an administratrix does not succeed to her duties or powers as such.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 531; Dec. Dig. § 128.*]

7. Trusts (§ 244*)—Change from Express to Constructive Trust.

An executor of a trustee of an express trust becomes a trustee of a constructive trust.

[Ed. Note.—For other cases, see Trusts, Cent Dig. § 311; Dec. Dig. § 244.*]

In Bank. Appeal from Superior Court, Contra Costa County; Wm. S. Wells, Judge.

Partition by Charles E. Sanford against T. I. Bergin, M. R. Jones, administrator with the will annexed of the estate of Harrie Sanford, deceased, and others. From the order of partition, and an order denying a new trial, Charles E. Sanford and M. R. Jones, administrator, appeal. Affirmed.

Charles S. Wheeler, Donzel Stoney, M. R. Jones, and E. De Los Magee, for appellants. Garret W. McEnerney, Elliott McAllister, J C. McKinstry, H. W. Bradley, Stafford & Stafford, Gaillard Stoney, and W. B. Treadwell, for respondents. T. I. Bergin, in pro. per.

SHAW, J. This is an action for the partition of a tract of land containing 13,316 acres, known as the rancho los Megaños, in Contra Costa county. An interlocutory order, declaring the interests of the several parties, and directing partition accordingly, was made by the court below. The plaintiff Charles E. Sanford and the defendant, M. R. Jones, as administrator with the will annexed, of the estate of Harriet Sanford, deceased, moved the court for a new trial, which was denied. They appeal from the order for the partition, and from the order denying a new trial.

1. The plaintiff was adjudged to be the owner of an undivided five and five-sixteenths hundredths of the land. In his complaint plaintiff alleged title to an undivided one-half thereof. This claim was based upon an alleged resulting trust in the land, whereby it was claimed that James T. Sanford, uncle of the plaintiff, in 1871 acquired the title to the land in trust for his mother, brother, and sisters, the plaintiff being the sole and only heir of the brother; the trust arising from the alleged fact that the purchase money belonged to the beneficiaries above mentioned. The court found that the allegations of fact upon which it is claimed that the trust arose were untrue. It is conceded that this finding is supported by sufficient evidence. The claim to an interest in the land by virtue of such resulting trust is now abandoned.

2. The claim of Jones as administrator of the estate of Harriet Sanford, deceased, is that Harriet Sanford held a mortgage upon the land to secure a debt amounting to at least $300,000, and he asks that said mortgage be declared a lien thereon, and that its payment be provided for in the partition proceedings. He asserts that on December 11, 1875, James T. Sanford was the owner of the land, that on that day he executed to Harriet Sanford, who was his mother, a deed purporting to convey the land to her in fee simple for an expressed consideration of $172,500, but that, in fact, said deed was intended as a mortgage to secure a debt then due from James T. Sanford to Harriet Sanford and "the family"; that is, his brother, Charles B. Sanford, and his sisters, Harriet A., and Josephine L., Sanford. It was alleged that this debt aggregated more than $300,000, but the mortgage lien asserted in this partition proceeding consists only of the amount thereof alleged to be due to Harriet Sanford. The court found that the deed to Harriet Sanford was absolute, and that no debt or mortgage from James T. to Harriet Sanford was proven, but that, if any such debt and mortgage did at any time exist, they were barred and extinguished by the statute of limitations and by laches, long before the commencement of the action. The action was begun on April 30, 1898. The answer of Jones, in which, for the first time, the mortgage claim was asserted, was filed on April 20, 1903. The filing of this answer must be deemed to be equivalent to an action of foreclosure, and the question of the bar of the statute of limitations or of laches must be decided upon the theory that the action was begun upon the date last mentioned.

The debt, if any, which was secured by the alleged mortgage, was not evidenced by any bond or note, nor, as far as appears, by any instrument in writing whatever. The evidence shows that if such debt ever existed, it arose in the state of New York while the parties resided in that state, and that if any writing was given in evidence thereof, such writing was executed in that state. The deed of December 11, 1875, claimed to constitute a mortgage, and which is the foundation of the asserted right of Jones as administrator of Harriet Sanford's estate, was executed in New York. "An action upon a contract, obligation, or liability, not founded upon any instrument in writing, or founded upon an instrument in writing executed out of the state," is barred, unless such action is begun within two years after the cause of action shall have accrued. Code Civ. Proc. §§ 312, 339. There is an exception in the case of a defendant who is out of the state, in which case the time of his absence is not a part of the time limited for the beginning of the action. But here the alleged debtor and mortgagor came to this state early in 1876, and remained here until his death on May 2, 1885. It is alleged in the answer that the debt which the deed of December 11, 1875, was intended to secure, was due at the time of the execution of that deed. Hence it follows that, unless something occurred to prevent the operation of the statute, or to revive or renew the debt or mortgage, any action thereon was barred on December 11, 1877, 25 years before the filing of the answer which we hold to be the beginning of such action. San Jose, etc., Bank v. Bank, 144 Cal. 574, 78 Pac. 5.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It is claimed that the following facts are proven by the evidence without conflict, and that they show that the action is not barred:

On October 12, 1881, Harriet Sanford, at the request of James T. Sanford, executed a quitclaim deed purporting to convey the land to her daughter, Harriet A. Sanford. This deed was intended and accepted as an assignment of the mortgage interest and rights claimed to have been created by the deed of December 11, 1875, from James T. Sanford to his mother. Before the execution of this deed the Savings & Loan Society of San Francisco, a corporation, and other persons holding as trustees for said corporation, had received deeds and conveyances of the land in trust to secure a debt due said society from James T. Sanford, but the society wrongfully claimed absolute title thereunder in trust for its benefit, and that James T. Sanford had no right or interest in the land. The society was in possession. On May 1, 1882, James T. Sanford and Harriet A. Sanford began an action in the United States Circuit Court against said society for an accounting, and to redeem the said land. Harriet A. Sanford and James T. Sanford both signed the complaint in said action. Therein they averred that the indebtedness of James to his mother on December 11, 1875, was more than $172,500; that the deed of that date, executed to Harriet Sanford by James T. Sanford was given as security for said indebtedness then due; that the quitclaim deed of October 12, 1881, by the mother to Harriet A. Sanford, assigned and transferred to Harriet A. Sanford all the rights and interests of the mother acquired by the deed aforesaid to her from James T. Sanford, and they prayed that the Savings & Loan Society, upon payment to it of the amount found due to it from James T. Sanford, be required to convey, or cause to be conveyed, the said rancho to Harriet A. Sanford. On April, 1884, James T. Sanford gave and signed his deposition as a witness in said action. Therein he testified that the said deed by his mother to his sister Harriet A. Sanford was made for the reason that his mother was too ill to commence or carry on the action against the Savings & Loan Society, which was then in contemplation, that the reason that the conveyance was not made to himself was that he did not wish to disturb the security that that deed carried with it, and that the deed to his sister was made without any other consideration. It is claimed that the complaint and deposition in said action constitute written acknowledgments of the existence of the debt and mortgage to Harriet Sanford, taking the same out of the operation of the statute of limitations.

Harriet Sanford died on October 11, 1883. Her will was probated in New York on December 26, 1886, and Harriet A. Sanford was appointed executrix thereof. James T. Sanford died on May 3, 1885. His will was probated in New York, and Harriet A Sanford was there appointed executrix thereof. By Harriet Sanford's will a legacy of $150,000 was given to her daughter Josephine L. Sanford, some small legacies were bequeathed to others, and the residue equally to the four children, Charles B. Sanford, Harriet A. Sanford, James T. Sanford, and Josephine L. Sanford. Charles B. Sanford died on January 29, 1896. The plaintiff is his son and only heir. Harriet A. Sanford died testate on January 12, 1888. Her will gave all her property to her sister Josephine L. Sanford. On February 13, 1888, said will was admitted to probate, and said Josephine was appointed administratrix of her said estate, and on October 6, 1890, the said estate, including all the interest of Harriet A. in the lands in controversy here, was finally distributed to said Josephine. On May 21, 1887, Josephine was appointed administratrix of the estate of James T. Sanford. His will gave all his property to his said sisters, Harriet and Josephine. On May 12, 1888, his estate was distributed to Josephine; one-half in her own right, and one-half as successor to her sister Harriet A. Josephine then represented all the interests concerned in the prosecution of the action in the United States Circuit Court. In her dual capacity as the representative of the respective estates of her brother and sister, as aforesaid, she obtained a revival of said action against the Savings & Loan Society and others, and on December 31, 1889, was duly substituted as plaintiff therein. Thereafter, until her death on September 12, 1897, the prosecution of said action was continued by her, individually, and as administratrix of the respective estates of James T. and Harriet A. Sanford. Final judgment in the action to redeem was rendered on February 27, 1897, and the action was appealed to the Circuit Court of Appeals. On May 1, 1900, the administrators of the estate of Josephine were substituted in her stead as plaintiffs in said action, and on the same day the appeal was determined in their favor, and the judgment became final.

The first written acknowledgment of the debt and mortgage by James T. Sanford was the aforesaid complaint, filed by him on May 1, 1882, more than six years after the mortgage was made. As the alleged mortgage secured a debt which said complaint declared was due at its date, it follows that the debt was barred three times over when the acknowledgment was made. At that time, therefore, the mortgage had already become extinguished by the lapse of time within which an action could be commenced upon the debt which it secured. Civ. Code, § 2911; San Jose, etc., Bank v. Bank, supra; Wells v. Harter, 56 Cal. 343; Jeffers v. Cook, 58 Cal. 152; Henderson v. Grammar, 66 Cal. 336, 5 Pac. 488; Ward v. Waterman, 85 Cal. 505, 24 Pac. 930; Hughes v. Cannedy, 92 Cal. 387, 28 Pac. 573; Newhall v. Sherman, 124 Cal. 512, 57 Pac. 387. When a written acknowledgment of a debt is made after the statute of limitations has begun to run, but before the statutory period has expired, the effect is to keep the original obligation alive, and a suit may be maintained on the original contract after the expiration of the original period, and within the new period initiated by such acknowledgment. Rogers v. Byers, 127 Cal. 528, 60 Pac. 42, and cases there cited. But if the new promise or acknowledgment is not made until after the debt has become barred, the original contract is practically extinguished, and the suit can only be maintained upon the new express promise, or upon the new promise which the law implies from an acknowledgment in writing. Rogers v. Byers, supra; Concannon v. Smith, 134 Cal. 17, 66 Pac. 40; Southern P. Co. v. Prosser, 122 Cal. 417, 52 Pac. 836, 55 Pac. 145. The effect of the application of these rules to a debt secured by a mortgage is that, where the acknowledgment is made before the action is barred, the original contract being thereby kept alive, the mortgage is not extinguished by the lapse of the period of limitation after the cause of action first accrued. The original contract not having been barred at the time of such acknowledgment, it is extended, and the mortgage lien continues with it. Daniels v. Johnson, 129 Cal. 417, 61 Pac. 1107, 79 Am. St. Rep. 123. But when the new promise or acknowledgment occurs after the debt is barred and the mortgage lien extinguished, the new promise, express or implied, becomes the basis of the cause of action, and it does not revive or renew the mortgage lien. Wells v. Harter, supra; Southern P. Co. v. Prosser, supra. "A mortgage can be created, renewed or extended, only by writing, executed with the formalities required in the case of a grant of real property." Civ. Code, § 2922. Neither the complaint nor the deposition can be construed to be a renewal or revival of the mortgage lien. Undoubtedly, if the case of the administrator of Harriet Sanford depended upon this question, the action would have long ago become barred.

In avoidance of this conclusion the appellants contend that the complaint in the redemption suit was more than a mere acknowledgment. They say that it was an assertion by James T. Sanford that on May 1, 1882, when the complaint was filed, the said mortgage was then a subsisting, valid lien on the property to secure the existing debt, and that the debt was not then barred, nor the mortgage lien extinguished; that this assertion necessarily implies that there had been successive renewals or acknowledgments of the debt from time to time within the period of limitation, whereby both the debt and the mortgage had been kept in existence as continuing obligations until that date, and that this averment in the complaint is the equivalent of proof of the renewals necessary to accomplish that end. It will here be observed that, even if this is taken as correct, and the giving of the deposition in 1884 be deemed a new acknowledgment of the debt within the new period of limitation beginning on May 1, 1882, in which event the debt and mortgage would be kept alive until April, 1886, there would still remain a period of 17 years between April, 1886, and April, 1903, when the present proceeding is deemed to have been commenced, by which period the action would be barred. To surmount this obstacle, in part at least, the appellants advance another proposition, which we will now state.

It is said that the filing of that complaint to redeem from the prior mortgage, the mortgagor and second mortgagee joining therein, with a prayer that the second mortgage be protected by the decree, was a continuing declaration by the mortgagee and his successors in the suit, repeated, in effect, every day during the pendency of the action until the final judgment therein, that the second mortgage was a valid and subsisting lien to secure the payment of the debt for which it was given, and that this prevented the running of the statute of limitations during the pendency of that action. It is also claimed in the same connection, that so long as the mortgagor and his successors were engaged with the mortgagee and her successors in prosecuting the action to redeem the prior mortgage, for the purpose, among others, avowed in the complaint therein, of protecting and preserving the estate so that the lien of the said second mortgage might be effectual thereon, such mortgagor and his successors are estopped, so far as the beneficiaries under the second mortgage are concerned, to assert that the statute of limitations had been running in their favor, or that by that means the mortgage lien had been extinguished.

It may be conceded that there is some force in these three propositions respecting the effect of the complaint and depositions and the joinder in the prosecution of such action. We are not disposed to enter upon a discussion of the questions presented thereby, but will, for the purposes of the case, concede all that the appellants claim in respect thereof. We are of the opinion, notwithstanding these propositions, that the action to foreclose the mortgage is barred.

Final judgment of the essential fact in dispute in the action to redeem, the right of the said plaintiffs to redeem at all, was given by the United States Circuit Court on November 16, 1893, after a trial upon the merits. This judgment declared that the Savings & Loan Society, through George Mearns, its trustee, held the land and the title thereto in trust, as security for the payment of a debt due to it from James T. Sanford, and that upon payment of such debt the complainants, "as the personal representatives and successors in interest of James T. Sanford," were entitled to have executed to them a conveyance of all the estate, right, title, and interest in the land had and held by the said society and its trustees in the said land. An accounting was necessary, and a referee was appointed to take the account. He made his report, stating the account up to February 25, 1897, and on that date the court gave final judgment of redemption and conveyance to said complainants, upon payment of the debt. Josephine L. Sanford was the sole complainant at the time the aforesaid interlocutory and final judgments were rendered, she having been regularly substituted for James T. Sanford and Harriet A. Sanford, respectively, as administratrix of their respective estates. Redemption was to be made within six months, or, if an appeal was taken, within six months from the time the judgment should become final on such appeal. In default of any redemption the complainants' bill was to thereupon stand dismissed. This judgment was affirmed on appeal. The executors of the estate of Josephine L. Sanford were substituted for her as complainants, and by stipulation of both parties to the suit a supplemental decree was made therein on May 1, 1900, bringing the account down to that date, declaring that $195,000 had been agreed to as the sum due to the Savings & Loan Society, and that upon payment thereof within six months thereafter the said society should execute, or cause to be executed, to the "complainants, their successors, assigns, or appointees, the conveyance provided for in, and directed to be executed by, said final decree," referring to the decree of February 25, 1897. No redemption having been made within the six months allowed therefor, the complainants' bill, by the terms of the decree itself, stood dismissed on November 1, 1900. A formal order dismissing the bill was made on May 13, 1901. It further appears in the evidence that the plaintiff caused Jones to obtain letters of administration upon the estate of Harriet A. Sanford in Contra Costa county on April 6, 1903, nearly 20 years after her death; that the answer of Jones as administrator was filed and prosecuted at the instance of the plaintiff in this action; that as early as 1897 he had employed attorneys to prosecute such rights as he had under the asserted mortgage to Harriet Sanford; that he and his attorneys were at that time informed of all the facts tending to establish those rights; and that no disclosure of his claim to any such rights was made to the adverse parties prior to the filing of the answer of Jones on April 20, 1903.

The final decree of May 1, 1900, fully settled the rights of all the parties, and then, if not before, there was an end to those relations between them which, it is claimed, suspended the operation of the statute of limitations, and estopped James T. Sanford and his successors from invoking it. Nothing then remained to be done, except to pay the debt declared to be due to the Savings & Loan Society. James T. Sanford and his successors had, by that decree, which was final, obtained all the relief that was possible in that action. Thenceforward his successors and representatives were not asking any relief on behalf of the successors of Harriet Sanford or Harriet A. Sanford, as mortgagees, nor were they constructively repeating any written declaration in the complaint that the deed of December 11, 1875, was in effect a mortgage. If the beneficiaries under that instrument had any rights thereunder at that time, such rights had then accrued and matured, and were at once enforceable by foreclosure suit against the interests of the successors of James T. Sanford, and there was nothing in the relations between them which should have prevented such foreclosure, if it were necessary in order to keep the mortgage alive. Charles E. Sanford had then full knowledge of all the facts upon which the claim that such mortgage existed was based. He was at liberty to procure letters of administration upon his grandmother's estate, and begin such action without delay. The want of an administration upon an estate does not suspend the statute of limitations upon a mortgage in favor of such estate. Grattan v. Wiggins, 23 Cal. 28; Tynan v. Walker, 35 Cal. 634, 95 Am. Dec. 152; Hibernia, etc., Soc. v. Conlin, 67 Cal. 178, 7 Pac. 477. Conceding, therefore, that the statute was suspended while the action was pending it again began to run either on May 1, 1900, the date of said decree, or on November 1, 1900, the date when the period of redemption expired. In either case the present action to foreclose was barred.

Furthermore, the record shows that there was, prior to that decree, an abandonment and repudiation by Josephine L. Sanford of the original plan to have the Harriet Sanford mortgage of 1875 kept alive, and that this was known to Charles E. Sanford and his attorneys, so that it cannot be said that they were relying on the good faith of Josephine L. Sanford or her successors. The decree of 1893 in the redemption suit declared the right of redemption, which was the vital question, but it did not follow the prayer of the complaint by providing for a conveyance of the land to the successors of Harriet Sanford, the alleged mortgagee, or of Harriet A. Sanford, the alleged successor and trustee of Harriet Sanford. Josephine L. Sanford, then the sole complainant, was the administratrix of the respective estates of the two original complainants, and thus represented both interests. But instead of procuring a decree providing for a conveyance to her as representative of Harriet A. Sanford's interest, she obtained a decree declaring that upon redemption a conveyance should be made to her as the personal representative and successor in interest of James T. Sanford. Here was a distinct repudiation of the claim that the old mortgage of December 11, 1875, then remained a subsisting lien or right. Neither the final decree of 1897, nor that of 1900, specified or stated the capacity in which the complainant was to receive such conveyance. They merely followed the original decree of 1893, and did not purport to change or modify it in that particular. Josephine L. Sanford executed her last will on May 3, 1897, in which she disposed of the rancho los Megaños in terms showing an intent to dispose of the entire estate in fee simple, and inconsistent with any other intention. She was not on friendly terms with Charles E. Sanford, as he well knew. She did not mention nor dispose of any interest in the estate of her mother, but treated the entire estate as composed of said land and certain goods and chattels. This will was filed for probate on September 20, 1897. Charles E. Sanford filed a contest thereof, but it was admitted to probate on September 14, 1898. The inventory of her estate was filed by her executors on April 6, 1900. It stated that the estate consisted of the said rancho, subject to the Savings & Loan Society mortgage, and various articles of personal property, making no mention at all of any legacy due from her mother's estate, or any lien in her favor on the rancho. It thus appears that from and after 1893 she was acting in open hostility to plaintiff's claims, whether under a resulting trust, or as one of the residuary legatees under Harriet Sanford's will. This evidence of repudiation of the former relations which may have been supposed to have existed between Josephine L. Sanford and the plaintiff was sufficient to justify the court in concluding that the plaintiff had not been the victim of any misplaced confidence in his aunt. In addition, it is to be noticed that on May 1, 1900, the executors of Josephine were substituted as complainants in the redemption suit, and it was therein decreed that upon redemption the conveyance from the trustee of the Savings & Loan Society was to be made to said executors as complainants. Upon the death of Josephine the administration of the two estates of James T. Sanford and Harriet A. Sanford lapsed. No successor was appointed in either estate. The executors of Josephine L. Sanford did not succeed to her duties or powers as administratrix of the estates of her deceased brother and sister. If she were trustee of an express trust, they became trustees of a constructive trust. They did not represent those estates when they were substituted as complainants in the suit to redeem, but they then represented the interests of Josephine L. Sanford alone. Norton v. Bassett (Cal.) 97 Pac. 894. A conveyance to them as such executors would be a conveyance on its face inuring to the benefit of the estate of Josephine, and not for the benefit of the plaintiff. It would be antagonistic to him. In view of all these considerations it is very clear that the statute of limitations immediately began to run in favor of her estate against any claim of the plaintiff, or of the successors or representatives of Harriet Sanford, based upon any mortgage then claimed to exist upon the interest of James T. Sanford then vested in the successors of Josephine. The court below properly refused to give any relief to the administrator of the estate of Harriet Sanford.

The respondents earnestly contend that the parol express trust in favor of Harriet Sanford, upon which it is claimed Harriet A. Sanford and Josephine, as her successor, held the mortgage herein sought to be enforced, was not established by satisfactory or sufficient evidence, and that consequently the transfer thereof to Harriet A. Sanford was absolute, that the estate of the mother had no interest therein, and that it vested wholly in Josephine, under her sister's will. They also contend that upon the failure to redeem on November 1, 1900, the title to the land became absolute in the Savings & Loan Society and its trustees, free from all claim on the part of the plaintiff or Jones as administrator, that the title of the respondents is derived by subsequent deeds from said trustees, and that by these transactions all right to, or lien upon, the land in favor of the plaintiff or Jones has been cut off. In view of the conclusions we have reached in regard to the statute of limitations, we find it unnecessary to consider these questions.

The judgment and order are affirmed.

We concur: SLOSS, J.; HENSHAW, J.; ANGELLOTTI, J.; MELVIN, J.

156 Cal. 114

HALSEY et al. v. GILLETT, Governor, et al.

(S. F. 5,309.)

(Supreme Court of California. July 12, 1909.)

STATES (§ 155*) — STATE BONDS — ISSUANCE — SIGNATURE.

Act 35th Leg. (St. 1903, p. 247, c. 211), providing for the issuance and sale of state bonds for the construction of a sea wall and appurtenances in the city and county of San Francisco, and requiring all the bonds to bear date as of January 2. 1905. the Governor, Comptroller, and Treasurer in office at the time the bonds were originally issued and not those in office when the bonds were sold, were the proper persons to execute them.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 146, 147; Dec. Dig. § 155.*]

In Bank. Petition for writ of mandamus by N. W. Halsey and another against the Hon. James N. Gillett, Governor of the State of California, A. B. Nye, Comptroller of the State, and William R. Williams, State Treasurer. Writ denied.

Goodfellow & Eells, for plaintiffs.

BEATTY, C. J. Omitting merely formal allegations, the facts alleged in the petition are the following:

"That at the Thirty-Fifth session of the Legislature of the state of California there was duly enacted by said Legislature an act entitled 'An act to provide for the issuance and sale of state bonds to create a fund for the construction by the Board of State Harbor Commissioners of a sea wall and appurtenances in the city and county of San Francisco; to create a sinking fund for the payment of said bonds, and providing for the submission of this act to a vote of the people,' which said act was duly approved by the Governor on the 20th day of March, 1903. That said act was thereafter submitted to the people of the state of California for their ratification by the proclamation of the Governor of said state of California calling for a general election by the people of said state to be held in the month of November in the year 1904, in which proclamation the said Governor included the submission of said act of the Legislature, and said act was duly ratified at said general election by receiving a majority of all the votes cast for and against it at said election; and ever since the said election said act, commonly known as 'The San Francisco Sea Wall Act' has been and is in full force and effect.

"That in said month of November, 1904, after and pursuant to said election and in accordance with section 10 of said act, the Governor of California made due proclamation that said act had been so ratified and was in full force and effect, and thereupon, in accordance with the provisions of section 1 of said act, Truman Reeves, who was then State Treasurer of the state of California, did prepare as such State Treasurer 2,000 suitable bonds in the form prescribed by said act, the said several bonds being numbered consecutively from 1 to 2,000 inclusive, and the said bonds were then, in or about the month of December, 1904, signed by George C. Pardee as Governor of said state, and were countersigned by E. P. Colgan as Comptroller of the state of California, and were indorsed by Truman Reeves as State Treasurer of the state of California, and each bond then had the seal of the state of California stamped thereon, and to each of said bonds, when so signed in the year 1904, were attached interest coupons in accordance with said act, which coupons were consecutively numbered on each bond, and were each signed by Truman Reeves as the State Treasurer of the state of California. That each of said bonds bore date of the 2d day of January, 1905, and in said month of December, 1904, and on said 2d day of January, 1905, the said George C. Pardee was the Governor of the state of California, and the said E. P. Colgan was the Comptroller of said state, and the said Truman Reeves was the State Treasurer of said state; but none of said persons is the holder of any of said offices at the present time, or did hold the same at any time since January, 1909.

"That of said 2,000 bonds 1,250 of the bonds, numbered 1 to 1,250, inclusive, were by the State Treasurer sold at public auction, and delivered to the highest bidder for cash, prior to January 1, 1909. That on the 6th day of May, 1909, the Board of State Harbor Commissioners of the state of California, at a meeting regularly called and held on said day, duly passed and adopted a resolution requesting the said Hon. James N. Gillett, as Governor of the state of California, to direct the sale of 500 of the bonds to be issued under said San Francisco sea wall act then remaining unsold; and thereafter the said Governor, under seal of the state of California, did direct said William R. Williams, as State Treasurer of said state, to offer for sale, and to sell at public auction to the highest bidder for cash, as provided in said act, 500 of the bonds authorized by said act, to wit, bonds numbered 1,251 to 1,750, both inclusive, and did further direct that said 500 bonds be sold in one parcel. That said Treasurer thereafter, and on the 24th day of May, 1909, caused notice of the public auction of said bonds to be given as required by said act, stating therein that said State Treasurer would sell said bonds numbered 1,251 to 1,750, inclusive, as authorized and required by said act, on Friday the 2d day of July, 1909, at the hour of 2 o'clock p. m. of that day at the office of the State Treasurer in the state capitol building at Sacramento, Cal. A copy of said notice is hereto attached, and marked 'Exhibit A,' and made a part of this petition.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"That on said 2d day of July, 1909, at the hour and place aforesaid, the said State Treasurer, William R. Williams, did offer for sale at public auction 500 of the bonds authorized and directed to be issued by the said act in accordance with the said notice; and your petitioners, as copartners as aforesaid, did then and there bid and offer for the said 500 bonds in United States gold coin the sum of $500,000, together with all interest accrued, and to accrue, upon said bonds to the time of their delivery to your petitioners, and also the further sum of $3,025 premium or bonus upon said bonds. That said bid by your petitioners was the highest and best bid made to, or received by, the said State Treasurer at said sale, and was by the said Treasurer accepted, and the said State Treasurer did then and there award and sell all of the said 500 bonds to your petitioners as copartners, as aforesaid.

"That the said State Treasurer William R. Williams has offered and tendered to your petitioners, as and for the bonds so sold to them, 500 of the bonds which were so signed in the year 1904 by the said Pardee as Governor, and countersigned by the said Colgan as Comptroller, and indorsed by the said Reeves as State Treasurer; and has refused to date, or cause to be dated, any of said bonds as of the year 1909, or to indorse any of said bonds, or to sign the coupons thereto attached as State Treasurer of the state of California, and does refuse so to do; that the said James N. Gillett and A. B. Nye have refused, and do refuse, to sign or countersign any of said bonds so sold and tendered to your petitioners as Governor or Comptroller of said state, and none of said bonds so tendered or offered to your petitioners by the said State Treasurer are signed or authenticated in any manner except by the signature of said state officers in the year 1904.

"That by such refusal so to sign, countersign, and indorse said bonds and to sign their coupons the said Governor, Comptroller, and Treasurer, defendants herein (as your petitioners are informed and believe) have violated, and are violating, the provisions of said San Francisco sea wall act, relating to the issuance and execution of said bonds; and the 500 bonds so tendered and offered to your petitioners by the said State Treasurer as aforesaid, have not been signed or executed by the proper officers of the state of California, as required and directed by said act. That your petitioners, as copartners as aforesaid, are ready and willing to pay the State Treasurer the full amount of their said accepted bid in exchange for, and upon receipt of, 500 bonds executed in accordance with said act, and it is the express duty of said officers, defendants herein, so to sign, countersign, and indorse the same. That unless said bonds shall be so signed, countersigned, and indorsed by the defendants, your petitioners will suffer great loss and hardship, and that your petitioners have no plain, speedy, or adequate remedy at law for the wrongs hereby complained of.

"That in the opinion of your petitioners it is proper that the writ herein applied for should issue originally from this honorable court without previous application to a lower court, because the construction and meaning of said act of the Legislature, herein involved, was recently before your honors in the application made by E. C. Graham to this honorable court for a similar writ of mandate to the same state officers, which application, numbered S. F. 5,294, was denied by your honors because said Graham, not being a purchaser or holder of any of said bonds, has no status entitling him to invoke the remedy sought by him.

"Your petitioners make this application to your honors in the first instance for the further reason that the validity and value of the bonds of the state of California already issued, and to be issued and sold by the state, will be determined by the court's decision, and the question is therefore of great public interest, affecting large property values, which must ultimately come before your honors for decision, in order to end all doubts of investors who may wish to purchase any of said bonds."

Upon these allegations of fact the petitioners pray "that an alternative writ of mandate issue herein out of this court directed to the defendants above named, and each of them, requiring and commanding them to immediately execute said 500 bonds numbered 1,251 to 1,750, inclusive, in accordance with said act; that is to say, that the said defendant Hon. James N. Gillett be required to sign said 500 bonds, and each of them, as Governor of the state of California; that said defendant A. B. Nye be required to countersign said bonds, and each of them, as Comptroller of the state of California; that said defendant William R. Williams be required to indorse said bonds, and each of them, as Treasurer of the state of California, and also to sign each of the interest coupons attached to said bonds maturing subsequent to said 2d day of July, 1909, and thereupon to deliver said 500 bonds with their coupons to your petitioners upon receipt of $503,025, with all accrued interest as shown by said coupons up to the date of such delivery to your petitioners. And further that the said defendants above named be required to do any and all things necessary for the due and legal execution and issuance of said bonds in the manner required by law, and that upon the hearing of this cause the said writ be made absolute, and that your petitioners may have such other relief, judgment, and order as may be meet in the premises."

The statute authorizing the issuance and sale of the bonds described in the petition is somewhat ambiguous, but since the whole

2,000 bonds authorized are required by the act to bear date the 2d day of January, 1905, the better construction of its equivocal provisions seems to be that the Governor, Comptroller, and Treasurer then in office were the proper officers to execute them, and such having been their construction of the act evidenced by their contemporaneous action, we hold that the bonds tendered to the plaintiff were duly and properly executed according to law.

For that reason only, the writ is denied.

We concur: SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.

(156 Cal. 638)

KAISER LAND & FRUIT CO. v. CURRY, Secretary of State. (S. F. 5,146.)

(Supreme Court of California. June 15, 1909.)

1. Statutes (§ 181*)—Construction — Reasonable Construction.

An intention should not be attributed to the Legislature which would make a statute ineffectual and worthless, unless such intention is plain.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 259, 263; Dec. Dig. § 181.*]

2. Corporations (§ 592½*)—Construction—Statutes — Forfeiture — Ipso Facto Forfeiture.

A statute, forfeiting corporate charters if an annual tax thereby imposed is not paid by a certain time, should be construed against an ipso facto forfeiture without further proceedings, if it can be fairly so construed.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 592½.*]

3. Licenses (§ 18*) — Forfeiture of Franchise.

Act approved March 20, 1905 (St. 1905, p. 493, c. 386), as amended June 13, 1906 (St. 1906, p. 22, c. 19), March 19, 1907 (St. 1907, p. 664, c. 347), and March 20, 1907 (St. 1907, p. 745, c. 403), imposing a license tax on all domestic corporations with certain exceptions, and all foreign corporations doing business in the state, and forfeiting the charter or the right to do business in the state on failure to pay, *held* to require every domestic corporation to pay the tax, whether or not it transacted business in the state.

[Ed. Note.—For other cases, see Licenses, Dec. Dig. § 18.*]

4. Corporations (§ 608*) — Forfeiture of Charter—Ipso Facto Forfeiture—Statutory Provisions.

While at common law, a forfeiture does not divest title until the rights of the state have been determined by a proper judgment, a statute prescribing a forfeiture may be self-executing, and the failure of any domestic corporation to pay the charge imposed by the statute in question for any year by 4 o'clock p. m. on November 30th, ipso facto forfeited the corporate charter without further proceedings; section 6, making the original act of June 13, 1906 (St. 1906, p. 23, c. 19), permitting any corporation which has failed to pay the license tax, and penalty, to pay the same between July 1, 1906, and 4 o'clock p. m. on September 1, 1906, together with the tax for the current year, and thereby be relieved from the forfeiture prescribed, and the amendment to that section approved March 20, 1907 (St. 1907, p. 746, c. 403), relating to amounts unpaid for the years 1905 and 1906, and 1906–1907, merely relieving corporations from forfeitures already accrued by their failure to pay charges for the years specified.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2416–2419; Dec. Dig. § 608.*]

5. Licenses (§ 7*)—Corporate Franchises —Tax upon "Property"—Privilege Tax.

The tax imposed by the statute is not a tax upon "property," within Const. art. 13, § 1, requiring all property to be taxed in proportion to its value, being a license fee for the privilege of existing as a corporation in case of domestic corporations, and for the privilege of doing business within the state in case of a foreign corporation.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 13; Dec. Dig. § 7.*

For other definitions, see Words and Phrases, vol. 6, pp. 5693–5728; vol. 8, pp. 7768–7770.]

6. Taxation (§ 49*)—Corporate Franchises —"Property."

Everything which gives value to corporate stock must be assessed as "property," under Const. art. 13, § 1, requiring all property not exempt to be taxed in proportion to its value, and corporate franchises are property within the Constitution, which may be assessed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 117; Dec. Dig. § 49.*]

7. Corporations (§§ 4, 391*)—Power to Regulate.

The state can determine upon what conditions corporations may be created and exist therein.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 11–13, 1573, 1578; Dec. Dig. §§ 4, 391.*]

8. Constitutional Law (§ 126*)—Corporate Franchises—Alteration.

Under Const. art. 12, § 1, providing that all laws "now" in force, or which may hereafter be passed, concerning corporations may be altered or repealed, the Legislature may change the condition upon which the privilege of acting as a corporation shall continue, and every corporation accepts its charter subject to the exercise of such power.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 325, 366–369; Dec. Dig. § 126.*]

9. Licenses (§ 7*)—Corporate Franchises.

Under Const. art. 12, § 1, permitting the alteration or repeal of all laws concerning corporations, the state may require the payment of an annual license tax of all corporations for raising revenue.

[Ed. Note.—For other cases, see Licenses, Dec. Dig. § 7.*]

10. Constitutional Law (§ 287*)—Due Process of Law—Taxation of Property—Forfeitures of Corporate Charter.

The statute does not violate the constitutional provision, prohibiting the taking of property without due process of law, because the failure to pay the tax ipso facto forfeited the corporate charter, as there could be no forfeitures of charters of corporations exempted from paying the tax, even if they were reported as delinquent, nor could the charter of any corporation required to pay the tax be forfeited by a declaration of forfeiture, if the tax was in fact paid, as it could show that fact whenever its legality was attacked.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 831, 905; Dec. Dig. § 287.*]

11. Constitutional Law (§ 287*)—Due Process of Law—License Tax.

The statute was not a taking of property at all within the constitutional provisions, even though the continuance of the right to exist or do business as a corporation might be very valuable; the charge imposed being a mere license either for the privilege of being, or doing business as, a corporation.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 287.*]

12. CONSTITUTIONAL LAW (§ 80*)—DISTRIBUTION OF GOVERNMENTAL POWERS—LEGISLATIVE POWERS — ENCROACHMENT — ENCROACHMENT ON JUDICIARY—CONSTITUTION OF STATUTE.

The statute does not violate Const. art. 3, § 1, prohibiting any person charged with the exercise of powers of one of the three departments of government from exercising functions pertaining to either of the others, on the ground that the Secretary of State, an executive officer, is given the judicial power to determine whether any delinquent corporation is within the class of corporations exempted by St. 1906, p. 24, c. 19, § 7, from paying the tax; such determination being merely incidental to his ministerial duty of reporting to the Governor the list of delinquent corporations, and not being binding upon any corporation.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 140, 143–147; Dec. Dig. § 80.*]

13. LICENSES (§ 7*)—FOREIGN CORPORATIONS—STATUTORY PROVISIONS—DISCRIMINATION IN FAVOR OF FOREIGN CORPORATIONS.

The statute does not violate Const. art. 12, § 15, providing that no foreign corporation shall be allowed to transact business within the state on more favorable terms than are prescribed by law for similar domestic corporations; domestic corporations being required to pay the same tax at the same time.

[Ed. Note.—For other cases, see Licenses, Dec. Dig. § 7.*]

14. STATUTES (§ 72*) — OPERATION—UNIFORM OPERATION—GENERAL LAWS.

That a law operates differently on different classes does not make its operation not uniform, if the classification is reasonable, so that a statute forfeiting a charter of domestic corporations which failed to pay the license tax imposed, and forfeiting the right to do business of foreign corporations failing to pay such tax, does not violate Const. art. 1, § 11, requiring all general laws to have a uniform operation, since in each case the state forfeits all it has given.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 72.*]

15. CONSTITUTIONAL LAW (§ 230*)—EQUAL PROTECTION OF LAW—LICENSE TAX.

A statute forfeiting the charters of domestic corporations for nonpayment of an annual license fee does not deny the equal protection of the law, within the rule that there is a denial of equal protection of the law where the validity of a statute depends upon the existence of a fact which can only be determined by an investigation of a complicated and technical character, and a provision thereof imposing severe penalties for its violation so as to intimidate persons affected from resorting to the courts to test the validity.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 687; Dec. Dig. § 230.*]

16. STATUTES (§ 113*) — TITLES — EXPRESSION OF SUBJECTS.

Act approved March 20, 1905 (St. 1905, p. 493, c. 386), as amended June 13, 1906 (St. 1906, p. 22, c. 19), March 19, 1907 (St. 1907, p. 664, c. 347), and March 20, 1907 (St. 1907, p. 745, c. 403), entitled "An act relating to revenue and taxation," providing for a license tax upon corporations, and making an appropriation for the purpose of carrying out the objects of the act, imposes a license tax upon foreign and domestic corporations, incorporated or doing business within the state, requiring the Secretary of State to report a list of all corporations becoming delinquent, and forfeiting the charters of such delinquent corporations upon a certain date each year. *Held*, that the title of the act sufficiently expressed its subject, as required by Const. art. 4, § 24, even though the statute was construed to impose a tax upon corporations irrespective of whether they were actually engaged in business, and, though the title did not state that the act was one amending the charters of corporations, every new law affecting corporations necessarily amends their charter.

[Ed. Note.—For other case, see Statutes, Dec. Dig. § 113.*]

17. STATUTES (§ 109*)—SUBJECTS—EXPRESSION OF SUBJECTS IN TITLE.

Const. art. 4, § 24, requiring the subject of every act to be expressed in its title, was intended to prevent fraud and deception in the enactment of statutes, the title of which did not intimate its contents, and the inclusion of incongruous matter not specified in the title, and the title is sufficient if it reasonably intimates matters contained therein.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 136–139, 196; Dec. Dig. § 109.*]

In Bank. Petition for a writ of mandate by the Kaiser Land & Fruit Company against Charles F. Curry, Secretary of State of the state of California. On demurrer to petition. Demurrer sustained and proceeding dismissed.

Gray & Cooper, Otto Irving Wise, Louis Hirsch, and Hugo K. Asher, amici curiæ, for petitioner. U. S. Webb, Atty. Gen., R. C. Van Fleet, Deputy Atty. Gen., and Raymond Benjamin, Deputy Atty. Gen., for respondent.

ANGELLOTTI, J. Mandamus prayed to be directed against Charles F. Curry, Secretary of State of the state of California. This is an original proceeding in mandate. The petition shows the following to be the material facts: Plaintiff is a domestic corporation formed for purposes of profit, whose certificate of incorporation was issued August 12, 1899. By its articles of incorporation, its number of directors is fixed at five. On or about October 15, 1908, a majority of the stockholders thereof duly met, executed and acknowledged a certificate, decreasing the number of directors from five to three, which, on October 22, 1908, was filed in the office of the county clerk of Santa Barbara county, the county in which was located the principal place of business of the corporation. A certified copy of this certificate was presented to the Secretary of State for filing, on October 29, 1908, together with the fees allowed by law for filing, and the corporation demanded that such officer file the same, and issue a certificate of decrease of the number of directors. Section 290, Civ. Code. The Secretary of State refused to file the same, or to issue such certificate, on the ground that said corporation had never paid the "corporation license tax," claimed to be due under an act of the State Legislature, entitled "An act relating to revenue and taxation, providing for a license tax upon corporations, and making an appropriation for the purposes of carrying out the objects of this act," approved March 20, 1905 (St. 1905, p. 493, c. 386), as amended June 13, 1906 (St. 1906, p. 22, c. 19), March 19, 1907 (St. 1907, p. 664, c. 347), and March 20, 1907 (St. 1907, p. 745, c. 403), claiming that by reason of such nonpayment said corporation had become dissolved and had forfeited its charter and no longer existed. Said corporation transacted no business of any kind or character in the state of California, or elsewhere, between July 1, 1907, and June 30, 1908. It had never paid said tax, but at the time of the tender for filing of said certificate, on October 29, 1908, it offered to pay the amount due for said fiscal year 1907–1908, the penalty for delinquency provided in the act, and any other amount that had since become due thereunder, and is now ready and willing to pay the same. The matter has been submitted for decision upon the petition and the demurrer thereto of the Secretary of State, based on the ground that the petition does not state facts sufficient to warrant relief.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

So far as it may be considered material, the act is as follows:

"Section 1. No corporation heretofore or hereafter incorporated under the laws of this state, or of any other state, shall do or attempt to do business by virtue of its charter or certificate of incorporation, in this state, without a state license therefor.

"Sec. 2. It shall be the duty of every corporation incorporated under the laws of this state, and of every foreign corporation now doing business, or which shall hereafter engage in business in this state, to procure annually from the Secretary of State a license authorizing the transaction of such business in this state, and shall pay therefor a license tax as follows: [Then follows a statement of the amounts of tax proportioned to the amount of the authorized capital stock of the corporation, the tax running from $10 where the authorized capital stock does not exceed $10,000, to $250 where it exceeds $5,000,000.] Said license tax or fee shall be due and payable on the first day of July of each and every year to the Secretary of State, who shall pay the same into the state treasury. If not paid on or before the hour of four o'clock p. m. of the first day of September next thereafter, the same shall become delinquent and there shall be added thereto, as a penalty for such delinquency, the sum of ten dollars. The license tax or fee hereby provided authorizes the corporation to transact its business during the year or for any fractional part of each year in which such license tax or fee is paid. 'Year,' within the meaning of this act, means from and including the first day of July to and including the thirtieth day of June next thereafter.

"Sec. 3. The Secretary of State shall, on or before the 15th day of September in each year, report to the Governor of the state a list of all corporations which have become delinquent, as provided in section two of this act, and the Governor shall forthwith issue his proclamation, declaring under this act that the charter of such delinquent domestic corporation will be forfeited and the right of such foreign corporation to do business in this state will be forfeited unless payment of such license tax, together with the penalty for such delinquency, as hereinbefore provided, be made to the Secretary of State on or before the hour of four o'clock p. m. of the thirtieth day of November next following.

"Sec. 4. Said proclamation shall be filed immediately in the office of the Secretary of State, and said Secretary of State shall immediately cause a copy of said proclamation to be published in one issue of each of two daily newspapers to be selected by the Governor.

"Sec. 5. At the hour of four o'clock p. m. of the thirtieth day of November each year the charters of all delinquent domestic corporations which have failed to pay the said license tax, together with said penalty for such delinquency, shall be forfeited to the state of California, and the right of all delinquent foreign corporations to do business in this state which have failed to pay said license tax, together with the penalty for such delinquency, shall be likewise forfeited. * * *

"Sec. 7. All educational, religious, scientific and charitable corporations, and all corporations which are not organized for pecuniary profit, are exempt from the provisions of this act.

"Sec. 8. On or before the thirty-first day of December of each year the Secretary of State shall make a list of all domestic corporations whose charters have been so forfeited and of all foreign corporations whose right to do business in this state has been so forfeited, and shall transmit a certified copy thereof to each county clerk in this state, who shall file the same in his office.

"Sec. 9. It shall be unlawful for any corporation, delinquent under this act, either domestic or foreign, which has not paid the license tax or fee, together with the penalty for such delinquency, as in this act prescribed, to exercise the powers for such corporation, or to transact any business in this state, after the thirtieth day of November next following the delinquency. * * *"

Section 10a makes the directors or managers in office of a corporation whose charter is so forfeited the trustees of the corporation and stockholders or members to settle up the affairs of the corporation.

Section 10b is as follows: "At the time of filing a certified copy of articles of incorporation of any corporation when filed on or between the first day of July and the following first day of December in any year, there shall be paid, in addition to all other fees required by law to be paid to Secretary of State, the sum of twenty dollars, which shall be received and license receipt issued in full of the license tax payable under this act, for the then current year."

Certain questions as to the proper construction of this act are involved by this application. We are satisfied that the act must be construed as imposing the duty on all domestic corporations (excepting educational, religious, scientific, and charitable corporations, and all corporations which are not organized for pecuniary profit) to pay the so-called "tax," regardless of whether they actually transact, or attempt to transact, business in the state. Section 2, the section prescribing this duty, is plain and explicit in this regard. "It shall be the duty of every corporation incorporated under the laws of this state, and of every foreign corporation now doing business, or which shall hereafter engage in business in this state, to procure annually from the Secretary of State a license authorizing the transaction of such business in this state, and shall pay therefor a license tax as follows." The words "now doing business or which shall hereafter engage in business in this state" are of course referable only to the words "every foreign corporation." A distinction is thus clearly made between domestic and foreign corporations in the matter of the duty imposed, which, in view of other provisions of the act, is unexplainable on any other theory than that the doing of business is immaterial so far as a domestic corporation is concerned. If such distinction had not been intended it would have been the natural and ordinary course to have followed substantially the form used in section 1, by prescribing that any corporation "heretofore or hereafter incorporated under the laws of this state or of any other state" doing, or which shall hereafter engage in, business in this state, etc., or the form used in section 9, by providing that every corporation, "either domestic or foreign," now doing business or which shall hereafter engage in business in this state, etc., shall obtain a license, etc. The provision that the license thus to be obtained shall authorize the transaction in this state of "business," or "such business," does not detract from the force of the preceding portion of the section, which, in terms, requires every domestic corporation to obtain such a license and pay the amount prescribed therefor, whether or not it transacts business. The view that the act contemplated the imposition of this burden on every domestic corporation, regardless of whether or not it transacts business in the state, is, we think, more consistent with the whole frame of the act than would be the view that it was intended simply to impose a tax on the transaction of business in the state by any corporation. The title in no way indicates the imposition of any charge upon the carrying on by a corporation of any business or occupation, excepting so far as the use of the words "license tax" in designating the burden imposed may so indicate. It is simply "an act relating to revenue and taxation, providing for a license tax upon corporations," etc. The words "license tax," used with reference to corporations exclusively, mean no more necessarily than a charge of some kind imposed upon them solely for their corporate privilege, and as here used simply import a charge, for purposes of revenue it may be conceded, upon "corporations" generally; that is, upon all corporations so far as it was within the power of the Legislature to impose the charge.

Again, we find it provided in section 10b that, "at the time of filing a certified copy of the articles of incorporation of any corporation, when filed on or between the first day of July and the following first day of December in any year, there shall be paid, in addition to all other fees required by law to be paid to Secretary of State, the sum of twenty dollars, which shall be received and license receipt issued in full of the license tax payable under this act, for the then current year." As the statute was at the time of this enactment the "tax" prescribed for all corporations was $20 per annum. A foreign corporation had no right to do business in this state without filing a certified copy of its articles of incorporation with the Secretary of State (St. 1901, p. 108, c. 93), and the filing of such a copy by a domestic corporation was a condition precedent to the issuance of the certificate of incorporation (Civ. Code, § 296). It thus appears very clearly that it was the intention of the Legislature that the "tax" should be paid by every corporation a certified copy of whose articles of incorporation was on file in the office of the Secretary of State. This construction is still further supported by the provisions of section 3. The Secretary of State is to report to the Governor a list of all corporations that are delinquent under section 2, and the Governor is to act solely on such report. No method is provided by which the Secretary of State can ascertain which of the many thousand corporations in this state are actually engaged in business in this state under its articles, and there is no intimation in the act that he is to make any such investigation. It seems obvious that the intention was that he should act upon the records of his office, showing the corporations that were in fact authorized to do such business, and that all corporations so authorized were liable, and should be reported to the Governor if they failed to pay the tax; any foreign corporation so authorized being engaged in business in this state within the meaning of the act, even if it failed to actually transact business. Any other construction would render the act absolutely worthless, so far as its practical effect is concerned, and certainly we are not to attribute to the Legislature an intention that would bring about such a result, unless that intention is plain. It may be conceded that the intent to impose this charge on all domestic corporations and foreign corporations whose articles of incorporation are on file in the office of the Secretary of State, regardless of whether they actually do the business they are authorized to do by such articles, might have been more clearly and concisely expressed, but we think it obvious from a consideration of the whole act that such was undoubtedly the intent, and that such intent has been sufficiently expressed.

The next question to be considered in regard to the construction of the act is whether under its provisions a failure on the part of a domestic corporation to comply with its provisions by paying the charge imposed thereby for any year by 4 o'clock p. m. of the 30th day of November of that year ipso facto works a forfeiture of its charter. The contention of plaintiff on this point is that the act merely states the conditions under which the charter is liable to forfeiture, and that the forfeiture before becoming effective must be established by the decree of a court of competent jurisdiction, in some proceeding brought for that purpose. It is of course admitted that the only question in this connection is one of legislative intent. All the cases agree upon the proposition that, although a forfeiture at common law does not operate to divest the title of the owner until by a proper judgment in a suit instituted for that purpose the rights of the state have been determined, a statute prescribing a forfeiture may be self-executing. Upon this point the language of the act is so clear and unmistakable in meaning that we should be obliged to hold that it was intended that such failure should ipso facto work a forfeiture, even if the result thereof should be, as claimed, that the act so providing must be held unconstitutional on the ground that it violates the due process of law clauses of the federal and state Constitutions. We concede the claim that the act should be construed against such ipso facto forfeiture if the language used is fairly susceptible of such interpretation, but we are satisfied that it is not so susceptible. As we have seen, the act, after imposing the specific charge, provides that it shall be paid between July 1st and 4 o'clock p. m. of September 1st of the year for which it is due; that at the last-mentioned time a penalty of $10 for delinquency shall accrue (section 2); that the Secretary of State shall, on or before September 15th in each year, report to the Governor a list of all delinquent corporations, whereupon the Governor shall issue his proclamation declaring "that the charters of such delinquent corporations will be forfeited * * * unless payment of said license tax, together with the penalty for such delinquency, * * * be made to the Secretary of State on or before the hour of four o'clock p. m. of the thirtieth day of November next following"; that a copy of such proclamation shall be immediately published by the Secretary of State in one issue of each of two daily newspapers to be selected by the Governor (section 4); that "at the hour of four o'clock p. m. of the thirtieth day of November each year the charters of all delinquent domestic corporations which have failed to pay the said license tax, together with said penalty for such delinquency, shall be forfeited to the state of California" (section 5); and that on or before the 31st day of December of each year the Secretary of State shall make "a list of all domestic corporations whose charters have been so forfeited" (section 8). The language used is irreconcilable, under the decisions in this state, with any other theory than that of ipso facto forfeiture, and the whole frame of the act is in support of this theory.

In Los Angeles Ry. Co. v. Los Angeles, 152 Cal. 242, 92 Pac. 490, 15 L. R. A. (N. S.) 1269, the latest case on this subject, the provision under consideration was that portion of section 502 of the Civil Code relative to street railroad corporations, providing that "a failure to comply with either of the foregoing provisions of this section, or with either of the provisions of the ordinance granting said right of way, *works a forfeiture* of the right of way, and also of the franchise," etc. It was held, Chief Justice Beatty speaking for the court, that the words italicized made the statute self-executing, and it was said: "A judgment declaring and enforcing a forfeiture does nothing more than work a forfeiture, and when a breach of condition works a forfeiture, there is no office for a judgment to perform, except perhaps to supply conclusive evidence of the fact—evidence which may in certain contingencies be useful, though not for all purposes essential." In Oakland, etc., R. R. Co. v. Oakland, etc., R. R. Co., 45 Cal. 365, 13 Am. Rep. 181, the provision was "that, if the provisions of this act are not complied with, then the franchise and privileges herein granted *shall utterly cease and be forfeited.*" It was held that the statutory provision was self-executing, and that the mere failure to comply with the provisions of the act ipso facto worked a forfeiture. In Upham v. Hosking, 62 Cal. 250, 257, the provision was that if the said parties shall fail, etc., "then all the rights granted by this act shall become forfeited to the state," and it was held that this provision ipso facto worked a forfeiture. See, also, Borland v. Lewis, 43 Cal. 569; Town of Arcata v. The Arcata, etc., Co., 92 Cal. 639, 645, 28 Pac. 676.

Section 6 of the act, inserted by way of amendment to the original act on June 6, 1906 (St. 1906, p. 23, c. 19), providing that any corporation which failed to pay the license tax and penalty required by the original act "may between the first day of July, 1906, and the hour of four o'clock p. m. of the first day of September, 1906, pay the said license tax and penalty," together with the license tax for the current year, and thereby "be relieved from the forfeiture prescribed" by such original act, is somewhat relied on as showing an intention that the failure to comply with the provisions of the act as to payment does not ipso facto work a forfeiture. The same claim could with equal force be made as to the amendment of this section approved March 20, 1907 (St. 1907, p. 746, c. 403), referring to amounts due and unpaid for the years 1905–1906 and 1906–1907. We think that these provisions can be reasonably construed in no other way than as being designed simply to relieve corporations that had failed to pay the charges for certain specified years from the effect of a forfeiture that had already occurred, upon condition that such corporations should then pay the amount of such charges. This is the necessary construction, whether or not the effect thereof be that under section 7 of article 12 the provisions are void. The question of the validity of such provisions is not involved in this proceeding.

This brings us to a consideration of the question of the nature of the charge imposed by this act on the corporations affected by its provisions. It is earnestly claimed that, although denominated a "license tax," it is a tax on "property" within the meaning of that word as used in section 1, art. 13, of our Constitution. That section providing that "all property in the state, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law," it is claimed that, as this act taxes the property of the various corporations without regard to its value, it is void. In view of what we have already said, it is clear that the charge imposed by this act is a charge for the privilege of being and continuing to exist as a corporation in the case of a domestic corporation, and a charge for the privilege of doing business as a corporation in this state in the case of a foreign corporation. It is settled in this state that the corporate franchise of a corporation, the right to be and exist as a corporation, may constitute valuable property of the corporation within the meaning of the term "property" as used in section 1, art. 13, and that when it does constitute such valuable property, it is to be assessed and taxed "in proportion to its value" as any other property. Burke v. Badlam, 57 Cal. 594; Spring Valley W. W. v. Schottler, 62 Cal. 69, 110; Bank of California v. San Francisco, 142 Cal. 276, 75 Pac. 832, 64 L. R. A. 918, 100 Am. St. Rep. 130. The well-settled theory of our system of taxation of corporations is that everything that gives value to the shares of stock of a corporation must be assessed as property of the corporation under this section of the Constitution (see Crocker v. Scott, 149 Cal. 575, 583, 589, 87 Pac. 102, 117 Am. St. Rep. 167), and it is recognized that this corporate franchise constitutes one of such elements.

As was said in Bank of California v. San Francisco, supra, 142 Cal. 288, 75 Pac. 837, 64 L. R. A. 918, 100 Am. St. Rep. 130: "It is the exercise of the right that gives *the value that our laws require to be taxed.*" (The italics are ours.) In the same case it was also said, speaking of the right or franchise of a corporation engaged in the business of supplying water or artificial light in municipalities to use the public streets for their pipes, etc., conferred by section 19, art. 11, of the Constitution on any corporation or individual engaged at any time in such business: "While the generality of the grant does not deprive such rights of the character of franchises, they have value only so far as the exercise thereof contributes to the value of the capital of the corporation, and are precisely the same in this respect as the exercise of the corporate franchise." It is only in this sense that such a franchise has any value under our general laws relating to the formation of corporations. It is this value that our law requires to be ascertained and taxed as property. The provision of our Constitution authorizing and requiring such assessment and taxation of the corporate franchise as a thing of value cannot be held to preclude the state from imposing a charge for the privilege obtained from it of being and acting as a corporation. Under our law there is really no difference in principle in this regard between a fee required to be paid to the state "as a condition or for the privilege of being a corporation" and an annual charge or excise upon the right to continue corporate existence. So far as such charge is a tax at all, it is a mere privilege or license tax (Gray's Limitations on Taxing Power, §§ 54, 55), the mere purchase price of the privilege. The state has the sole power to determine upon what conditions corporations may be created and exist within its borders. As put by Mr. Gray, "Corporate life is a creation of the state, and can be bestowed by the state upon such conditions as it chooses." Section 54. In section 1, art. 12, of the Constitution of 1879 it is provided: "Corporations may be formed under general laws, but shall not be created by special act. All laws now in force in this state concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time or repealed." Under this reserved power it is not to be doubted that the Legislature has the right to change the conditions upon which the privilege of being and acting as a corporation shall continue to exist, and that every corporation accepts its charter subject to the exercise of such power. Where the state possesses such reserved power as to corporations already created that it may, for the purpose of increasing its revenue, prescribe as one of such conditions the annual payment of any amount it sees fit, it cannot be questioned. See Home Ins. Co. v. New York, 134 U. S. 599, 10 Sup. Ct. 593, 33 L. Ed. 1025.

In New Jersey, where, as here, the corporate franchise was assessed as property, according to its value, a statute provided, so far as material to the case before the court, that "all other corporations incorporated under the laws of this state, and not hereinbefore provided for, shall pay an annual license fee or franchise tax of one-tenth of one per centum on all amounts of capital stock issued and outstanding." In holding the receiver in charge of an insolvent corporation liable to pay this charge, notwithstanding that the corporation's franchises were no longer a valuable asset, and were not being used, the Court of Errors and Appeals of New Jersey said: "Although the statute designates an imposition of this kind as a license fee or franchise tax, it plainly is not a tax upon corporate franchises. In fact, strictly speaking, it is not a tax at all, nor has it the elements of one. It is in reality an arbitrary imposition, laid upon the corporation without regard to the value of its property or its franchises, and without regard to whether it exercises the latter or not solely as a condition of its continued existence. The state in creating a corporation has the right to impose upon its creature such conditions as the Legislature within constitutional limits may deem proper; and the acceptance by the corporation of the franchises, powers, and privileges conferred upon it binds it to the performance of those conditions so long as it continues to remain in possession of those franchises, powers, and privileges, and the conditions themselves remain unrevoked by the Legislature, and this is so without regard to the solvency or insolvency of the corporation, the value, or want of value, of its franchises, or whether or not it is exercising them either by its officers and directors or through a receiver. The sole test in determining its liability to comply with those conditions so long as they remain unrevoked is the existence or nonexistence of the corporation." In re United States Car Co., 60 N. J. Eq. 516, 43 Atl. 673. This quotation aptly states the real nature of the charge imposed by the act under consideration, and the grounds upon which the imposition is justified. It is substantially the purchase price which the state has seen fit to charge for the continuance of the privilege of being and acting as a corporation. Although this privilege had already been granted to plaintiff and all other existing corporations, it had been granted subject to the power reserved by the state, to be exercised by general laws, of revocation, or the imposition of new charges therefor, or new conditions upon which it might be enjoyed. The charge is in no sense a tax upon the thing granted, as is the tax imposed under section 1, art. 13. It is a mere license fee charged for the privilege, and is not a tax upon property at all, and the requirements of section 1, art. 13, of the Constitution do not apply thereto. See, in addition to authorities already cited, Jersey City, etc., Co. v. United, etc., Co. (C. C.) 46 Fed. 264; State v. Pacific, etc., Co. (Or.) 99 Pac. 427; Chehalis Boom Co. v. Chehalis Co., 24 Wash. 135, 63 Pac. 1123; American Smelting, etc., Co. v. People, 34 Colo. 240, 82 Pac. 531; Marsden Co. v. Assessors, 61 N. J. Law, 461, 39 Atl. 638; People v. Knight, 174 N. Y. 478, 67 N. E. 65, 63 L. R. A. 87. So far as the charge is imposed on foreign corporations, it is of the same general nature, and rests upon the same basis. It is imposed as a condition of the grant of the privilege to do business in the state. "A foreign corporation can only come into a state and do business there by consent of the state; and the charge imposed by the state as a condition of that consent is not ordinarily a tax on property." Gray's Limitations of Taxing Power, § 57; Ashley v. Ryan, 153 U. S. 436, 14 Sup. Ct. 865, 38 L. Ed. 773.

Construing the act as we do, and in view of what we have already said, we see no force in the claim that it is void as being in conflict with the due process of law provisions of the federal and state Constitutions, by reason of the fact that the failure of a domestic corporation to pay the charge imposed ipso facto works a forfeiture of its charter, without any opportunity to the corporation to be heard. Practically we have here simply the case of the grant by the state of a privilege upon condition subsequent, the privilege of being and acting as a corporation, which is to continue only upon the condition that the corporation shall annually pay to the state a certain specific amount therefor, on or before the 30th day of November at 4 o'clock p. m., it being provided that upon failure to pay at such time, the privilege shall ipso facto cease, provided, of course, that the acts required to be performed by the Secretary of State and the Governor shall have been performed in the manner required. This is not the taking of property without the due process of law, or, indeed, the taking of property at all within the meaning of the constitutional provisions, notwithstanding that the continuance of the privilege might be very valuable. By virtue of the terms of the statutes relating to the grant of the privilege and its continuance the privilege ceases to exist upon the failure of the corporation to make the payment specified as a condition of its continuance. As said in Los Angeles, etc., Co. v. Los Angeles Co., supra, where a breach of condition works a forfeiture of the thing granted, "there is no office for a judgment to perform, except perhaps to supply conclusive evidence of the fact" which itself works the forfeiture. See, also, Arcata v. Arcata, etc., Co., 92 Cal. 639, 645, 28 Pac. 676. It is obvious that there is no analogy between such a case as is here presented and cases like Chauvin v. Valiton, 8 Mont. 451, 20 Pac. 658, where the statute provided for the summary seizure and sale in a manner held to be in violation of the due process provisions of any property used in carrying on a trade, occupation, or profession for which a license was required, to pay the amount due for the privilege of carrying on such trade, occupation, or profession. It may be conceded for the purposes of this case that the Legislature has not the power to enact a law the effect of which would be to summarily deprive a corporation of other property owned by it, as a penalty for the nonpayment of an amount due the state, without notice and some opportunity to the corporation to be heard. The property rights of a corporation are, of course, as sacred as those of the individual. But so far as the privilege to be and act as a corporation granted by the state constitutes property of the corporation, one of its elements is that it is held subject to such conditions as may lawfully be imposed by the state, and that it will cease to exist upon noncompliance with those provisions if the state has so declared. We need not consider, therefore, what kind of notice and hearing is essential in proceedings to enforce taxes by the seizure or sale of property of the taxpayer, or the question of the validity of such a provision as was involved in King v. Mullins, 171 U. S. 407, 18 Sup. Ct. 925, 43 L. Ed. 214, which was one contained in the Constitution of West Virginia providing for the forfeiture of any land the owner of which had failed during a given period to have placed on the proper land book for taxation.

It should be unnecessary to say that it is only when the breach of condition prescribed by the act in fact occurs that there is any forfeiture, and that there can be no forfeiture as to any corporation exempted from the provisions of the act. Nothing is conclusively adjudicated, or adjudicated at all, against any corporation by any tribunal or officer. If a corporation exempted from the provisions of the act under the section exempting "all educational, religious, scientific and charitable corporations, and all corporations which are not organized for pecuniary profit," is nevertheless reported to the Governor by the Secretary of State as delinquent, and included in the proclamation of the Governor provided for in section 3, there is no forfeiture as to such a corporation, and wherever its right to be and continue as a corporation is legally assailed, that fact could be made to appear. So if a corporation liable under the act had in fact paid the amount prescribed prior to the 1st day of September at 4 o'clock p. m., but was nevertheless included in such report and proclamation, there would be no forfeiture, for the simple reason that the event upon which the forfeiture depended had not occurred, and whenever its right to continue as a corporation is legally assailed that fact can be shown. See King v. Mullins, 171 U. S. 404, 434, 18 Sup. Ct. 925, 43 L. Ed. 214. And if there be any objection to the validity of the act, either as to the whole act or in so far as it purports to affect any particular corporation, such corporation has ample opportunity to make such objection when an attempt is made to enforce the forfeiture declared thereby. If the objection be sustained, it will of course result that there has been no forfeiture.

The act is not in violation of section 1, art. 3, of the Constitution, providing that no person charged with the exercise of powers properly belonging to one of the three departments of the state, the legislative, executive, and judicial, shall exercise any functions appertaining to either of the others, except as in the Constitution provided. The point in this connection is that the Secretary of State, an executive officer, is given the judicial power to determine whether any corporation which has failed to pay the charge is within or without the exception mentioned in section 7 of the act. He is given no such power within the meaning of the constitutional provision. He is simply called upon to report to the Governor, with a view to the making of the proper proclamation of the latter officer, a list of the corporations which, according to the records of his office, have not paid the charge imposed upon them by the act. This proclamation, it will be remembered, is practically a notice to delinquent corporations, advising them that unless the charge, together with penalty for delinquency, is paid at the time designated by the statute, their charters will be forfeited. While the Secretary of State must exercise his judgment in determining which of the corporations whose articles are on file come within the description given in section 7, purely for the purpose of determining which shall be included in the list he is required to make, he does this as a mere incident to the exercise of a purely ministerial function, and is not making a determination that is binding on any corporation. See People v. Hayne, 83 Cal. 111, 23 Pac. 1, 7 L. R. A. 348, 17 Am. St. Rep. 211; In re Stevens, 83 Cal. 322, 332, 23 Pac. 379, 17 Am. St. Rep. 252; People v. Board of Education, 54 Cal. 375; Robinson v. Kerrigan, 151 Cal. 49, 90 Pac. 129, 121 Am. St. Rep. 90; Owners of Lands v. People, 113 Ill. 296, 309.

We are unable to see any force in the objection made by amici curiæ that the act is in conflict with section 11, art. 1, of the Constitution, in that it does not operate uniformly upon all the corporations to which it is applicable, in that it imposes different penalties upon domestic and foreign corporations for nonpayment of the charge. The California corporation forfeits its charter, while the foreign corporation forfeits only the right to do business in the state. As to each, the state takes away all that it has given, and all that it can take away. The operation of a law is none the less uniform because it operates differently upon different classes, provided there be a reasonable basis for the classification and for a different treatment of the various classes. There is such a reasonable basis here. The difference in the power of the state as regards domestic and foreign corporations furnishes a rational and proper basis for providing these different penalties in case of delinquency by the two classes of corporations.

The act is not in conflict with section 15, art. 12, of the state Constitution, which provides that "no corporation outside the limits of this state shall be allowed to transact business within this state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state." The conditions prescribed upon which corporations are allowed to transact business within this state are absolutely the same as to both classes, domestic and foreign. Each is required to pay the same amount, and the time for payment is the same as to each.

We do not think that the case falls within the rule enunciated in Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, to the effect that, where the validity of a statute depends upon the existence of a fact which can be determined by a court only after investigation of a very complicated and technical character, a provision in the statute which imposes such severe penalties by way of fine and imprisonment for disobedience of its provisions as to intimidate the parties affected thereby from resorting to the courts to test its validity practically prohibits those parties from seeking such judicial construction, and denies them the equal protection of the law. It is claimed that the provision for a forfeiture of the corporate charter of a domestic corporation for nonpayment of the charge imposed by the act is of such a nature as to bring it within the operation of this rule. The statutes under consideration in Ex parte Young were statutes fixing rates for the various railroad companies for the carriage of passengers and merchandise, and providing penalties by way of fine and imprisonment for a failure to comply therewith. It was claimed that the rates so fixed were too low to permit any return upon the investment, and constituted an attempt to confiscate valuable property of the railroad companies, and that the law was therefore void. There was no opportunity to test the validity of the act except after violation thereof. The penalties imposed by the act for noncompliance were so enormous, it was held by the court, as to practically prevent any person from disobeying the statute and resorting to the courts to test its validity, in view of the possibility that the result of such investigation might be adverse, and these enormous penalties be imposed. The court, however, said: "The distinction is obvious between a case where the validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character and the ordinary case of a statute upon a subject requiring no such investigation, and over which the jurisdiction of the Legislature is complete in any event." Regardless of other considerations, the case before us is clearly of the kind last mentioned in this quotation.

In our judgment, the act is not void for failure of the title to sufficiently express its subject. Article 4, § 24, Const. As is said in Ex parte Liddell, 93 Cal. 633, 29 Pac. 251: "The object of the provision is to prevent legislative abuse—to prevent the passage of acts bearing deceitful and misleading titles. It is intended to protect the members of the Legislature, as well as the public, against fraud; to guard against the passage of bills the title of which give no intimation to the members of the Legislature or to the public of the matters contained therein; * * * to prevent deception by the inclusion of matters incongruous with the subject specified in the title. If the title contains a reasonable intimation of the matters under legislative consideration, the public cannot complain." These objects were fully subserved by the title of this act, "An act relating to revenue and taxation, providing for a license tax upon corporations, and making an appropriation for the purpose of carrying out the objects of this act." This obviously indicated the imposition of a charge of some kind upon corporations as such, and there was nothing in the language used reasonably tending to induce the belief that the act was confined to corporations actually engaged in the transaction of business. As we have heretofore said herein, the words "license tax," used with reference to corporations exclusively, mean no more, necessarily, than that a charge of some kind is imposed upon them solely for their corporate privilege. It was not necessary to state in terms in the title that it was an act "amending the charters of corporations." Every new general law affecting corporations necessarily amends such charters to the extent that it operates upon them differently from existing laws. The title, we think, measures fully up to the requirements of our constitutional provision, as the same are declared in Ex parte Liddell, supra. See, also, Deyoe v. Superior Court, 140 Cal. 476, 488, 74 Pac. 28, 98 Am. St. Rep. 73.

What we have said substantially covers all of the points that have been made against the validity of the act.

The demurrer to the petition is sustained, and the proceeding dismissed.

We concur: SLOSS, J.; SHAW, J.; LORIGAN, J.; MELVIN, J.

10 Cal. App. 719

BENEDICT v. WILSON et al. (Civ. 633.)

(Court of Appeal, Second District, California. May 29, 1909.)

1. Stipulations (§ 14*) — Construction — Presumption.

In an action for commissions on a contract, by which plaintiff was employed to sell lots at private sale or public auction, "collect all first moneys," and do certain others things, the question was whether plaintiff was entitled to commissions on defaulted contracts of sale, and the case was submitted on an agreed statement, reciting the amount of commissions accruing "on defaulted contracts of sale with purchasers at the auction sale, * * * and no part of which has been or will be received," and that plaintiff claims right to the commissions "regardless of subsequent defaults of contracting parties." *Held*, that there was nothing to show that, as to sales in which default was made, there was any "first money" to be paid, in the absence of provision for which the auction sale was, under Civ. Code, §§ 1793, 1798, complete when the auctioneer announced the lots were sold, and entered minutes of the sale in his salebook, and nothing to show that, if there was provision for "first money," it was not collected by plaintiff, the recited failure of receipts being capable of being referred solely to subsequent defaulted payments, and that no presumption as to existence of such a provision, or as to failure of plaintiff to collect "first money" if there was a provision therefor, could be made, so as to defeat plaintiff's right of recovery in the absence thereof; the contract not making it a guarantor of payment of the purchase price on sales made by it.

[Ed. Note.—For other case, see Stipulations, Dec. Dig. § 14.*]

2. Contracts (§ 179*)—Parties.

Where persons, though describing themselves, in recitals of a contract employing a company to sell land, as a syndicate committee of the syndicate owning the land, sign it individually, they, at least in the absence of other evidence, bind themselves personally.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 179.*]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by F. C. Benedict against Calvin J. Wilson and others. From a judgment for plaintiff, defendants Wilson and another appeal. Affirmed.

H. M. Barstow, for appellants. Charles S. McKelvey, for respondent.

TAGGART, J. Action to recover on contract for commissions earned and disbursements made in sales of real estate by plaintiff's assignor. The case was submitted on an agreed statement of facts. The contention of plaintiff is that he was entitled to collect $750 on account of the disbursements made by him under the contract, consisting of $500 on account of presents to stimulate sales, and $250 paid for traveling expenses in going to and from the place at which the sales were made, and commissions on all sales made by him, amounting in the aggregate to $2,310.94, on which he had received the sum of $1,021.25, leaving a balance due of $2,039.69. The defendants admitted by the agreed statement that plaintiff's assignor had expended $325 on account of presents, and that they owed plaintiff under the contract the further sum of $504.18, included in which was the $250 transportation charge. The defendants contend, however, that of the commissions claimed by plaintiff $1,035.50 were computed on sales made by plaintiff's assignor, the Metropolitan Land Company, under the contract, but upon which nothing "has been or will be received." The court gave judgment for the sum of $325 on account of presents, $250 for traveling expenses, and $1,289.68 balance due on commissions; the latter sum including the $1,035.50, to which defendants object. The question here presented is the right of plaintiff to recover commissions on the sales in which the purchasers have defaulted. The contract does not make the Metropolitan Land Company a guarantor of the payment of the purchase price on the sales made by it. Its duties were to make a sale of the lots at private sale or public auction, collect all first moneys, make out bonds and contracts, and get signatures thereto, and to render accounts of its transactions and of moneys received, and to furnish all data necessary for the execution of deeds to the purchasers.

There is nothing in the statement of facts showing that it failed to perform these duties, or any of them. The language of the statement referring to the defaulting of purchasers is not entirely clear, but the only matter as to which any question can be raised in respect to the performance of the contract by the Metropolitan Land Company is that of collecting first moneys. Paragraph 3 of the agreed statement is as follows: "That the commissions accruing on defaulted contracts of sale with purchasers, at the auction sale had under such contract by the Metropolitan Land Company, and no part of which has been or will be received, amount to $1,035.50." If it were to be assumed from the statement that a certain sum or percentage of the purchase price was required to be collected on the fall of the hammer, or no sale, there is nothing to negative the inference that any amounts so required to be collected were actually collected by the land company. The inference that such sums were not collected does not necessarily follow from the language used, to wit, "and no part of which has been or will be received." This failure of receipt may refer solely to subsequent defaulted payments. Such a view of the term "defaulted contracts of sale" is borne out by the use in subdivision "b" of paragraph 4 of the agreed statement of the language "regardless of subsequent defaults of contracting parties," in connection with the statement of plaintiff's contention in this respect. There is nothing, however, in either statement or pleading to show that as to the sales in which default was made there was any first money required to be paid, and consequently it cannot be presumed that the land company failed to collect it.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

In the absence of any such a provision in the contract the sale by auction was complete when the auctioneer announced that the lot was sold. Civ. Code, § 1793. An entry by him in his salebook, specifying the thing sold, the names of seller and buyer, the price and terms of the sale, binds the parties the same as if the memorandum was made by the parties themselves. Civ. Code, § 1798. We hardly think the appellants would contend that if a broker had brought the parties to a private sale to this point, he would not be entitled to his commissions in the absence of some express agreement requiring him to do something else. If there was anything else required of the Metropolitan Land Company which it failed to do, it is not set down in the statement of fact, or the answer.

There may be some question whether or not, under the agreed statement of facts, it is necessary for us to consider the other point made by appellants, the controversy having been submitted solely upon the matter of the amount of commissions to be allowed, and there having been no question raised as to the liability of appellants to pay whatever judgment was properly entered. Conceding that the question is one of law within the rule applied in S. F. L. Co. v. Bibb, 139 Cal. 325, 73 Pac. 864, it is clear that the defendants made themselves liable as principals to the Metropolitan Land Company under the contract set out in their answer. They did not execute it in the name of any one as agent, but as individuals, and describe themselves as a syndicate committee of the syndicate owning Corinth Heights in the recitals in the contract. Taking the language most strongly against them as makers of, and promisors in, the covenants of the instrument relied upon by them here, the word "committee" may be construed to be a committee of the whole syndicate. Civ. Code, § 1654. The allegations of the answer cannot be considered in aid of the construction of this language to the advantage of the defendants, or to add to the agreed statement of facts. Where a person executes a writing in his individual capacity, and recites in the body of the instrument that he acts as the representative of a third person, it cannot be said, as a matter of law, that by so doing he binds the third person, and with much less reason can it be said that he does not bind himself. At most, it becomes a question of fact, which may be determined by parol evidence (S. P. Co. v. Von Schmidt, 118 Cal. 368, 50 Pac. 650), and there is no evidence on the subject before us, except the fact of the execution of the writing by defendants individually.

The judgment is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

10 Cal. App. 690

HODGKINS v. DUNHAM et al. (Civ. 558.)

(Court of Appeal, Third District, California. May 27, 1909. Rehearing Denied by Supreme Court, July 26, 1909.)

1. Fraud (§ 4*)—Elements—Intent.

That false representations were with intent to deceive is an essential of actionable fraud.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 2; Dec. Dig. § 4.*]

2. Fraud (§ 42*)—Complaint—Allegations of Intent.

Under Civ. Code, § 1572, defining actual fraud, and section 1709, providing that one willfully deceiving another with intent to alter his position to his injury is liable, etc., a complaint, in an action for fraudulent representations, inducing plaintiff to purchase a horse, which alleges that material representations made by the seller were untrue, and were known by him to be untrue at the time, and were made to induce plaintiff to purchase, etc., sufficiently charges that the representations were made with intent to defraud.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 39; Dec. Dig. § 42.*]

3. Evidence (§ 434*) — Parol Evidence — Fraudulent Misrepresentations.

Fraudulent misrepresentations as to a material matter, by which one is induced to enter into a contract to his damage, is ground for an action at law or relief in equity, though the contract is in writing, and the representations were not.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2012; Dec. Dig. § 434.*]

4. Attachment (§ 217*)—Proceedings—Judgment.

By an attachment, where there is no service of summons, the court acquires only the right to apply the property attached to the satisfaction of the judgment, which, though in form a personal one, has no effect beyond the property attached.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 745; Dec. Dig. § 217.*]

5. Fraud (§ 37*)—Actions—Venue.

An action for fraudulent representations in the sale of personal property is transitory, and redress may be given by any court obtaining jurisdiction, though defendant, personally served within the state, is a nonresident, and only temporarily therein.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 33; Dec. Dig. § 37.*]

6. Appearance (§ 19*) — Effect — Jurisdiction of Nonresident.

Under Code Civ. Proc. § 416, declaring that the voluntary appearance of defendant is equivalent to personal service, and section 1014, providing that defendant appears when he demurs, the court acquires jurisdiction of a nonresident defendant in an action for fraud, based on misrepresentations made in a sister state, where he demurs to the complaint generally, and also on the ground of want of jurisdiction, and the court may render a personal judgment against him, without reference to the property seized under an attachment issued in the action.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 80, 82; Dec. Dig. § 19.*]

7. Fraud (§ 11*)—Fraudulent Representations—Facts or Opinions.

Whether false representations are statements of facts, and actionable fraud, or merely matters of opinion, depends on the circumstances of the case, and the court must consider the situation of the parties, their general intelligence and experience, and then determine whether the representations complained of were understood as a matter of fact or opinion.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 12; Dec. Dig. § 11.*]

8. SALES (§ 363*)—"WARRANTY"—QUESTION FOR JURY.

Any affirmation made at the time of a sale of property as to the quality or condition thereof is "a warranty," if so intended, and the buyer bought on the faith thereof, and whether it was so intended, and the buyer acted on it, are questions of fact.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1064; Dec. Dig. § 363.*

For other definitions, see Words and Phrases, vol. 8, pp. 7396–7404; vol. 8, p. 7833.]

9. FRAUD (§ 11*) — REPRESENTATIONS — MATERIALITY.

A representation that a horse is a sure foal getter, made to induce one to buy the horse for breeding purposes, is a representation of a material fact.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 12, 13; Dec. Dig. § 11.*]

10. FRAUD (§ 58*) — MISREPRESENTATIONS — EVIDENCE.

Evidence *held* to show the falsity of representations that a horse was a sure foal getter, made to induce one to buy the horse for breeding purposes.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 56; Dec. Dig. § 58.*]

11. FRAUD (§ 58*) — MISREPRESENTATIONS — KNOWLEDGE OF FALSITY—EVIDENCE.

Evidence *held* to show that a seller of a horse had no reasonable grounds for believing in the truth of a representation made to the buyer to induce him to buy.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 57; Dec. Dig. § 58.*]

12. FRAUD (§ 58*)—FRAUDULENT REPRESENTATIONS—INTENT—EVIDENCE.

In an action for fraudulent representation, inducing one to buy a horse for breeding purposes, evidence *held* to justify a finding that the representations were made with intent that they should be acted on by the buyer, and that he acted on them in ignorance of their falsity, and reasonably believed them to be true.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 58; Dec. Dig. § 58.*]

13. FRAUD (§ 13*)—FRAUDULENT REPRESENTATIONS—LIABILITY.

A representation, believed on reasonable grounds to be true, is not actionable fraud.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 3–5; Dec. Dig. § 13.*]

14. FRAUD (§ 35*)—FRAUDULENT REPRESENTATION—WAIVER.

A seller of a horse represented to the buyer that it was a sure foal getter. Before learning that the representation was fraudulent, but after the horse had shown its incapacity, the buyer applied to the seller for a modification of the contract, so as to permit the breeding of mares to another horse. *Held* that the buyer did not waive the fraud.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 30; Dec. Dig. § 35.*]

15. SALES (§ 425*)—FRAUDULENT REPRESENTATIONS—ACTIONS.

A buyer, induced to buy personal property by the false representations of the seller, is not bound to rescind the written contract of sale, but may sue for the fraudulent representations which were independent of the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1207, 1208; Dec. Dig. § 425.*]

16. SALES (§ 124*)—FRAUD—RESCISSION.

Where a buyer elects to rescind the contract of sale, because of the fraud of the seller, he must restore the property; but, where he elects to affirm the contract, and sue for damages for the fraud, he need not offer to restore the property.

[Ed. Note.—For other cases, see Sales, Dec Dig. § 124.*]

17. ELECTION OF REMEDIES (§ 7*) — FRAUD — ACTS CONSTITUTING AN ELECTION.

A buyer, remaining silent after the discovery of the seller's fraudulent representations, affirms the contract with knowledge of the facts, so that his right to rescind is extinguished, but he may sue for deceit, practiced on him to induce the execution of the contract.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. § 12; Dec. Dig. § 7.*]

18. APPEAL AND ERROR (§ 966*)—RULINGS ON MOTION FOR CONTINUANCE—ABUSE OF DISCRETION.

Where plaintiff had not said or done anything to mislead defendants as to what he would testify to, and a defendant who knew the facts was present, and was not sworn, the denial of a continuance to take the deposition of a codefendant, to obtain his version of a conversation testified to by plaintiff, was within the court's discretion, and would not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3837; Dec. Dig. § 966.*]

19. DEPOSITIONS (§ 95*) — ADMISSION IN EVIDENCE.

A party may not introduce selected portions of a deposition of his own witness on direct examination, omitting the rest.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. § 276; Dec. Dig. § 95.*]

20. APPEAL AND ERROR (§ 1047*)—HARMLESS ERROR—ADMISSION OF DEPOSITIONS.

Where an entire deposition was admitted, but because of a party's objection it was limited in its use to a fact desired to be shown by the adverse party, the party was not prejudiced by the limit given the deposition by the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4146; Dec. Dig. § 1047.*]

21. SALES (§ 442*)—FRAUDULENT REPRESENTATIONS—DAMAGES.

Under Civ. Code, §§ 3313, 3314, relating to the detriment caused by the breach of the warranty of the quality or fitness of personal property, a buyer of a horse for breeding may recover for the fraudulent representations of the seller that the horse is a sure foal getter, the actual damages sustained, based on the value of the breeding season, and the money lost because of the incapacity of the horse.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1284; Dec. Dig. § 442.*]

Appeal from Superior Court, San Joaquin County; W. B. Nutter, Judge.

Action by Francis I. Hodgkins against W. S. Dunham and others, copartners as Dunham, Fletcher & Coleman. From a judgment for plaintiff, defendants appeal. Affirmed.

Arthur C. Huston and Geo. F. Buck, for appellants. Budd & Thompson and Nicol & Orr, for respondent.

CHIPMAN, P. J. This is an action to recover the price agreed to be paid for a certain stallion, and also damages for alleged fraudulent representations as to the reproductive potency of the horse. The cause was tried by the court without a jury, and plaintiff had judgment, from which defendants appeal on bill of exceptions.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

In the amended complaint it is averred that defendants are nonresidents of this state, and were copartners, whose business was that of "importing and breeding of draft stock and sale of stallions for breeding purposes," and that plaintiff is engaged "in breeding draft and driving stock and breeding stallions to his own brood mares and the brood mares of others for hire"; that plaintiff, being "desirous of securing a first-class imported black Percheron stallion, which was a sure foal getter for the head of his stud for breeding to his said mares and for booking to outside mares," so stated to defendants on or about July 25, 1904, "and the defendants then and there stated and represented to the plaintiff that they had an imported black stallion named Joubert, registered No. 40,002 (45,105) one of the most noted sires that ever left France, and which they were then and there using in stud for their own brood mares, and that he was one of the stallions at the head of their stud, and had been so used by them; that he was a sure foal getter, and offered to sell him to plaintiff for $2,500, for the uses so as aforesaid stated by plaintiff to them; that the plaintiff had confidence in the defendants and believed said statements and representations to be true, and, relying wholly on the truth thereof, he then and there agreed to purchase, and did purchase, said stallion Joubert from the defendants at the price and for the uses and purposes so stated by him to the defendants as aforesaid; * * * that the said statements and representations were so made by the defendants to plaintiff at the very time of the purchase of said stallion Joubert to induce, and did induce, plaintiff to purchase the same; that the said statements and representations of the said defendants so made as aforesaid to plaintiff (other than that they then had said stallion Joubert registered No. 40,002 (45,105) were untrue, and were known to the defendants to be untrue at the very time the same were made." It is then averred that plaintiff "bred and rebred his said brood mares to said stallion at the proper time in the season of 1905, and used all proper care in so doing, and gave said Joubert a full and fair trial, but that he failed to get said mares in foal, and was during all the times herein mentioned impotent, and was of no value as a breeding stallion." It is then averred that by reason of the impotence of said stallion, and his failure to get said mares in foal, plaintiff lost the season of 1905 for breeding purposes to said stallion, and lost the breeding of said mares during said season, to his damage for the season of 1905 in the sum of $9,500. It is also alleged that for like reason he lost the season of 1906, to his damage in the sum of $4,650. It is also alleged that for like reason he lost the breeding of certain outside mares, to his damage in the sum of $700. "That by reason of the failure of said stallion Joubert as a breeding stallion, plaintiff was and is further damaged in the amount of the agreed purchase price, to wit, $2,500."

A general and special demurrer to the complaint was overruled, and defendants answered, denying specifically the material averments of the complaint, and for further answer defendants set forth a bill of sale or contract executed by them to plaintiff at the time of said sale, which it is averred "includes and covers all the transactions between the said plaintiff and the said defendants relative to the sale of the said stallion Joubert," and avers that defendants "have at all times complied with said contract," and "deny that said plaintiff has complied with any of the terms or conditions of said contract." It is further answered that at all times mentioned in the complaint none of said defendants resided in the state of California, and do not now reside therein, and no time has or have resided in said state, but are residents of the state of Illinois, and that all contracts, agreements, representations, and warranties relative to the said stallion were made and entered into by and between plaintiff and defendants outside the state of California, and that this court has not jurisdiction of the subject-matter of the said amended complaint, or of the persons of said defendants, or either of them."

The bill of sale or contract referred to is as follows: "Know all men by these presents, that we, Dunham, Fletcher & Coleman of Wayne, Du Page county, Illinois, have this day sold to Francis I. Hodgkins of Stockton, San Joaquin county, California, the black imported Percheron stallion Joubert 40002 (45105) foaled March 25th, 1889; got by Nesi (42499); Barcelone (42955). For extended pedigree see certificate of registry; for the consideration of twenty-five hundred dollars the receipt whereof is hereby acknowledged. In the event that the above-named stallion in perfect health, with proper usage, and the mares to him regularly returned and tried or bred, on one full service season's trial does not get with foal fifty per cent. of the mares regularly tried and bred to him, then on return of the said stallion to us at Wayne, Du Page county, Illinois. during the first week in the month of April, next following the full service first concluded we agree to furnish the above-named purchaser, without further charge, another imported or pure bred stallion of equal quality, in exchange; but it is expressly provided as a condition of this warrant, that the tally sheet accompanying and delivered with this bill of sale shall be accurately filled out, with date of each service trial, to enable identification of all mares bred, and after being so filled out shall be returned to us at Wayne, Du Page county, Illinois, by registered letter, not later than July 15, 1905. It is hereby stipulated that a stallion's full service season shall be considered as the period commencing the first day of May and ending the first day of July. In the event the conditions of the above agreement are not faithfully performed, or should the above-named stallion hereafter become injured or disabled through accident or disease, or should any changes, additions or alterations be made in this bill of sale, not shown by the press copy of same preserved by us, this warranty shall be null and void and of no effect and all obligations incurred by us herein shall be considered fulfilled and ended. This bill of sale contains all the agreements of warranty or guaranty made by us in the sale of the above-mentioned stallion, and it is expressly provided that we shall not be liable for any claim that may hereafter be made alleging any verbal agreement of ourselves or agents in the sale of said horse. In witness whereof, we have hereto set our hand and seal this twenty-fifth day of July in the year of our Lord, nineteen hundred and four. [Signed] Dunham, Fletcher & Coleman. [Seal.]

This bill of sale was delivered to plaintiff at the time of said purchase for which the following receipt was given: "Received and accepted of Dunham, Fletcher & Coleman of Wayne, Du Page county, Illinois, their written bill of sale to Francis I. Hodgkins of Stockton, San Joaquin County, California, dated July 25, 1904, and conveying the title to the black imported Percheron stallion Joubert. * * * Dated Wayne, July 25, 1904. Francis I. Hodgkins."

The court found the facts substantially as set forth in the complaint and made also the following findings: "(7) That by reason of the failure of said stallion Joubert to get said brood mares in foal, the plaintiff lost the season of 1905 for breeding purposes to said stallion, to his damage $1,625; (8) that plaintiff, by reason of the failure of said stallion Joubert as a breeding stallion, was further damaged in the sum of $2,500, the agreed purchase price for said stallion; (9) that said stallion Joubert while in the possession of plaintiff and on or about the month of June, 1906, died." It was also found that plaintiff did not offer to return the said stallion to defendants, and that it is not true that no statements or representations and warranties relative to said stallion other than contained in said bill of sale, were made by defendants to plaintiff.

It appeared in evidence, and was not disputed, that on May 20, 1905, plaintiff wrote to defendants the following letter: "Dear Sirs: In regard to Joubert I want to know if you are going to hold me exactly to your guaranty. There is one clause in there which reads: 'It is hereby stipulated that a stallion's full service season shall be considered as the period commencing the first day of May and ending the first day of July.' The season out here commences the first of March and practically ends the middle of June. Now I don't want to lose the use of my mares entirely for this year and if I have to keep breeding Joubert it will mean that I will, because every mare that I have bred has come back to him twice and three times and I have bred to over forty mares. Most of these mares have colts at their sides so that I know they are producing mares. Please wire an answer to this at my expense so that I can begin to breed my mares to another horse or I will lose next year's crop of colts as Joubert has not got one mare in foal yet, and he has had as fair a trial as possible for any horse to have. I have not had any kicks yet from any of the horses I have sold except one and I think he is doing all right now. Please wire me an answer to Stockton and oblige. Yours truly, Francis I. Hodgkins." And on May 26, 1905, received the following telegram from defendants: "You may change Joubert mares after second service." Defendants wrote plaintiff in reply on May 26, 1905, as follows: "Dear Sir: Yours of May 20th regarding Joubert is received. We do not wish to be unreasonable in the matter and yet at the same time we are anxious of course that Joubert should have the fairest of trials and have no doubt you are also. So we have wired you and now confirm. 'You may change Joubert mares after second service.' As we understand it you have bred practically all of his mares the second time so this will allow you to make the change you wish to another horse." Upon this evidence the court found "that it is not true that on or about May 20, 1905, or at any time, with full knowledge of the facts, the said plaintiff applied to defendants for a modification of said contract permitting plaintiff to breed to any stallion certain mares that had been bred to said stallion Joubert."

It was also found that none of the defendants resided in this state, but were and are residents of the state of Illinois; that the agreements and representations in the findings mentioned, relative to said stallion, were made outside of this state, "but the said stallion was sold to plaintiff by defendants to be used by him in the state of California, and that the representations made by defendants were so made with that fact in mind; that the records and files in this action show that an attachment was issued in this action and a levy made upon personal property of defendants in this state, but that the same was released by the sheriff of Yolo county and the sheriff of San Joaquin county upon bonds duly executed for such release at request of defendants." Plaintiff had judgment accordingly for $4,125.

1. It is claimed by defendants that the complaint does not state a cause of action. The point here relied upon is that there is a failure to allege that the statements

and representations attributed to defendants were made by them with intent to deceive or defraud plaintiff, citing Newman v. Smith, 77 Cal. 26, 18 Pac. 791; Feeney v. Howard, 79 Cal. 525, 21 Pac. 984, 4 L. R. A. 826, 12 Am. St. Rep. 162; Estate of Benton, 131 Cal. 478, 63 Pac. 775. Without doubt the essence of a cause of action for deceit consists in the fact that false representations were made with intent to deceive; such intent being a necessary element to constitute actual fraud. The averments here, it seems to us, meet the requirements of the law. It is averred that the representations made by defendants "were untrue, and were known to the defendants to be untrue, and the very time the same were made," that "the said statements were so made by defendants to plaintiff at the very time of the purchase of said stallion Joubert to induce, and did induce, plaintiff to purchase the same," and that "plaintiff had confidence in the defendants, and believed said statements and representations to be true, and, relying wholly on the truth thereof, he then and there agreed to purchase," etc. Plaintiff had previously averred in the complaint the purpose for which he desired the horse, and the representations made by defendants showing that the horse was adapted to that purpose, and would meet plaintiff's requirements, among which was the material qualification that the horse "was a sure foal getter." It is true that the word "intent" is not used in the pleading, but the intent is implied, or may well be inferred, from the allegations that defendants made untrue statements which they knew to be untrue for the purpose, at the time they were made, of inducing plaintiff to purchase the horse. Section 1572 of the Civil Code declares that actual fraud "consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract: (1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true; (2) the positive assertion in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true." Where A. knows that he is stating an untruth "to induce, and did induce," B. to act to his injury, the intent to deceive is necessarily involved in the conduct of A. Section 1709 of the Civil Code provides that: "One who willfully deceives another, with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers." It was said in Newman v. Smith, supra, cited by defendants: "It is elementary that fraudulent misrepresentation as to a material matter, by which a party was induced to enter into a contract to his damage, is ground for an action at law or relief in equity, notwithstanding that the contract was in writing, and the representations were not."

What has been said upon this point will dispose of the objection that the findings are insufficient, for they are quite as specific in the respects complained of as is the complaint.

2. It is contended that under the admitted facts the court was without jurisdiction either of the persons of defendants or the subject-matter of the action. The court found that the defendants are nonresidents of this state, and that the representations complained of were made in the state of defendants' residence, to wit, Illinois; that an attachment was issued in this action, and personal property of the defendants levied upon under the same in this state, but that it was released by the sheriff "upon bonds duly executed for such release at request of said defendants." It is conceded by plaintiff that upon the complaint and attachment alone the case was in its nature in rem, "and the jurisdiction (other than of the subject-matter) depended upon, and was limited to, what the plaintiff had acquired by such attachment." By an attachment where there is no service of summons the court simply acquires the right to apply the property to the satisfaction of whatever may be found due the plaintiff; that is, the judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in the suit; and the court, in such a suit, cannot proceed unless the officer finds some property of defendant on which to levy the writ of attachment. Cooper v. Reynolds, 10 Wall. 317, 19 L. Ed. 931; Works on Jurisdiction, p. 48.

Defendants devoted much attention to the point that the attachment was void, not being authorized by section 537 of the Code of Civil Procedure as amended in 1905 (St. 1905, p. 492, c. 385), and hence the court was without jurisdiction. The proceedings are not in the record. All that we know is shown in the findings. We do not understand that plaintiff claims jurisdiction by virtue of his attachment. Nor is it necessary that he should. The action is transitory as distinguished from what are local actions. "The distinction," says Mr. Cooley, "is this: If the cause of action is one that might have arisen anywhere, then it is transitory; but, if it could only have arisen in one place, then it is local." "And," says this author, "it is a general rule that for the purpose of redress it is immaterial where a wrong was committed; in other words, a wrong being personal, redress may be sought for it wherever the wrongdoer may be found." Cooley on Torts (3d Ed.) p. 899. Where the action is for fraud, he cites McQueen v. New, 87 Hun, 206, 33 N. Y. Supp. 802. Mr. Works says: "If the defendant is personally served within the state, although a nonresident, and only temporarily, or transiently therein, this gives the court full jurisdiction." Works on Jurisdiction, p. 48, citing Peabody v. Hamilton, 106 Mass. 220. In Roberts v. Dunsmuir, 75 Cal. 203, 16 Pac. 782, a British subject brought suit against other British subjects in this state to recover damages for injuries received while employed by them in their coal mines in British Columbia. The court said: "The action is transitory, and the defendant may be sued wherever found. Otherwise a person might in some cases escapes such liability by simply going to another state."

Defendants demurred to the complaint generally and also upon other grounds, including want of jurisdiction. A defendant appears in an action when he demurs. Code Civ. Proc. § 1014. The voluntary appearance of a defendant is equivalent to personal service of the summons and copy of the complaint. Id. § 416. The court, therefore, acquired jurisdiction of the persons of defendants, and also jurisdiction to render a personal judgment, without reference to the property which had been seized by attachment.

3. It is urged that the evidence is insufficient to establish a cause of action. It appeared from the evidence that plaintiff was in 1904, as he had been in previous years, engaged in breeding fine horses, Percherons and others, and had been a valuable customer of defendants. In the spring of 1904 Mr. Coleman, one of the defendants, visited plaintiff's farm near Stockton, and was told by plaintiff that he desired to purchase the best Percheron stallion for breeding purposes that he could buy. Coleman represented to him that he had a stallion, recently imported from France, called Joubert, whose colts defendant Fletcher said he had seen in France, and were the best he ever saw. Plaintiff had received a catalogue from defendants describing this, among other thoroughbred horses and mares on sale at their Oaklawn stock farm in Illinois. This catalogue gave Joubert high praise as a superior stallion. Two or three months after this conversation plaintiff visited defendants' farm to make purchases, arriving about July 15, 1904, and there met defendants Dunham and Coleman. Plaintiff testified: "The first conversation I can remember having with Mr. Dunham took place in his private house, and during that conversation I asked him if Joubert was proving a sure foal getter, and whether he was getting his mares in foal properly. He said, 'Yes.' I then asked him about how many mares Joubert had been bred to. He said about 40 to the best of his knowledge, but that Billy Burns had a list, and could tell me all about them, the man at the time in charge of Joubert." Four or five days later plaintiff saw Burns: "I asked Mr. Burns if Joubert was a sure horse. Mr. Burns told me he considered Joubert to be as sure a foal getter as he had ever had in his barn except Villiers. This was in July, and Joubert was in service upon the farm of Dunham, Fletcher & Coleman in Illinois at that time. I saw him bred to a mare there. That was after I had the conversation with Dunham."

Plaintiff was on the farm about 10 days in all "looking at mares and stallions." After his conversation with Dunham he had a conversation with Coleman, in which he said to Coleman: "I didn't care particularly about a show horse, but that I did want a sure breeder. I further told him that he knew what I wanted the horse for. He then advised me, or he told me, that if he was in my place he would buy Joubert, that Mr. Fletcher had seen his colts in France, and considered them a fine lot of colts, and that I wasn't taking any chances on Joubert, and that Mr. Dunham—and he thought Mr. Dunham was a damn fool for selling him." Plaintiff testified that he had not up to this time made up his mind to buy Joubert; that he knew nothing concerning the horse's power of procreation except as obtained from these people; that he was depending upon their judgment; that he would not have purchased the horse had it not been for the statements of these people to which he testified; and that the horse had no value for any purpose othen than breeding. Plaintiff testified that the purchase was concluded the day of, or the next after, his last conversation with Coleman, and the price was fixed at $2,500.

The horse was taken to plaintiff's farm in August of that year. He was in good condition on his arrival and thenceforward received such care and attention as was ordinarily given to a horse of his character and value. In December of 1904 he was taken ill with pneumonia, and was seriously sick for a week or more, but recovered upon proper treatment in about six weeks, and entered the season in March, 1905, in good health and vigor. The breeding season begins in March, and ends about July 1st. The evidence is that Joubert was bred to 31 mares belonging to plaintiff, and 32 "outside mares"; that the usual care given a stallion during such service—as to feed, exercise, etc.—was given this horse, and usual efforts to get mares with foal, such as return service, when failing at first, were made, sometimes mares being returned two or three or more times. The result of the season was that of plaintiff's mares but one was in foal, and of the others one or two only. There was evidence that the mares were breeders, some having sucking colts by their sides. There is evidence, from which the inference could be drawn that the failure of the horse could not be attributed to any cause other than his impotency. It was in evidence that Dunham visited plaintiff's ranch and saw Joubert in April, 1905, during the breeding season, but did not inform plaintiff of the result of his (Dunham's) breeding, and did not tell him that of the 40 mares bred by him only 2 were got with foal. About a month after the close of the season Joubert was attacked with a disease, which developed into what was pronounced by veterinary surgeons to be spinal meningitis. He found difficulty in getting up when once down, and his locomotion was affected.

In August Fletcher visited plaintiff's ranch, and saw the horse, and something was said as to how the horse was to be disposed of. Plaintiff testified: "Q. Did he say anything to you at that time with respect to what you should do with this horse? A. He said I could probably sell him for a certain amount of money, enough so to pull even. Q. What did you say? A. I said I couldn't and wouldn't sell him. Q. Was anything said at that time as to the return of this horse? A. Yes. Q. What did you say? A. In the course of the conversation I told Mr. Fletcher that if I was to return him, they wouldn't accept him on account of the condition he was then in. Q. What did he say? A. He says no, that they couldn't accept him." Witness was asked if he had further conversation with Fletcher as to the horse at this time, and what Fletcher said: "I asked Mr. Fletcher if Joubert had proved a satisfactory breeder for Mr. Dunham. He said: 'No; I don't think so.' I then asked him if it was true that Joubert had only gotten 2 colts for Mr. Dunham. He said, 'Yes.' I then told him that they couldn't have helped but known that the horse was no good at the time they sold him to me, and he didn't say anything."

Joubert did not recover from this second illness. The disease progressed slowly, notwithstanding the efforts made to restore him to health, and he died in June, 1906. As tending to show impotency in the horse, it appeared that a stallion of sufficient age in good condition could safely serve 60 to 75 mares each season; that he should get in foal about 60 per cent. of the mares bred to him, of which about 90 per cent. are dropped alive and healthy. It also appeared from the evidence that almost invariably when a mare has "caught" or is impregnated, she will not demand or submit to a second service, and, if she returns, it is the experience of experts that she is not in foal. It is thus known during the season whether or not the horse is incapable of procreation. Defendants seem to have had knowledge on this point, for they authorized plaintiff to change the stallion after the second service. There was evidence that Joubert was foaled in March, 1899, and his former owner, in France, Mr. Perriott, bred him to 75 mares in 1902, and to 65 in 1903, and that he got 51 colts the first season, and 43 the second. It also appeared, by the uncontradicted testimony of an expert, that such early breeding would almost certainly destroy the horse's potency; and it appeared that in the two seasons following—one under defendants' management, and the other under plaintiff's—the horse showed unmistakable loss of procreative virility.

Opposed to this testimony, and in conflict with it to some extent, the deposition of Mr. Fletcher was introduced by defendants. Mr. Coleman was a witness at the trial. Mr. Dunham was present, but was not called as a witness, and left before the trial closed. Fletcher testified that he was not personally present, although he was at the Oaklawn farm when plaintiff purchased Joubert; that he made no representations to him about the horse until after the purchase, and then only as to what he learned about him from Mr. Perriott; that he had no knowledge other than through that source as to Joubert's breeding qualities, and that he believed him to be all right in that particular, and did not know to the contrary; that he did not know, and had no reason to believe, that the horse was impotent. Mr. Coleman testified that he and Fletcher were not interested in breeding, and that the mares were owned by Dunham; that he and Fletcher were interested only in the importation of stallions with Dunham, but he knew that Dunham was using them for breeding; that Fletcher bought Joubert in France, after having investigated his history, and reported him to be a sure breeder and "a grand breeding horse" with a fine pedigree; that he met plaintiff at his ranch in California in June, 1904, and told him what Fletcher had said of the horse. His testimony as to what took place the day plaintiff came to the Oaklawn farm is brief, and to the effect that, after a few minutes talk at the office, he and Dunham went with plaintiff to the barns, and had Joubert led out by Burns with another stallion called Bosquet; that he looked the horses over carefully, "probably 15 minutes, and he came around to me, and he says: 'Joubert is good enough for me; I will take Joubert.'" He testified that he said nothing to plaintiff about the horse, except as to some blemish of the hocks; that he gave him no advice, and made no representations then or at any time about his being a sure breeder; denied all knowledge on that point, except as told him by Fletcher, although he said he understood he had been bred to 6 mares, and had gotten 3 with foal; that plaintiff was there several days, and nothing more was said about Joubert until July 25th, when they came to settle up, and plaintiff took the bill of sale, signing a receipt therefor; that plaintiff used his own judgment, and did not act on his (Coleman's) advice or judgment.

It appeared that the deposition of one Vandervere, who had charge of the accounts and books of the firm, and had access to the breeding book, was taken by defendants, but was not introduced by them at the trial. The court, over the objection of defendants, allowed plaintiff to introduce this deposition for the sole purpose of showing that breeding books were kept and could be produced but that on the advice of defendants' counsel the witness refused to produce them. The inference sought to be drawn from this fact was that this record would have shown how many mares were bred to Joubert by defendants, and the evidence would have been unfavorable to defendants, and would have tended to corroborate plaintiff's testimony, as well as to dispute that of defendants.

It seems to us that the evidence justified the findings of the court. It is strongly urged by defendants that the most that can be made out of the representations of defendants is that they were but expressions of opinion, and were so received by plaintiff. Cases are cited holding that misstatements of matters of opinion do not constitute fraud; that expressions of opinion, however erroneous, if honestly made, will not be regarded as fraud. Wainscott v. Occidental Association, 98 Cal. 258, 33 Pac. 88, is cited, wherein the rules applicable to cases of this character are said to be succinctly stated, as quoted from the opinion in Southern Development Co. v. Silva, 125 U. S. 250, 8 Sup. Ct. 882, 31 L. Ed. 678, and it is there stated that "these rules, properly construed, exclude such statements as consist merely of expressions of opinion or judgment honestly entertained." And as was said in Reeves v. Corning (C. C.) 51 Fed. 774, cited by defendants: "Whether false representations or statements are facts or matters of opinion depend upon the circumstances of each case. In reaching a conclusion the court will consider the intelligence, the situation of the parties, the general intelligence and experience of people as to the nature and use of the property, the habits and methods of those dealing in or with it, and then determine whether, the representation was understood as a matter of fact or opinion." It was said in McLennan v. Ohmen, 75 Cal. 558, 17 Pac. 687: "To create an express warranty the word 'warrant' need not be used, nor are any particular words necessary. Any affirmation made at the time of the sale as to the quality or condition of the thing sold will be treated as a warranty, if it was so intended, and the purchaser bought in the faith of such affirmation; and whether it was so intended, and the purchaser acted upon it, are questions of fact for the jury."

In the light of these rules let us consider the elements necessary to constitute fraud or deceit, and the evidence in the case. (1) That the representations made were as to material facts is abundantly shown. The single fact alone that the horse was represented to be a sure foal getter covers this requirement. (2) That the representation was untrue is established by the evidence that in 1904, bred to 40 mares by defendants, the horse got but 2 with foal, and of 63 mares bred to the horse by plaintiff, in 1905, but 3 proved in foal. According to the uncontradicted testimony no surer test could be given of the horse's sterility. (3) Were the representations actually believed by defendants on reasonable grounds to be true? If so, the rule exonerates them. Assuming that the horse was virile when he came from France, and that his history there was believed by defendants to be as Mr. Perriott represented, the evidence is that, when they made the representations to plaintiff, the season was about concluded. Forty mares had been bred to Joubert, and only 2 were with foal. As breeders and dealers in breeding horses and mares of long and wide experience, it must be presumed that they knew, what witnesses stated was well known to breeders, that these mares were not being got with foal. Plaintiff was referred by defendants to Burns, who had charge of the horse, and was by him assured of the fact uppermost in plaintiff's mind—that Joubert was a sure foal getter—and yet Burns' position must have shown him that the statement was untrue, and that he had no reasonable grounds to believe it to be true. The silence of Fletcher when confronted with the fact later lends support to this view. (4) That these representations were made with intent that they should be acted upon by plaintiff, it seems to us must follow from the knowledge of the fact on the part of defendants, and their withholding that knowledge when making the representations. We can conceive of no other intention in the minds of defendants than that plaintiff should act upon their statements. (5) That plaintiff acted upon these representations clearly appeared. And (6) that in so acting he was ignorant of their falsity and reasonably believed them to be true. He had no means at the time of knowing the truth, except as he got it from defendants, and his former dealings with defendants justified him in believing what they told him, and acting upon it.

These are the six elements relied on by defendants as necessary to be established, and we think they have been. It is urged by defendants as peculiar that plaintiff said nothing to Dunham in April, 1905, when he visited plaintiff's ranch, about any misrepresentation, and that this fact, together with his having written the letter of May 20, 1905, shows conduct incompatible with any claim of fraud. In April the season had but just begun, and it was too soon to form an opinion as to the capacity of the horse. By May 20th his incapacity had shown itself, but not necessarily that plaintiff had been willfully deceived by defendants. It was not until August—after the close of the season, and when Fletcher told plaintiff of facts not hitherto known to plaintiff—that the fact of defendants' fraudulent misrepresentations was brought home to him. We cannot regard this letter of May 20th as a waiver of the fraud as claimed by defendants, for the reason that when it was written, plaintiff had no sufficient knowledge to warrant such a charge. He cannot be presumed to have waived a fact of which he was not as yet informed. He simply said that he had gone far enough to learn that he would lose the use of his mares for the season if obliged to continue the vain thing of breeding Joubert longer. Defendants' answer is a concession that plaintiff had done all that could be required of him, and authorized him to "change Joubert mares after second service." Up to this time, as we have seen, and until August following, plaintiff was ignorant of the material fact that Joubert had proved sterile in 1904.

4. It is defendants' further contention that in bringing his action for damages for fraud plaintiff affirmed the contract of sale, and is bound by its terms. The position taken by defendants is that, if plaintiff intended to repudiate the contract, and not rely upon its provisions as furnishing him a remedy for the failure of Joubert to meet the requirements of the contract, plaintiff was in duty bound to rescind. Instead of doing this, it is contended that he elected to affirm the contract and retain the property, and cannot therefore escape the burdens and limitations imposed upon him by the writing, citing 15 Cyc. 252; Bigelow on Frauds, p. 65; Montgomery v. McLaury, 143 Cal. 87, 76 Pac. 964; Schmidt v. Mesmer, 116 Cal. 267, 48 Pac. 54, and other cases. We do not regard this case as falling within the rules of the cases cited. The action is not for breach of the contract, nor is it for any warranty, express or implied, as found in it. The contract contains no express warranty that the horse was a sure foal getter. The promise there made is to furnish plaintiff a horse of equal quality (whatever that means) in case of failure. The action is for fraudulent representations made at the time of the purchase, against which no provision was made in the bill of sale. Up to May 20th, and to July, when he returned to defendants the tally sheet of mares bred, indeed, until in August, 1905, plaintiff seems to have been disposed to look to the contract, and on May 20th he communicated the facts so far as disclosed to him. He then had reason to believe that the horse was a failure, and that the representations made to him were untrue, but he had no reason for believing that they were known by defendants to be untrue, or were made with intention to deceive. There must be full knowledge before there could be a waiver. The friendly relations long existing between the parties, and their former business dealings, would make plaintiff slow to attribute fraud to defendants. But in August the truth came out. Plaintiff charged the fraud promptly, and a suggestion that the horse be taken back was as promptly refused by Fletcher, while remaining silent as to the charge of fraud. The fraudulent representations upon which plaintiff bases his action are entirely independent of the contract. "Fraud vitiates all transactions, and cannot be put beyond the reach of the law by so simple a device as a writing." Newman v. Smith, supra.

When the party imposed upon elects to rescind, he must make restoration of the property, but where he elects, as he may do, to affirm the transaction, and sue for damages, no offer to restore what was received is necessary. 8 Am. & Eng. Ency. Pl. & Pr. p. 895. He is not restricted to his right to rescind his contract of sale on discovery of the fraud practiced upon him, but may bring assumpsit for money had and received (Lord v. French, 61 Me. 420); or he may have other remedies (Edwards v. Owen, 15 Ohio, 503; Meeker v. Potter, 5 N. J. Law, 586). A party may remain silent after discovery of the fraud, and affirm the contract with knowledge of such fraud, as this can only extinguish the right to rescind, leaving his other remedies unimpaired; and by bringing an action for deceit before he has complied with the terms of the contract on his part, he merely restricts the extent of any recovery which might be authorized. Weaver v. Shriner, 79 Md. 530, 30 Atl. 189; Groff v. Hansel, 33 Md. 166. The action here is not for rescission, nor is it for breach of contract, but is for the deceit practiced to induce its execution.

The following cases will illustrate the one here with clearness. In Dixon v. Barclay, 22 Ala. 370, a bill of sale was given for a slave. At the time the contract was executed it was agreed by the vendee that he would remove the slave from the state, and this it was claimed was part of the consideration entering into the price. The action was by the vendor for deceit and fraud in making with plaintiff a contract which at the time he made it, the defendant did not intend to keep. The court allowed parol proof of the fraud, although it contradicted the bill of sale set out in the complaint, the gravamen of the action being the fraud and deceit. Similarly held in Plant v. Condit, 22 Ark. 454. In the case of Inge v. Bond, 10 N. C. 101, the action was for deceit in the sale of an unsound negro. A bill of sale had been given containing no warranty of soundness; defendant expressly refusing to sign a bill of sale containing such warranty. The court said: "The affirmation, as stated in the declaration, is not laid in the way of a contract, the breach of which has brought damage to plaintiff, but as a deceit practiced upon him, whereby he was induced to make the contract. * * * If there is any fraud in the case, that cannot be done away by the contract, and the buyer may notwithstanding bring his action on the case, which is the only one that could be brought in this case"—the slave having died. In Antle v. Sexton, 137 Ill. 410, 27 N. E. 691, the action was on the case to recover damages for fraud and deceit in the sale of timber standing on the land of one Jameson. The subjects of the sale included timber land. The ground of fraud was the representation that the tract of timber contained 80 acres when in fact the contract conveyed only 30 acres. The court said: "The action was not brought upon the contract, but upon false representations and deceit, used to induce the plaintiffs to enter into the contract, whereby they have been damaged. It is well settled that such an action will lie though the parties may have entered into a written agreement, and though in such agreement there may be a warranty or stipulation upon the point covered by the misrepresentations"—citing 2 Addison on Torts, 1004; 1 Chitty Pl. 137, note 4; Hilliard on Torts, §§ 4, 5, 12; Ward v. Wiman, 17 Wend. (N. Y.) 193. "And so it will lie if in the written contract there is no reference to the subject of the deceitful statements. * * * The fraud is not merged nor extinguished by the covenant, but affords an additional and more complete remedy."

5. Error is assigned for denying defendants' motion for a continuance of the case, to take Fletcher's deposition, to obtain his version of the conversation related by plaintiff as having occurred in 1905. The ground of this motion was that plaintiff's testimony was a surprise, and could be met only by Fletcher, whose business engagements forbade his being present. We cannot see that plaintiff had, by anything said or done by him, misled defendants as to what he would testify to. The essential fact to be known was whether Dunham did breed 40 mares to Joubert, and the result. Dunham, who knew the facts, was present, but was not sworn. This situation was one in which the granting of the motion was peculiarly within the discretion of the court. The showing made is far from convincing us that the court abused this discretion.

6. Error is claimed in admitting the deposition of Vandervere for the purpose to which the court limited it. It may be that, had the court refused to allow defendants' request that all or none of the deposition be read, it would have been error. A party may not introduce selected portions of the deposition of his own witness upon direct examination, omitting the rest of the deposition. Bank of Orland v. Finnell, 133 Cal. 475, 65 Pac. 976. Here the entire deposition was admitted, but, because of defendants' objection, it was limited in its use by the court to the fact desired to be shown by plaintiff. Defendants could have made the entire deposition part of the record had they been so minded, but they did not want this, and were therefore not prejudiced by the limit given the deposition by the court. The fact shown, as already pointed out, was material as showing that breeding books were kept by defendants, and that they refused to produce them. The demand to produce the books was made by plaintiff before resorting to the Vandervere deposition. We see no error in the ruling.

7. There was much testimony introduced by plaintiff, over defendants' objection, for the purpose of showing damages. Evidence of the value of colts, thoroughbred and graded, when foaled; also when weaned at six months; the value of the breeding season; the money loss in failure of the horse, resulting in the failure of the mares to have colts. It is claimed that the evidence was remote, and the damages speculative, conjectural and uncertain; that plaintiff is not entitled to recover profits which he might have made had he not been deceived. The evidence left little, if any, uncertainty as to the actual damages sustained. Whatever may be the rule elsewhere, we understand our Civil Code (sections 3313, 3314) to establish the rule in this state. The rule contended for by defendants is that laid down in section 3313, which relates to "the detriment caused by the breach of a warranty of the quality of personal property," etc. Section 3314 relates to "the detriment caused by the breach of a warranty of the fitness of an article of personal property for a particular purpose," in which case the detriment "is deemed to be that defined by the last section (3313), together with a fair compensation for the loss incurred by an effort in good faith to use it for such purpose." In the case of McLennan v. Ohmen, 75 Cal. 558, 17 Pac. 687, the warranty related to an engine which the seller warranted to save the buyer 25 per cent. of his fuel bills. Evidence was taken that it increased the coal bill 40 per cent. The judgment for damages was held to be supported by the evidence. Greenleaf v. H. & A. Works, 78 Cal. 606, 21 Pac. 369, was an action for damages resulting from the failure of a threshing machine to meet the warranty as to its fitness to do a certain work. Actual damages sustained by plaintiff were recovered, under the rule laid down in these Code provisions. There was evidence in the present case ample to support the judgment.

The case was well and thoroughly tried, and seems to have had careful attention by the learned trial judge, and has been ably argued here. The manifest zeal and earnestness of counsel for defendants, and the insistence with which their many points are urged, must plead our apology for the unusual length of this opinion.

With the consideration we have been able to give the case, we fail to discover any prejudicial error in the record, and the judgment is therefore affirmed.

We concur: BURNETT, J.; HART, J.

8 Cal. App. 74

LIGHT v. STEVENS. (Civ. 436.)

(Court of Appeal, Third District, California. April 9, 1908. Rehearing Denied by Supreme Court June 4, 1908.)

1. Bills and Notes (§ 527*)—Payment—Evidence.

The giving of checks and drafts by a debtor to a creditor, with the fact that they were indorsed by the payee, and returned in due course to the drawee, and marked "Paid," is evidence of payment.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1855; Dec. Dig. § 527.*]

2. Bills and Notes (§ 527*)—Payment—Application—Evidence.

Payment by the maker to the payee of a note is evidence of payment thereof, in the absence of evidence of other indebtedness; there being no presumption of other indebtedness.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 527.*]

3. Pleading (§ 93*)—Inconsistent Defenses.

Inconsistent defenses may be set up in an answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 189, 190; Dec. Dig. § 93.*]

4. Pleading (§ 93*)—Answer.

A denial in one defense of an answer is not waived by the setting up of affirmative matter in another defense.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 190; Dec. Dig. § 93.*]

5. Bills and Notes (§ 489*)—Issues and Proof.

Evidence, tending to prove the averment of the answer that the amount of the note sued on was paid, can and must be considered, though not supporting another distinct count of the answer setting up a counterclaim.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 489.*]

6. Appeal and Error (§ 957*)—Review—Discretion of Court — Setting Aside Default.

An order setting aside a default will not, in the absence of abuse of discretion, be disturbed, unless the rules of procedure imperatively demand it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3823; Dec. Dig. § 957.*]

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action by E. S. Light against C. A. Stevens (F. S. Crouch, substituted), as administrator of Theodore A. Light, deceased. Judgment for plaintiff, and new trial denied. Defendant appeals. Reversed.

Bell, York & Bell, for appellant. Lynch & Drury (R. Benjamin, of counsel), for respondent.

BURNETT, J. The action was brought to recover the sum of $3,000, and interest, alleged to be due upon a promissory note of decedent in favor of respondent, executed April 15, 1902. All the allegations of the complaint are admitted, except the one in reference to nonpayment, which is denied, and there is an affirmative allegation in the answer "that said promissory note was fully paid, satisfied, and discharged by said intestate, Theodore A. Light, during his lifetime." The only question, then, on this appeal is, as stated by appellant, based upon said averment of full payment.

The plaintiff offered in evidence the promissory note described in his complaint; there being no indorsement of any payment thereon, and then rested his case. This was a prima facie showing, sufficient to support a finding that the note had not been paid. Thereupon, C. A. Stevens, subject to the objection of plaintiff, testified as follows: "I know that subsequent to this loan of $3,000 which Theodore A. Light secured from his brother, Theodore A. Light paid money to his brother, Eugene S. Light. On July 10, 1902, Theodore A. Light paid to E. S. Light, or deposited in my bank, subject to his brother's order, $1,250. That was paid to him on December 9th of that same year. He cashed that certificate at the bank." The certificate was received in evidence. It was stamped on the face: "C. A. Stevens, Banker. Paid Dec. 9, 1902, Calistoga, Cal." "On the back of this certificate appeared the signature of E. S. Light. I made out that certificate of deposit, and delivered it to some one, I don't know to whom, but it was subsequently returned indorsed by E. S. Light, I think in December. Whereupon I marked it 'C. A. Stevens, Banker, paid Dec. 9, 1902, Calistoga, Cal.'" The witness further testified in a similar manner as to two other certificates for the aggregate sum of $1,408.65, and then: "On December 25, 1903, T. A. Light paid his brother, E. S. Light, $2,000. Theodore A. Light drew this money out of his regular account, and obtained this draft, December 28, 1903, which he mailed to his brother in San Francisco, who cashed it on December 30, 1903. The signature on the back of this draft is the signature of E. S. Light. The money for this draft was paid to Eugene S. Light by the Bank of California in San Francisco." On cross-examination the witness testified that he did not remember whether he had seen Theodore Light deliver any of these drafts to Eugene S. Light; that he might have seen it, and might not, but did not remember. "These drafts and certificates of deposit were issued for money deposited by T. A. Light, and returned to the bank in regular order of business indorsed by E. S. Light. If he presented it to the bank, I saw him sign his name on the back, but I could not swear that I saw him indorse them, because I do not remember whether I did or not." The court was thereupon moved to strike out the testimony of the witness, on the ground that it was immaterial, incompetent, and irrelevant, counsel specifying particularly that it was not connected with any issues of the pleadings, did not tend to establish a counterclaim, and was not connected with the promissory note in issue in the case. The court granted the motion, and instructed the jury that all the testimony of witness Stevens was eliminated from the case, and was not to be considered. This ruling of the court presents the vital question for our determination.

It is to be observed that in the direct examination Mr. Stevens testified positively that the money had been paid to the plaintiff, but the cross-examination discloses this to be the conclusion of the witness drawn from the fact that the checks and drafts properly indorsed by the plaintiff were returned to the bank in regular order of business, and credited as paid. If this circumstance affords any evidence of payment of the note, it is manifest that the action of the court was prejudicially erroneous. Respondent cites a large number of cases to the effect that "a note, check, or draft, given by a debtor to a creditor, does not constitute payment, unless received by the creditor under an express agreement to accept it as absolute payment, and that the presumption is against it being so received." The doctrine as stated is supported by the authorities cited, and indeed is well settled, but it has no application to the case at bar, for the reason that we have the additional features shown by the testimony that the checks and drafts were indorsed by the payee, and returned in due course to the drawee and marked "Paid." If the said bills had been in possession of plaintiff at the time the action was brought, without any indorsement thereon, the ruling of the court would have been undoubtedly correct, but from the facts shown we think the presumption of payment would arise, and therefore that it was error to withdraw the evidence from the consideration of the jury. A paid bank check, payable to the order of the creditor, and indorsed by him, is admissible as evidence of payment. 9 Ency. of Evidence, p. 725. Payment of a bill or note will be presumed from possession, after maturity, by the party liable on it, especially if indorsed and canceled. Randolph on Commercial Paper, §§ 1475, 1476. After a bill has been circulated, its possession by the acceptor will be presumptive evidence that it is paid. Baring v. Clark (Mass.) 19 Pick. 220. The same conclusion follows from these presumptions of the Code: "That a person in possession of an order on himself for the payment of money or the delivery of a thing has paid the money or delivered the thing accordingly," and "that the ordinary course of business, has been followed." Code Civ. Proc. § 1963, subds. 13, 20. Exactly the same principle is involved as where a note is in possession of the maker after maturity, and in the latter case no one would probably contend that payment would not be presumed. In Griffith v. Lewin, 125 Cal. 621, 58 Pac. 205, through Commissioner Cooper, it is declared: "It is said we must presume 'that the ordinary course of business has been followed.' If so, we must presume that, if deceased in his lifetime ever paid the note in this case, it was delivered up to him. If it had been delivered up to him we would have to presume that it had been paid; but, as it was not delivered up, but was at his death in the possession of plaintiff, we must presume that it has not been paid."

The question then arises whether the said bills were evidence of payment of the note in controversy. The record is silent as to that point, but there is no showing of any other indebtedness of decedent to plaintiff. In Murphy v. Richardson, 33 Pa. 236, it is said: "There was no evidence of any other transaction, or of any other account, between Mr. Brick and the defendant and his wife, or either of them. When there is but one single transaction to which a payment can be referred, the law necessarily appropriates it to that account, and no other." In Masser v. Bowen, 29 Pa. 128, 72 Am. Dec. 619, the rule is stated as follows: "A check by the defendant to the plaintiff's order, indorsed by him and paid, is evidence that the amount of it was paid to the plaintiff on account of such debt as we know to have existed, and it cannot be excluded because the court may think it belongs to a different transaction." To the same effect are Jesse v. Davis, 34 Mo. App. 353; Boyd v. Daily, 85 App. Div. 581, 83 N. Y. Supp. 539; Stevens & Andrews v. Gainesville Nat. Bank, 62 Tex. 499. In 22 Am. & Eng. Ency. of Law, p. 608, the rule is stated as follows: "Where a debtor pays or transfers to his creditor a sum of money or property equal in value to, or greater than, the indebtedness, the presumption arises that the transaction was intended to operate as a payment and satisfaction of the indebtedness." Indeed the conclusion that the money paid, in the absence of evidence to the contrary, should be applied to the indebtedness evidenced by the promissory note follows from these considerations: It is never presumed that one man is indebted to another. The presumption is otherwise. Hence in the case at bar it must be presumed that the only indebtedness of the decedent to plaintiff is what was shown by the evidence. Again it is presumed "that money paid by one to another was due to the latter." Code Civ. Proc. § 1963, subd. 7. Therefore the inference necessarily is that the money was paid on the indebtedness in controversy.

Respondent insists that "the contention of appellant that three of these drafts were ever intended to apply as payment on account of said promissory note is untenable under the allegations of his answer that they were received by said E. S. Light from said Theodore A. Light for the former's use and benefit, upon a promise and agreement to be returned to said Theodore A. Light upon demand, and there is no consistency between the pleadings on behalf of appellant and the argument advanced in his brief in reference to the three drafts." But it is clearly established that inconsistent defenses may be set up in an answer (McDonald v. Southern Cal. Ry. Co., 101 Cal. 206, 35 Pac. 643, 646;

Miles v. Woodward, 115 Cal. 315, 46 Pac. 1076), and the rule is the same when the answer is verified (Banta v. Siller, 121 Cal. 418, 53 Pac. 935). The effect of a denial in one defense is not waived by the setting up of affirmative matter in another defense. Billings v. Drew, 52 Cal. 565. In view of the foregoing it would be inexcusable to hold that evidence, which tends to prove the averment of the answer that the amount of the note was paid, must not be considered for that purpose, but must be rejected because it does not lend support to another distinct count of said answer setting up a counterclaim. The fact is, of course, that evidence offered by defendant must be considered if material and relevant to any legal defense that is pleaded.

Respondent claims that we should not consider the statement on motion for a new trial contained in the transcript, for the reason that the trial judge, over the objection of respondent, improperly settled it. We think, however, that there was no abuse of discretion shown by the order relieving appellant from his default. Causes should, if possible, be heard upon their merits, and an order setting aside a default should not be disturbed, unless the rules of procedure imperatively demand it. We think the interests of justice require that there should be a new trial in order that all the evidence available may be considered in the determination of the important issue submitted.

The order denying the motion for a new trial is reversed.

We concur: CHIPMAN, P. J.; HART, J.

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10 Cal. App. 685

RITZ v. LIGHTSTON, City Treasurer.
(Civ. 589.)

(Court of Appeal, First District, California. May 27, 1909.)

1. Constitutional Law (§ 205*)—Grants of Regulations of Liquor Traffic—Special Privileges.

An ordinance confining the right to a license to sell liquor at a bar in certain parts of a city to bona fide hotels confers the privilege on a classification that the council has a right to make.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 205.*]

2. Constitutional Law (§ 42*)—Constitutional Questions—Persons Entitled to Raise.

The council having the right to provide that a bar license in certain parts of the city shall be granted only to hotels, one desiring a license, but having no hotel, is not in a position to complain of any discrimination in the ordinance in limiting the right to hotels in existence at the time of its passage.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 39; Dec. Dig. § 42.*]

Appeal from Superior Court, Santa Clara County; John E. Richards, Judge.

Application by E. Ritz for writ of mandate to Charles J. Lightston, as treasurer of the city of San Jose. Writ denied, and plaintiff appeals. Affirmed.

Karns & Whitehurst, for appellant. H. L. Partridge, for respondent.

COOPER, P. J. This is an appeal from the judgment of the trial court denying the application of appellant for a writ of mandate against the defendant as treasurer of the city of San Jose. It is conceded that the defendant was, at all the times set forth in the verified petition, the treasurer of the city of San Jose, and that it was his duty, by virtue of his said office as such treasurer, to issue licenses to all persons conducting a legal business within the corporate limits of said city, where such business is authorized under the ordinances of said city, and where persons conducting the same are required to take out a license for the purpose of conducting such business.

The petitioner, on and prior to the 16th day of December, 1907, had been engaged in the business of conducting and maintaining a saloon and bar upon his premises within the corporate limits of said city, and continued in such business until the 1st day of July, 1908, when the defendant as treasurer refused to issue to him any further license or permit to carry on the said saloon and bar. The defendant based his refusal upon an ordinance, duly passed by the mayor and common council of the city of San Jose, on the 16th day of December, 1907, to take effect on and after July 1, 1908, which ordinance provides: "No license for any bar, barroom, saloon or other public drinking place, and no transfer or removal of any license for any such place shall be granted, except where such bar, barroom, saloon or other public drinking place is to be conducted in a building fronting upon one of the streets hereinafter named, or upon that portion of some street or alley contained within the territory hereinafter described, to wit: * * *" Then follows a description by metes and bounds of the portion of said city in which saloons and bars are expressly authorized. The ordinance then concludes as follows: "Provided that nothing herein contained shall prevent the renewal of any license to conduct a bar in any bona fide hotel at present existing without said limits." It is the contention of the appellant that the ordinance is void by reason of the proviso, which in effect declares that in certain territory of said city a license to conduct a bar shall only be issued to a bona fide hotel at present existing, and for this reason it is claimed that the ordinance discriminates against the appellant in favor of other persons conducting a hotel business, that it creates a monopoly, and that it is not a police regulation.

The appellant is within the territory covered by the proviso, but he is not, and was not, a hotel keeper, nor did he conduct his bar in any hotel at the time the ordinance was passed. He, therefore, comes clearly within the class of persons in the territory to whom, by the terms of the ordinance, no license shall be granted. This is the decree made by the governing body of the city in which he lives, and to whom has been intrusted the right to enact all proper legislation for the safety, health, peace, good order and morals of such community. By adopting the city of San Jose as his home the petitioner has consented to be governed by general laws and ordinances passed by the legislative body of such city. Of course such ordinances must not unreasonably discriminate; must be general in their nature, and impartial in their operation. They must not be unjust or oppressive, or make an act done by one person penal which, if done by another, would not be so, unless under some general rule or classification founded upon some reason. As to whether or not the matter in any particular case is a police regulation, or a proper classification, must be left, to a great extent, to the judgment of the lawmaking power of the city. It is only in unusual cases that the courts interfere with the discretion of such lawmaking power.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It is said by the Supreme Court of the United States, speaking through Mr. Justice Field, in Crowley v. Christensen, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 620: "By the general concurrence of opinion of every civilized and Christian community, there are few sources of crime and misery equal to the dramshop, where intoxicating liquors in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The statistics of every state show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source. The sale of such liquors in this way has therefore been, at all times, by the courts of every state, considered as the proper subject of legislative regulation. Not only may a license be exacted from the keeper of the saloon before a glass of his liquors can be thus disposed of, but restrictions may be imposed as to the class of persons to whom they may be sold, and the hours of the day and the days of the week on which the saloons may be opened. Their sale in that form may be absolutely prohibited. It is a question of public expediency and public morality, and not of federal law. The police power of the state is fully competent to regulate the business, to mitigate its evils, or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the state or of a citizen of the United States. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the direction of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue licenses for that purpose. It is a matter of legislative will only." The rule laid down in the case above cited has been uniformly followed by the Supreme Court of this state and by the District Courts of Appeal, and by the best-considered decisions of the higher courts in other states. As the sale of intoxicating liquors to be used as a beverage may injure society and impose a burden upon the state, it is uniformly held that no person can engage in that business of common right, as in the sale of commodities which are classed as necessaries. There being no inherent right in a citizen to engage in the business of selling intoxicating liquors, he cannot complain of general laws which impose burdens, conditions, and regulations upon its sale. Under such general laws a privilege may be conferred upon one class of persons which is denied to another class, provided there is good reason for such classification; and, as before stated, that is to a great extent a matter for the governing body of the city to determine. Ex parte Murphy (Cal. App.) 97 Pac. 199; In re Kidd, 5 Cal. App. 159, 89 Pac. 987; Sandys v. Williams, 46 Or. 327, 80 Pac. 642; Ex parte Christensen, 85 Cal. 209, 24 Pac. 747; People v. Murray, 148 N. Y. 171, 42 N. E. 584.

The ordinance in question confines the right to obtain a license to sell intoxicating liquors at a bar to bona fide hotels within the territory. This was a classification that the governing body of the city had the right to make. The fact that the right to a license was limited to hotels in existence at the time of the passage of the ordinance might become a very material one in case of another bona fide hotel being erected or opened within the territory and applying for a license; but that question does not affect the right of appellant. He has no hotel, and therefore is not in a postion to complain of any discrimination made by the ordinance as to hotels. In re Kidd, supra; Ex parte Murphy, supra; Davidson v. Von Detten, 139 Cal. 467, 73 Pac. 189.

We, therefore, conclude that the ordinance is not void as to the appellant, and the judgment is affirmed.

We concur: HALL, J.; KERRIGAN, J.

10 Cal. App. 723

DONOVAN v. ÆTNA INDEMNITY CO. OF HARTFORD, CONN. (Civ. 602.)

(Court of Appeal, First District, California. May 29, 1909. Rehearing Denied by Supreme Court July 28, 1909.)

1. APPEAL AND ERROR (§ 537*)—RECORD—PROPOSED STATEMENT — ON MOTION FOR NEW TRIAL.

A proposed statement, on motion for new trial, cannot be considered on appeal, not having been served in the time provided by law.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 537.*]

2. REPLEVIN (§ 120*)—LIABILITY ON BOND.

The sureties on the bond of plaintiffs in replevin, binding the surety, as required by Code Civ. Proc. § 512, for return of the property, if a return be adjudged, or for payment to defendants in replevin of such sum as may be recovered against said plaintiff, are liable, where the judgment in replevin is against said plaintiff for money only, without an alternative for return of the property, such a judgment being authorized under certain conditions, which will be presumed to have existed; findings of fact in the replevin suit having been waived.

[Ed. Note.—For other cases, see Replevin, Dec. Dig. § 120.*]

3. REPLEVIN (§ 120*)—LIABILITY ON BOND—JUDGMENT ON STIPULATION.

The surety on a replevin bond is liable thereon, though the judgment in replevin is entered on stipulation; there being nothing to show it was the result of the fraud or collusion.

[Ed. Note.—For other cases, see Replevin, Dec. Dig. § 120.*]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Margaret J. Donovan against the Ætna Indemnity Company of Hartford, Connecticut. Judgment for plaintiff. Defendant appeals. Affirmed.

George F. Hatton, Walter H. Robinson, and Hartley F. Peart, for appellant. Welles Whitmore and Alexander & O'Donnell, for respondent.

HALL, J. In this case two appeals are presented in one transcript—an appeal from the judgment, taken March 9, 1908, and an appeal from the order denying defendant's motion for a new trial, taken April 16, 1908.

Preliminary to taking up the main points involved in the appeal it is necessary to dispose of the objection made by the respondent that the statement on motion for a new trial is properly no part of the record upon either appeal, for want of jurisdiction in the court to settle the same. At the hearing upon the settlement of the statement respondent objected to the settlement thereof, upon the grounds, first, that the notice of intention to move for a new trial was not filed within the time provided by law; and, second, that the proposed statement on motion for a new trial was not served upon plaintiff within the time provided by law. These objections are preserved and presented in a bill of exceptions properly settled.

Whether or not the notice of intention to move for a new trial was filed in time is not important, for it is perfectly clear that the proposed statement was not served in time. At the hearing of the objections to the settlement of the statement it was stipulated "that defendant's statement was served on December 12, 1907, which date was too late, unless the time in which to serve same was extended by the special holidays then in force under proclamations of the Governor." These so-called special holidays, under the act of 1907, amending sections 10, 135, Code Civ. Proc. (St. 1907, p. 561, c. 287, and page 682, c. 358), have, since the settlement of the statement in this case, been held to have been no holidays at all (Diepenbrock v. Superior Court of Sacramento Co., 153 Cal. 597, 95 Pac. 1121). The statement having been served too late, the judge had no jurisdiction to settle the same, and it cannot be considered on these appeals. Cameron v. Arcata & Mad River R. R. Co., 129 Cal. 279, 61 Pac. 955; Freese v. Freese, 134 Cal. 49, 66 Pac. 43. In thus holding we have not overlooked the suggestion of appellant made at the oral argument, that respondent by a stipulation has consented that such statement may be taken as a bill of exceptions on the appeal from the judgment. As we read the stipulation, it has no such effect. By preserving in said stipulation the respondent's bill of exceptions taken on such settlement it is manifest that respondent did not waive his objections that said statement was not served in time, but intended to preserve his objections and exceptions thereto. The purpose of the stipulation was simply to permit the presenting of both appeals upon a record printed in one transcript.

The only record that we can look into upon these appeals consists of the judgment roll and notices of appeal. The action was brought to recover upon a replevin bond, given by defendant in an action, entitled "Mrs. A. B. Deussing v. Margaret J. Donovan et al.," to enable the plaintiff in the replevin suit to take from the possession of the defendant in that suit Margaret J. Donovan the possession of the property sued for. It is alleged, among other things, in the complaint in this action "that afterwards, on, to wit, the 19th day of September, 1905, in said action in said superior court, department No. 4 thereof, judgment was duly given and made in favor of the defendant Margaret J. Donovan, and against the plaintiff, Mrs. A. B. Deussing, for the sum of $1,250 principal, and $4 costs, aggregating the sum of $1,254, and said judgment was duly entered on the 25th day of September, 1905, in Judgment Book No. 96, at page 431, of the records of said superior court." In its findings of fact the court found the facts as to the judgment in the replevin suit exactly as alleged in the complaint, and further found:

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"That said judgment was so given, made and entered as aforesaid in pursuance of a stipulation in writing, entered into by the respective parties to said action on the 19th day of September, 1905, and by said stipulation findings of fact and the right to move for a new trial, and the right to appeal from said judgment, was waived, and said judgment then and there became, and is now, a final judgment, and that no part thereof has ever been paid, and the same is now wholly unsatisfied." It is now urged that the findings do not support the judgment, first, because the judgment in the replevin suit was not in the alternative—that is, the judgment does not comply with the requirements of section 667, Code Civ. Proc., that the judgment must be for the return of the property, or, in case return thereof cannot be had, for its value—and, second, because the judgment in the replevin suit appears to have been rendered and entered by consent of the parties to said suit.

1. The statute under which the bond was given requires the giving of a bond by the plaintiff in the replevin suit, with two or more sureties, "to the effect that they are bound to the defendant in double the value of the property, as stated in the affidavit, for the prosecution of the action, for the return of the property to the defendants if return thereof be adjudged, and for the payment to him of such sum as may from any cause be recovered against the plaintiff." By the language of the statute the surety is required to bind himself to answer for three things: First, for the failure of the plaintiff to prosecute the action; second, for the failure of the plaintiff to return the property, if a return thereof be adjudged; and third, for the failure of the plaintiff to pay to the defendant such sum as may from any cause be recovered against the plaintiff. Code Civ. Proc. § 512.

The bond now in suit is in exact accord with the statute. By its terms the surety (appellant herein) bound itself in the penal sum of $3,600 "for the prosecution of said action, for the return of said property to said defendants, if return thereof be adjudged, and for the payment to said defendants of such sum as may from any cause be recovered against said plaintiff." The plaintiff in the replevin suit did prosecute the action to judgment, and there was therefore no breach of the condition of the bond for failure to prosecute the action.

No judgment for the return of the property was rendered or entered, and there was therefore no breach of the bond on that score. A judgment against plaintiff in the replevin suit for the payment of the sum of $1,258 to defendant therein (plaintiff herein) was entered, which has not been paid. It is difficult to see why the surety on the replevin bond is not liable for failure of the principal to pay such judgment. It has been said that the primary purpose of an action in replevin is to enforce a right of possession in personal property, and this is true. But it sometimes happens that it becomes impossible in the action to specifically enforce the right of possession, and in such cases a money compensation may be given in lieu thereof. Ordinarily the judgment in form requires a delivery or return of the property, with an alternative for the payment of the value thereof in case a return cannot be had. Code Civ. Proc. § 667. But the law is well established that, where it appears that a delivery of the property cannot be had, the judgment need not be in the alternative, but may properly be for its value alone. A judgment for the value, without the alternative for the delivery of the property, is not void, even though erroneous, and in many cases such a judgment would not even be erroneous. Erreca v. Meyers, 142 Cal. 308, 75 Pac. 826; Brown v. Johnson, 45 Cal. 76; Burke v. Koch, 75 Cal. 356, 17 Pac. 228; Seligman v. Armando, 94 Cal. 314, 29 Pac. 710 See, also, Boley v. Griswold, 20 Wall. 486, 22 L. Ed. 375, where it is said: "The court must be satisfied that the delivery cannot be made before it can adjudge absolutely the payment of money. But, if so satisfied, it may so adjudge. A special finding to that effect is not necessary. An absolute judgment for the money is equivalent to such a finding." The cases just cited are all cases where judgments for plaintiff, in replevin, for a sum of money only, were affirmed; it being held that, where from any cause, such as the loss or destruction of the property, a delivery cannot be had, the judgment need not provide for any delivery. For precisely the same reason a judgment for defendant in a replevin suit may properly be for a sum of money only. If, after the taking of the property on the replevin bond from the possession of the defendant, it should be lost or destroyed while in the possession of the plaintiff, the plaintiff is liable to the defendant for the value of the property. De Thomas v. Witherby, 61 Cal. 92, 44 Am. Rep. 542. Such being the law it is perfectly clear that, if at the trial of the replevin suit it should appear that for any reason the property taken on the replevin bond from the defendant cannot be returned, a judgment for its return would be idle and vain, and the court may without error, and certainly without exceeding its jurisdiction, give a money judgment to defendant for its value.

Such a judgment would certainly be within the condition of the replevin bond, given in accordance with the statute, whereby the surety bound himself or itself "for the payment to him [defendant] of such sum as may from any cause be recovered against the plaintiff." Code Civ. Proc. § 512. What became of the property taken on the replevin bond, or what disposition was made thereof, does not appear from the judgment roll in this case, which, as we have before shown, is the only record properly before us. Findings of fact in the replevin suit were waived, and the judgment was therefore without findings. Upon a direct appeal from such judgment, upon the judgment roll, we would be obliged to assume that the facts supported the judgment. The same assumption must be made here. The judgment was against the plaintiff in the replevin suit, for the payment to defendant therein (plaintiff herein) of a sum of money. The judgment on its face was clearly one that the court might lawfully make in such suit, and must be presumed to be not even erroneous. Erreca v. Meyers, supra; Brown v. Johnson, supra; Burke v. Koch, supra; Seligman v. Armando, supra, and De Thomas v. Witherby, supra; Boley v. Griswold, supra.

Thus far in our discussion of the liability of sureties on a replevin bond we have not noticed any of the decisions of the courts concerning such liability, where judgment was entered for defendant in the replevin suit, without adjudging a return of the property taken on the replevin bond. We think we have clearly shown that, under the established law of this state, such a judgment may be properly entered, and that, under the language of replevin bonds given under our statute, the sureties are liable for the payment of any sum of money to the defendant in the replevin suit that may be for any cause recovered against the plaintiff in such suit. When we come to examine the authorities upon the liability of sureties on replevin bonds, there appears to be some conflict as to the correct rule. This seeming conflict may perhaps arise out of differences in the conditions of replevin bonds under the laws and practice in different states.

In Mason v. Richards, 12 Iowa, 73, the surety on the replevin bond was held liable for a money judgment only. The court said: "An irregular judgment for the value of property taken in replevin, in which no order for the return of the property was made, does not change the liability of a surety in an action on the replevin bond." So, also, in McCarthy v. Strait, 7 Colo. App. 59, 42 Pac. 189, it is held that the sureties are liable, where a judgment for money only is entered, without adjudging a return of the property. It was there said: "The undertaking of the sureties was secondary—collateral. Upon the default of the principal their liabilities as sureties attached. They were not parties to the adjudication in replevin, nor could they in this case avail themselves of any errors or defects in it. It was res adjudicata. Their undertaking was, in case of the default of the principal, to pay to the defendant such sum of money as might from any cause be recovered against said plaintiff. A judgment was entered against the principal, which he failed to pay." Dorrington v. Meyer, 8 Neb. 211, also holds that sureties are liable for the judgment in the replevin suit, though for money only, without an alternative for the return of the property. See, also, Barry v. Frayser, 57 Tenn. 207.

On the other hand, Gallarati v. Orser, 27 N. Y. 327, and Ladd v. Prentice, 14 Conn. 109, seem to hold to the contrary. In the New York case, however, the action was against the sheriff for failure to justify the sureties, and what was said as to the liability of the sureties may be obiter; and in Connecticut the condition of the bond is quite different from the condition of a similar bond in this state. Thomas v. Irwin, 90 Ind. 557, also seems to sustain the proposition that the sureties are not liable for the value unless there be a judgment for the return of the property, but it is impossible to determine from the case whether or not any judgment was entered in the replevin suit for the value. The case ends by holding that the complaint against the sureties did state a cause of action against them. Certain it is that the cases directly in point with the case at bar hold the sureties on the replevin bond liable for the money judgment, though no return of the property be adjudged. Mason v. Richards, supra; McCarthy v. Strait, supra; Dorrington v. Meyer, supra. Appellant, however, places much reliance upon Nickerson v. Chatterton, 7 Cal. 568, and Clary v. Rolland, 24 Cal. 148.

The first case was an appeal from an order overruling a demurrer which attacked a complaint upon a replevin bond upon various grounds. The replevin suit seems to have been tried before a jury, which failed to find the value of the property sued for, though it rendered a verdict for its recovery. The court said: "But there is no averment that any value was found by the jury or the court in that case." The court did say that the judgment must be in the alternative, which we have seen from subsequent cases cited is not always required. No judgment for value was given, and the case is not authority for the proposition that the sureties on the replevin bond are not liable where a money judgment is entered for the defendant without adjudging a return of the property. In the subsequent case of Ginica v. Atwood, 8 Cal. 446, it was held that the decision in Nickerson v. Chatterton only applies to cases which have been submitted to a jury. For this reason the rule in Nickerson v. Chatterton is not applicable to the case at bar. Clary v. Rolland, 24 Cal. 148, follows Nickerson v. Chatterton, reluctantly upon the doctrine of stare decisis, and is authority for the proposition that, where a return of the property is adjudged, and no judgment entered for its value, the sureties are not liable for its value. It is not authority for the proposition that where a money judgment is entered, but without adjudging a return of the property, the sureties are not liable for the judgment entered. This case, by quoting from Ginica v. Atwood, seems also to recognize that the rule laid down in Nickerson v. Chatterton only applies where the trial was had before a jury. Neither case can be said to be authority for the proposition that, where judgment is entered for the value without the alternative of a return of the property being adjudged, the sureties are not liable. In other jurisdictions the rule laid down in Nickerson v. Chatterton, supra, and followed in Clary v. Rolland, supra, has been distinctly repudiated. Lomme v. Sweeney, 1 Mont. 584; Marix v. Franke, 9 Kan. 132; Whitney v. Lehmer, 26 Ind. 503. In each of these cases it was held that the sureties were liable for a judgment for the return of the property, though no alternative judgment for the value had been given.

Both upon principle and authority it is clear to us that defendant was not released from the obligation of its bond to answer for the payment to plaintiff (defendant in the replevin suit) of the sum of money recovered against the plaintiff in the replevin suit, because the judgment entered was not in the alternative, and did not direct a return of the property taken on the replevin bond.

2. As before stated, appellant also insists that the findings do not support the judgment because it appears that the judgment in the replevin suit was entered in pursuance of a stipulation entered into by the respective parties to said suit. In support of that contention he cites Lee v. Hastings, 13 Neb. 508, 14 N. W. 476. In this case it affirmatively appeared from the complaint that the judgment in the replevin suit was entered in pursuance of a stipulation, which stated that the property could not be returned, and that the interest of the defendant in said suit in said property was of the value of $157.50, and that the judgment should be entered for defendant against plaintiff for said sum. Judgment was entered accordingly, and was not paid. No demurrer was filed to this complaint, but defendants (the sureties on the replevin bond) filed an answer, setting up affirmatively, first, that the stipulation was entered into without their consent, and that the property, at the time the stipulation was entered into, was in good condition, and in the possession of the plaintiff in the replevin suit, and capable of being returned, which the parties to the stipulation well knew; and, second, that in the judgment for $157.50 was included a debt of $44, owing by plaintiff in the replevin suit to the defendant therein, that did not grow out of the action in replevin. The trial court overruled a demurrer to this answer, and entered judgment against the sureties, and it was this ruling that was before the appellate court. It is manifest that the facts pleaded in the answer showed fraud and collusion between the parties to the replevin suit, which on plain principles of equity ought to release the sureties. The answer affirmatively showed that the property not only could have been returned, as was well known to the parties to the stipulation stating the contrary, but that the parties agreed to a judgment, including a debt in no way connected with the replevin suit. No such facts appear from the record in this case. All presumptions arising from the fact of the judgment must be to the contrary. In Lee v. Hastings the case was returned for trial upon the issues presented by the affirmative matter set up in the answer, and without suggestion that the complaint did not state a cause of action. As the complaint on its face showed a judgment entered on stipulation for a given sum, without adjudging a return of the property, it is difficult to see why a new trial should have been ordered if the court had been of the opinion that such facts released the sureties. What was said in Lee v. Hastings as to the necessity for an alternative judgment was subsequently in effect clearly overruled in the later case in the same state of Selby v. McQuillan, 59 Neb. 158, 80 N. W. 504.

A judgment entered on a stipulation is none the less a judgment of the court because consented to by the parties. It is a most common occurrence for parties to a litigation to stipulate to important facts that often determine the result of the litigation. In the absence of fraud and collusion we see no good reason why sureties on a replevin bond should not be bound by a judgment thus obtained. Perigo G. M. & Y. Co. v. Grimes, 2 Colo. 652. In this case the court held that a submission to arbitration that provided for the entry of judgment on the award did not release the sureties on the replevin bond. The court said: "As, therefore, it cannot be doubted that a plaintiff in replevin may, by confessing judgment in favor of the defendant, bind himself and his sureties to the performance of the judgment, no reason is perceived for discharging the sureties when the judgment is obtained according to the terms of a submission to arbitration." In Bradford v. Frederick, 101 Pa. 445, it is held that a confession of judgment is a recognized and orderly mode of ending a pending suit, and that sureties are not released because the judgment was confessed. The court said: "There is no difference in legal effect between a judgment confessed and a judgment on the verdict of a jury." There being nothing in the record to show that the stipulated judgment was the result of fraud or collusion, it was a judgment regularly and lawfully obtained in the replevin suit, and we see no reason why the defendant (surety on the replevin bond) should not be bound by it.

The other points referred to in appellant's brief relate to matters that do not appear on the judgment roll, and cannot be considered.

The judgment and order are affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

(156 Cal. 18)

FINNELL v. JAS. H. GOODMAN & CO. BANK. (S. F. 4,696.)

(Supreme Court of California. July 1, 1909. On Motion to Modify Judgment, July 30, 1909.)

1. SUBROGATION (§ 31*)—WHEN RIGHT EXISTS.

Where a bank had lent F. money, and the bank's president had also improperly lent him a further sum, and F. paid to the bank certain merchandise and shares of stock in his company as an entirety in extinguishment of his debt to the bank including the amount improperly lent by the president, the sum paid being much less than the debt, and the president subsequently paid the bank the amount he had wrongfully lent F., the president was not entitled to receive from the bank a proportionate part of the shares of stock received by the bank from F.

[Ed. Note.—For other cases, see Subrogation, Dec. Dig. § 31.*]

2. SUBROGATION (§ 33*)—PRIORITIES.

In applying the property received from F. in satisfaction of the entire debt, the bank's claim to have actual satisfaction for the legitimate part of its debt against F. would have priority over the president's claim to subrogation or to a lien on the property for the sum he refunded on account of the improper loans.

[Ed. Note.—For other cases, see Subrogation, Dec. Dig. § 33.*]

3. SUBROGATION (§ 31*)—WHEN RIGHT EXISTS.

Even if the president could claim subrogation or a right to hold the bank as trustee as to the property received from F., upon the theory that for his benefit equity would consider the entire debt still existing and the bank as the holder of the entire property in pledge for the payment of the entire debt, the president would have to make full payment of the entire debt as a condition precedent to his right of subrogation to the title of the bank to any part of the property or his right to hold the bank as trustee thereof.

[Ed. Note.—For other cases, see Subrogation, Dec. Dig. § 31.*]

4. SUBROGATION (§ 31*)—PERSONS ENTITLED TO.

The bank in any case should not be compelled to return F. a part of the stock turned over by him upon payment by the bank president of the sums improperly loaned by him to F., where the remainder of the stock would not be sufficient to secure or satisfy the part of F.'s debt which the president did not repay.

[Ed. Note.—For other cases, see Subrogation, Dec. Dig. § 31.*]

In Bank. Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action by Simpson Finnell against Jas. H. Goodman & Company Bank. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed.

Garret W. McEnerney and Walter Rothchild, for appellant. Charles W. Slack, Charles S. Wheeler, Bush Finnell, Charles E. Trower, and J. J. Dunn, for respondent.

SHAW, J. The defendant, a banking corporation, appeals from the judgment and from an order denying its motion for a new trial.

The object of the action, as shown by the complaint, is to have the plaintiff adjudged to be the owner of 3,241 shares of the capital stock of the Finnell Land Company, standing in the name of the defendant, and to compel the defendant to transfer and deliver the said shares to plaintiff. The court below gave judgment directing the defendant to deliver to the plaintiff 2,717 of the said shares. The transactions out of which the claim of the plaintiff arises occurred between the defendant and George E. Goodman. The plaintiff has succeeded to the rights of George E. Goodman by assignment. In our consideration of the case we will refer only to the actions and rights of

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Goodman. The facts upon which the judgment was based are stated in the findings and will now, in substance, be stated.

The defendant was incorporated as a banking corporation on June 11, 1889, and ever since July 1, 1889, has been engaged in the banking business. We shall hereafter designate it as the "bank." Goodman was its president during all the period involved except from March 22, 1895, to July 9, 1896. During that period, however, no important transactions occurred. The Finnell Land Company was incorporated on May 24, 1900, with a capital stock declared in its articles to be of the value of $650,000, divided into 6,500 shares of the par value of $100 each, all of which were owned by John Finnell. On October 26, 1900, John Finnell was indebted to the bank in the sum of $447,742.80, of which $275,559.87 was evidenced by notes secured by deeds of trust covering 12,221.87 acres of land belonging to the Finnell Land Company, and $172,182.93 was due for overdrafts on open account and unsecured. Of this sum of $447,742.80 due from Finnell to the bank, $267,372 was on account of money of the bank which had been loaned to Finnell by George E. Goodman, to be used to pay debts from Finnell to Goodman. This money was loaned by Goodman for that purpose at divers times while he was president of the bank and was so used and applied. On that day, October 26, 1900, Goodman being then president of the bank, Finnell made a settlement of his aforesaid debt to the bank. This settlement was made with the knowledge and consent of Goodman. The evidence shows further that he negotiated the settlement, but this is not stated in the findings. By this settlement Finnell sold and transferred to the bank 4,500 shares of the capital stock of the Finnell Land Company and certain wheat, barley, and wool, in consideration whereof the bank discharged Finnell's said debt. The wheat, barley, and wool taken by the bank were of the value of $21,477.80, and that sum was credited by the bank on its account against Finnell, which account included the secured notes aforesaid as well as the overdrafts. The findings show that at the same time Finnell transferred to Goodman the remaining 2,000 shares of stock in the Finnell Land Company in consideration of the discharge by Goodman of a debt of some $352,238.27 and accrued interest due from Finnell to said Goodman. We do not think these facts are material to the case, except, perhaps, as matters of evidence.

On August 21, 1903, the bank demanded of Goodman the sum of $323,970, on account of the said $267,377 of the bank's funds previously loaned as aforesaid by Goodman, as president, to Finnell and used to pay his debts to Goodman This demand included 7 per cent. interest from October 26, 1900, to August 21, 1903, on the sum so used by Goodman. After some negotiation with Goodman the interest was reduced to 5 per cent., and Goodman thereupon paid the bank $307,000 in satisfaction of the demand. On account of this payment the court below held that Goodman was entitled to a proportional part of the 4,500 shares of the Finnell Land Company stock which the bank had received from Finnell in satisfaction of the debt of which the $267,372 was a part. It also found that the bank had expended $10,000 in obtaining necessary advice and service of an attorney in enforcing its demand against Goodman for said sum, and that, on that account, in estimating the proportion of the stock due to Goodman, the sum of $257,372, only should be taken as the numerator. The $21,477.80 credited on account of the wheat, barley, and wool was taken from the total debt, leaving a balance of $426,265, for which balance the bank, as the court concluded, had received the 4,500 shares of stock. The theory was that each share of stock represented a due proportion of the debt, and that, when Goodman was forced to repay to the bank $267,372 of the same debt, he became equitably entitled to receive from the bank a number of shares of the stock bearing the same proportion to the 4,500 shares as the sum of $257,372 (being the sum he paid, less the $10,000, and without interest) bears to $426,265. This proportion would amount to 2,717 shares, for which judgment was given.

The original complaint alleged that when Goodman paid the $267,372 and interest in August, 1903, in liquidation of the demand then made upon him, it was agreed between him and the bank that the bank, in consideration thereof, would transfer to him a proportionate part of the 4,500 shares of the stock. In the amended complaint it was alleged that the bank agreed to transfer to him, in consideration of said payment, 3,241 shares of said stock. The court found that no such agreement was made, and that no agreement to transfer any shares to Goodman was made in connection with that transaction. The complaint alleges that the shares of stock of said company have no market value. The answer alleged that on October 26, 1900, when it was taken by the bank in discharge of Finnell's debt, each share of the stock "was of the value of $30," and that it has greatly depreciated in value since that date The court found that the stock has no market value. It also found as follows: "It is not true that on the 26th day of October, 1900, each share of the said Finnell Land Company stock was of the value of but $30." The complaint contained no allegation as to its actual, or intrinsic value, as distinguished from its market value. The suit of the plaintiff was manifestly founded upon the alleged agreement that upon payment by Goodman to the bank the bank would transfer to him a proportionate part of the stock. The court, as stated, found that this allegation was wholly untrue. The plaintiff is therefore forced to rely on other propositions in order to sustain the judgment.

We know of no principle of law or equity by which the plaintiff can claim a right to a proportion of the stock, upon the facts found. The claim of the plaintiff is: That, when the funds of the bank were improperly loaned by Goodman to Finnell, it then had two remedies whereby to obtain reimbursement of the $267,372, thus loaned, one to pursue Finnell, the debtor, the other to compel payment from Goodman its unfaithful president; that it elected to pursue Finnell and accepted property from him in satisfaction of the entire debt of $447,772.80, including the $267,372 for which Goodman also was liable; that, after having thus obtained satisfaction from Finnell, the bank could not demand payment from Goodman of a part of the debt, and at the same time hold the property received from Finnell for its own use; but that it thereupon and thenceforward held as trustee for Goodman that part of the stock received from Finnell which was the equivalent of the $267,372 refunded to it by Goodman. This claim is necessarily founded upon the proposition that, in the settlement with Finnell, each share of the stock was taken separately, as satisfaction for its proportion of the debt, or that it must be so considered in equity, so that, when Goodman refunded any of the money, he at once became entitled to its equivalent in stock at this ratio. This proposition finds no support either in the findings or in the evidence, and we know of no rule or principle in equity which declares it as a matter of law. It omits all consideration of the right of the bank to a full payment of its whole debt in preference to the claim of Goodman. The shares of stock were not taken separately at a fixed price per share. The stock, as a whole, was not even taken as satisfaction of a stated part of the debt. What actually occurred, according to the findings, was that Finnell transferred to the bank the wheat, barley, wool, and stock, as an entirety, in consideration of the satisfaction and extinguishment of his debt to the bank and the discharge thereof by the bank. There was no separation or segregation of the items, and the whole of the property was taken for the entire debt. The evidence shows further that when the wheat, barley, and wool were sold, after they were transferred to the bank, the selling price, $21,477.80, was credited on its books to the Finnell account, that the property was not accepted because it was considered full payment, or as sufficient to satisfy the debt, but because it was all that could be obtained from Finnell, and that it was not considered as satisfaction, but that in fact the bank's account against Finnell was balanced by crediting $276,000 for the stock, $21,477.80 for the other property, and writing off the balance of $150,265 as a charge to "Reserve" and "Profit and Loss." There is nothing to the contrary of this in the findings. Neither is there anything to indicate that at that time the right of the bank to look to Goodman for reimbursement for any part of the debt was considered or even thought of. The entire theory of the right of Goodman to a proportion of the stock therefore falls to the ground for lack of the essential facts upon which it must be founded.

The claim of the plaintiff is untenable upon other grounds. The wrongful acts of Goodman had added $267,372 to the claim of the bank against Finnell, who was unable to pay. It may be conceded for argument's sake that if Goodman repaid this money to the bank he would have a claim against Finnell therefor; Finnell being the primary debtor. But, in that case, it must also be conceded that, in making application of the property received from Finnell in satisfaction of the entire debt, the claim of the bank to have actual satisfaction for the legitimate part of its debt against Finnell, the part not improperly created by Goodman, would have priority and preference to any claim of Goodman to subrogation, or to a lien in his favor upon the property for the sum he refunded on account of the improper loans. He could not equitably claim equality with the bank in resorting to this property for the reimbursement of the moneys returned by him to the bank which had been wrongfully taken by him in the first place. As between the bank and Finnell, the transaction had been closed and the debt settled; but Goodman can claim a right of subrogation, or a right to hold the bank as trustee with regard to the property, if he can claim it at all, only upon the theory that for his benefit equity will consider the matter still at large, the entire debt still existing, and the bank as the holder of the entire property in pledge for the payment of the entire debt. Such being the case, the well-known principles of equity, as well as the relations of the parties and the tortious origin of Goodman's claim, require him to make full payment of the entire debt as a condition precedent to his right of subrogation to the title of the bank to any part of the property, or his right to hold the bank as trustee thereof, conceding for argument's sake that he could in any case have such right. Where property is mortgaged or pledged by a single transaction, as security for several claims to a single creditor, another person who is bound to the creditor for one, only, of the claims secured, is not entitled to subrogation until he has paid, not only the claim for which he is bound, but also all the claims for which the property is held. 1 Brandt, Suretyship, §§ 338–354; 6 Pomeroy's Eq. Jur., § 922, note 95, § 923, note 102; 27 Am. & Eng. Ency. Law, 211; Crump v. McMurtry, 8 Mo. 414; Grubbs v. Wysors, 32 Grat. (Va.) 130.

Furthermore, it would be inequitable in any case to compel the bank to yield the plaintiff a part of the property taken for its debt, unless the remainder of such property is sufficient to secure or satisfy the part of the debt which Goodman did not repay. This part, excluding the payment upon the sale of the wheat, barley, and wool, amounted to $158,893 on October 26, 1900. As the findings show that the Finnell Land Company had no revenue, it is obvious that it could not have paid any dividends. Allowing interest thereon, this part of the debt in August, 1903, when Goodman repaid the sum for which he was liable, amounted to over $190,000. It was incumbent upon the plaintiff, upon his own theory of the case, and by obvious principles of equity, to aver and prove that the stock was of a value more than sufficient to pay this balance. He did not allege that it had any value, and the findings show only that its value exceeded $135,000. The evidence indicates that it was worth even less. The stock left to the plaintiff by the judgment would be worth only $53,491.

We are of the opinion therefore that the findings do not support the judgment, and for this reason the judgment must be reversed. A large number of rulings in the exclusion and admission of evidence are assigned as error. The conclusions we have reached will, as we believe, be sufficient to indicate the evidence that will be proper upon another trial and render it unnecessary to consider these points at length. It may be remarked that the insolvency of Finnell, the failure of Goodman to take security for the money of the bank loaned him, or part thereof, the agreement, if any, when the bank was organized and succeeded to the assets of the previously existing partnership, that the bank was to be fully paid before Goodman would enforce his own debts against Finnell, and the actual value of the stock at the time it was taken and subsequently up to the time of trial, would be pertinent matters of evidence upon any trial of the real controversy between the parties.

The judgment and order are reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.; MELVIN, J.

On Motion to Modify Judgment.

PER CURIAM. The appellant has filed a petition asking that the judgment reversing the case unconditionally be vacated, and that, instead thereof, the cause be remanded with directions to the court below to enter judgment that the plaintiff should be entitled to receive the whole of the Finnell Land Company stock, upon payment of the balance due upon the debt for the satisfaction of which it was taken by the bank, treating that balance as a still subsisting obligation. In the opinion rendered we held in effect that this was the only relief which the plaintiff could equitably demand. The defendant now consents that this relief be directed. The bill of exceptions expressly declares that it exhibits the substance of all the evidence given and offered upon the trial. The trial was careful and thorough. The evidence in proof of the alleged agreement that, upon the payment by Goodman of the money demanded of him by the bank, it would transfer to him a proportionate part of the stock it had received from Finnell, was vague, unsatisfactory, and clearly insufficient to prove such agreement, and it appears therefrom that the plaintiff produced all the evidence upon the subject which it could ever hope to obtain. There is no occasion for a new trial if the defendant is content with a judgment as above indicated. The judgment on unconditional reversal would require a new trial. That judgment is vacated, and upon the consent of the defendant aforesaid the following is given as the judgment of this court:

The judgment and order are reversed, and the cause is remanded to the superior court, with directions to enter judgment that if the plaintiff shall, within six months from the date hereof, pay to the defendant the sum of $158,893, with legal interest from October 26, 1900, after crediting all profits received on the stock after that date, the plaintiff shall thereupon receive from the defendant the 4,500 shares of stock of the Finnell Land Company which said defendant received from John Finnell; and that, if such payment is not made within said period, then that the plaintiff take nothing by his action. The defendant will recover the costs of appeal.

156 Cal. 89

In re BREWER'S ESTATE. (S. F. 5,181.)

(Supreme Court of California. July 7, 1909.)

1. APPEAL AND ERROR (§ 355*)—MOTION TO DISMISS—JURISDICTION.

Motion to dismiss appeal, on the ground that service and filing of notice of appeal were too late, goes to the jurisdiction, which cannot be conferred by acts of the parties so that no waiver or estoppel to urge the objection can be claimed because of respondent indorsing admission of service on the notice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1926; Dec. Dig. § 355.*]

2. APPEAL AND ERROR (§ 338*)—TIME FOR APPEAL—PROBATE PROCEEDINGS—REPEAL OF STATUTE.

The enlargement, by Act March 20, 1907 (St. 1907, p. 753, c. 410), of Code Civ. Proc. pt. 2 (entitled "Of Civil Actions"), tit. 13 (entitled "Of Appeals in Civil Actions"), c. 1 (entitled "Appeals in General"), by the addition of the new sections 941a, 941b, 941c, furnishing an alternative method of appeal, is, like the sections of part 2 thereby supplemented, carried into part 3 (dealing with special proceedings), tit. 11 (dealing with probate proceedings), by section 1714 of said title 11, providing that the provisions of part 2 relative to appeals, "except in so far as they are inconsistent with the provisions of this title," apply to the proceedings mentioned in this title, but, so far as inconsistent with section 1715, providing that the appeal in probate proceedings shall be taken within 60 days after entry of order of judgment, it is not carried into such title; there being no repeal by implication of such sections in regard to the special subject of appeal in probate matters by the new sections relating to the general subject of appeal in civil matters.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 338.*]

In Bank. Appeal from Superior Court, Alameda County.

In the matter of the Estate of James A. Brewer, deceased. James Morris Brewer and another appeal. Dismissed.

Clark & Clark, R. Clark, James Morris Brewer, and Henry Clay Brewer, for appellants. Thomas C. Huxley, for respondent.

SLOSS, J. Motion to dismiss an appeal from a decree of final distribution. The decree was entered on October 15, 1907. Notice of appeal was served on the attorney for the executrix on December 16, 1907, and was filed on the same day. The ground of the motion to dismiss is that the appeal was "attempted to be taken after the time limited by law." Under the statutes, as they existed prior to the legislative session of 1907, there can be no doubt that the service and filing of the notice of appeal were too late. Section 1715 of the Code of Civil Procedure provides that appeals in probate proceedings "must be taken within sixty days after the order, decree, or judgment is entered." In re Wiard, 83 Cal. 619, 24 Pac. 45. The objection that an appeal has not been taken within the time limited by law goes to the jurisdiction of the appellate court. People v. Walker, 132 Cal. 138, 64 Pac. 133; Estate of Campbell, 141 Cal. 73, 74 Pac. 550. There is therefore no force in the contention made by appellants that such objection was waived by the action of the respondent in indorsing upon the notice of appeal an admission of service. Towdy v. Ellis, 22 Cal. 650. Nor can the appellants rely upon the position that respondent is estopped by such admission from objecting to a consideration of the appeal. The acts of the parties cannot confer jurisdiction on the court in a case withheld by the law from its jurisdiction. Even if no objection were made, it would be the duty of the court, of its own motion to dismiss the appeal if it appeared to be taken too late. Langan v. Langan, 89 Cal. 186, 195, 26 Pac. 764; Estate of Pearson, 119 Cal. 28, 50 Pac. 992. The appeal must therefore be dismissed unless it is saved by the provisions of the act of March 20, 1907, entitled "An act to add three new sections to the Code of Civil Procedure, to be known as sections 941a, 941b, and 941c, of said Code, respectively, providing a new and alternative method by which appeals may be taken from judgments, orders or decrees of the superior court of the state of California to the Supreme Court or District Courts of Appeal thereof." St. 1907, p. 753, c. 410. Section 941b, added to the Code by this act, allows an appellant to file his notice of appeal at any time after the rendition of the judgment, order, or decree, and requires him to file it within 60 days after notice of entry of the judgment or order has been served upon the attorneys of record in the proceeding, provided that, in any event, the notice of appeal must be filed not later than six months after entry of the judgment or order. In the present instance it is admitted that no notice of entry of the decree was even served, and the appeal is, accordingly, in time, if the case is governed by the new statute.

The three sections adopted in 1907 became, by virtue of the numbers assigned to them, a part of chapter 1, tit. 13, pt. 2, of the Code of Civil Procedure. Part 2 bears the general title "Of Civil Actions." The subject of title 13 is that "Of Appeals in Civil Actions," and chapter 1 deals with "Appeals in General." Prior to the enactment of the new sections 941a, 941b, and 941c, the manner and the time of taking appeals were covered by sections 939, 940, and 941. Under section 939 an appeal might be taken from "a final judgment in an action or special proceeding commenced in the court in which the same is rendered, within six months after the entry of judgment." This language is general, and, if it had stood alone and unaffected by any other provision, would unquestionably have authorized an appeal from a decree of distribution in a probate matter to be taken within six months after entry. Code Civ. Proc. § 23. But the Code, by other sections, specifically limits the application to probate proceedings of the provisions relating to appeals generally. Part 3 deals with special proceedings, and title 11 of that part, covering sections 1294 to 1810, with proceedings in probate courts. Section 1714 provides that "the provisions of part two of this Code, relative to new trials and appeals—except in so far as they are inconsistent with the provisions of this title—apply to the proceedings mentioned in this title," and section 1715 that "the appeal must be taken within sixty days after the order, decree or judgment is entered." Here is an express declaration that the general enactments regarding appeals are to apply to probate appeals only where not inconsistent with provisions declared in the title devoted to probate proceedings, and that in case of inconsistency the provisions of the probate title are to prevail. When the chapter relating to appeals in general was enlarged by the addition of new sections furnishing an alternative method of taking appeals, these new sections, both by the generality of their language (Estate of McPhee [Cal.] 97 Pac. 878, 881), and by the terms of section 1714, were carried over and imported into probate proceedings, but, like the provisions which they supplemented, only in so far as they were consistent with the rules laid down in the title governing probate proceedings. The appellant may follow the method laid down in sections 941a, 941b, and 941c. He may perfect an appeal by filing a notice, and is not required either to serve notice or to furnish an undertaking. But in the matter of time for taking an appeal section 1715 still remains in force. It limits the appellant to 60 days after the entry of the order, judgment, or decree. To the extent that this provision is inconsistent with the provision of 941b, it prevents the application of that section to probate appeals.

This result can be avoided only by holding that the new sections work a repeal, by implication, of sections 1714 and 1715. Such a holding would be contrary to well-established rules. Repeals by implication are not favored. They will be held to have taken place only where there is an irreconcilable conflict between the two acts, so that it is manifest that the Legislature did not intend both to be effective. Malone v. Bosch, 104 Cal. 680, 38 Pac. 680; Rowe v. Hib. S. & L. Soc., 134 Cal. 403, 66 Pac. 569. Here it is readily possible to give effect to both acts. The new sections, like sections 939, 940, and 941, are applicable to appeals in all cases except probate, and as to probate appeals they are applicable in all respects concerning which a contrary provision is not made in title 11, pt. 3, of the Code. Sections 1714 and 1715 may still be given the effect they had before; that is, the effect of importing into probate proceedings all Code provisions governing appeals which are not inconsistent with the title covering probate matters, and excluding such of them as are inconsistent.

Furthermore, it is to be observed that sections 1714 and 1715 deal with the limited and special subject of appeals from orders and decrees in probate. Sections 941a, 941b, and 941c relate to appeals in all civil matters. Their very generality furnishes the only argument for the contention that they override any contrary provision of section 1715. But "where two statutes treat of the same subject, one being special and the other general, unless they are irreconcilably inconsistent, the latter, although latest in date, will not be held to have repealed the former, but the special act will prevail in its application to the subject-matter as far as coming within its particular provisions." People v. Pac. Imp. Co., 130 Cal. 442, 446, 62 Pac. 739. See, also, Banks v. Yolo County, 104 Cal. 258, 37 Pac. 900.

From these views, it follows that the appeal was attempted to be taken after the time allowed by law.

The appeal is dismissed.

We concur: ANGELLOTTI, J.; SHAW, J.; MELVIN, J.; HENSHAW, J.; LORIGAN, J.

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156 Cal. 1

PEREIRA v. PEREIRA. (S. F. 4,882.)

(Supreme Court of California. June 30, 1909. On Rehearing, July 30, 1909.)

1. CONTRACTS (§ 111*)—OBJECT—ILLEGALITY—DEROGATION OF MARRIAGE.

A husband, with property worth $77,000, and an income of $11,000, was sued for divorce; but the action was dismissed, the parties having become reconciled and resumed marital relations. Subsequently, in pursuance of negotiations begun before the dismissal but after the reconciliation, they entered into a contract which recited the pendency of the divorce action. The wife therein waived the cause of divorce alleged, and agreed to dismiss the action. It was provided that, if the husband should thereafter so conduct himself as to give the wife a new cause of action for divorce, and she should establish it in a subsequent action against him, he should pay her $10,000, which should be a full satisfaction and discharge of all claims of the wife in the action for alimony, costs, support, homestead property, and benefit of every character, and, if such suit were brought, all claims by her to any property, community or otherwise, owned or acquired by the husband, other than the $10,000, were thereby settled and abandoned. *Held*, that the contract was void as against public policy, as intended to facilitate the dissolution of the marriage tie by the husband.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 515–520; Dec. Dig. § 111.*]

2. HUSBAND AND WIFE (§ 6*) — SEPARATE PROPERTY OF HUSBAND.

Where a husband, at his marriage, had a sum of money invested in his business, it was his separate property, and, where it remained in the business, he was entitled to have as his separate property the profits of the business due to the capital invested, under Civ. Code, § 163, providing that the profits of property owned by a husband before marriage shall be his separate property, and the amount of profits should be determined from all the circumstances of the case, and the business, being profitable, would amount at least to the usual interest on a long investment well secured.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 14; Dec. Dig. § 6.*]

3. DIVORCE (§ 280*)—REVIEW—DISPOSITION OF COMMUNITY PROPERTY.

The disposition of community property by the superior court in a divorce case in all particulars, including matters committed to its discretion, is subject to revision by the Supreme Court.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 280.*]

4. DIVORCE (§ 287*) — REVIEW — COMMUNITY PROPERTY—DISPOSAL.

Where the wife has not appealed from a judgment in a divorce case, the Supreme Court cannot, on the husband's appeal, change the judgment by increasing the share of community property given to the wife.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 287.*]

5. DIVORCE (§§ 249, 293*) — PROCEEDINGS — POWER OF COURT TO DECLARE RIGHTS TO PROPERTY AND CHILDREN BEFORE FINAL JUDGMENT.

Under Civ. Code, § 131, providing that in divorce, if the court determines that the divorce should be granted, an interlocutory judgment must be entered that the party in whose favor the court decides is entitled to a divorce, and section 132, providing that, after one year after the entry of the interlocutory judgment, the court, on motion of either party, or upon its own motion, may enter final judgment granting the divorce, which shall restore the parties to the status of single persons and permit either to marry, and such other relief as may be necessary to a complete disposition of the action, the court need not postpone trial of rights to property and children until rendition of final judgment, but may try the entire action at the same time as the issues as to the divorce and render an interlocutory judgment declaring the parties' rights with respect to property and children, and providing that the rights of the parties upon all the issues shall become final only when the divorce decree shall become final, allowing temporary alimony in the meantime.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. §§ 249, 293.*]

In Bank. Appeal from Superior Court, Alameda County; Wm. H. Waste, Judge.

Action by Anna Agnes Pereira against Frank Pereira. Judgment for plaintiff, and defendant appeals. Affirmed in part, and reversed and remanded in part.

Arthur J. Dannenbaum and Meyer Jacobs, for appellant. Charles S. Wheeler, Snook & Church, and J. F. Bowie, for respondent.

SHAW, J. The plaintiff obtained an interlocutory judgment of divorce on the ground of extreme cruelty. This judgment also declared that the plaintiff should have three-fifths of the community property when the divorce became final, that she should thereafter have custody of her minor child by the marriage, and it provided for temporary alimony to her and for the custody of the child during the time that would elapse between the interlocutory judgment and the final judgment. The defendant appealed from this interlocutory judgment within 60 days after the rendition thereof. This appeal is presented upon the judgment roll and upon a bill of exceptions containing the evidence. It is conceded that the evidence was sufficient to justify the divorce and the award of the custody of the child to plaintiff. The claim of the appellant is that the court erred in the finding as to the amount of the community property and in excluding evidence relating thereto.

1. The first point to be noticed is the ruling of the court declaring void a contract between the parties relating to their property and the division thereof, and in refusing to enforce or consider it in that connection. We are of the opinion that the court properly refused to consider this contract on the ground that it was plainly against public policy. The present action was begun on January 21, 1905. A previous action of divorce on the ground of extreme cruelty, consisting in large part of the same acts assigned in the present complaint, was commenced by the plaintiff against the defendant on September 23, 1904. After that action was begun, the parties became reconciled, resumed marital relations, and on November 1, 1904, the plaintiff dismissed the action. On November 4, 1904, in pursuance of negotiations begun before the dismissal, but after the reconciliation, the contract in question was executed. It was dated November 1st, and it recites that the previous action was then pending. Therein the plaintiff expressly waived the cause for divorce alleged in said complaint and agreed to dismiss the action. The contract further provided: That none of the relatives of either party should settle in, be invited to, or visit, the home without the consent of both parties; that if the husband should thereafter so conduct himself as to give the wife a new cause of action for divorce, and she should establish the same in a subsequent action against him for divorce or maintenance, the husband should thereupon pay to the wife $10,000, which should be a full satisfaction, settlement, and discharge of all claims of the wife in such action "for alimony, costs, counsel fees, support, maintenance of herself, homestead, homestead right, property, and benefit of every kind and character." It also declared that, "in the event of the institution of such subsequent action, all claims and demands by her or on her part in or to any moneys, property rights, or property, community or otherwise, now or hereafter owned or acquired by" the defendant, other than said $10,000, "are hereby forever settled, liquidated, relinquished, released, waived, and abandoned, and no claim, demand, or monetary or property benefit or relief shall ever be claimed, asserted, or sought in, by, or by reason of said subsequent action, should it be instituted, except only to the extent aforesaid."

The Civil Code provides that the husband and wife may enter into any engagement with the other respecting property which they might enter into if not married, subject to the law as to fiduciary relations in general (section 158); and that they may agree, in writing, to an immediate separation, and may make provision for the support of either of them and of their children during such separation; but that they cannot by contract otherwise alter their legal relations, except as to property (section 159). There was in this contract no agreement for separation, and hence the agreement to pay $10,000 cannot be upheld as a provision for the support of the wife on a separation, as provided in section 159. The real effect of the contract to pay the $10,000, so far as the husband is concerned, would be to provide against liability for a contemplated wrong to be subsequently inflicted by him upon his wife, and to liquidate such liability in advance of the commission of the wrong. The evidence and findings show that the defendant was then possessed of property worth about $77,000, was engaged in a very lucrative business, and was receiving an income of about $11,000 a year which he had every reason to believe would continue. By this contract, if valid, he was left free to inflict upon his wife the most grievous marital wrongs, such as would compel her to obtain a divorce, secure in the protection of his contract that $10,000 would satisfy all her claims against him of a pecuniary nature or in relation to the community property. If he should, after its execution, be moved by evil impulse to commit anew the offenses against his wife which first gave her cause for divorce, or other acts having the same legal effect, the existence of a valid contract of this sort could not but encourage him to yield to his baser inclinations and inflict the injury. As it was obviously adapted to produce this result, it is to be presumed that this was one of the inducements which made him desire its execution. The law does not countenance such agreements. "Any contract between the parties having for its object the dissolution of the marriage contract, or facilitating that result, * * * is void as contra bonos mores." Loveren v. Loveren, 106 Cal. 512, 39 Pac. 802, quoting Phillip v. Thorp, 10 Or. 494; Beard v. Beard, 65 Cal. 354, 4 Pac. 229; Newman v. Freitas, 129 Cal. 289, 61 Pac. 907, 50 L. R. A. 548. In Seeley's Appeal, 56 Conn. 206, 14 Atl. 291, the court says: "Inasmuch as the state rests upon the family and is vitally interested in the permanency of a marriage relation once established, it, for the promotion of public welfare, and of private morals as well, makes itself a party to every marriage contract entered into within its jurisdiction, in this sense, that it will not permit the dissolution thereof by the other party thereto. Its consent in the form of a decree of its court passed after hearing in due process of law is a prerequisite for a divorce. * * * Courts will not enforce any contract which is the price of consent by one party to the marriage relation to the procurement of a divorce by the other." And, in reference to a similar agreement to that in the case at bar, the court in the case just cited said: "Presumably each party saw in that agreement an individual advantage; to him, in that he possibly paid her less thereby than the judgment of the court upon hearing would compel; to her, in that he refrained therefore from answering the allegations of her petition by proof, and thus possibly permitted a divorce which he could have prevented."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Before the contract was made, or its terms agreed to, the parties had made up their former differences and had become reconciled. It shows by its terms that it is not an agreement to settle property rights accruing by reason of a marital offense already perpetrated and complete as a cause for divorce. There is therefore no force in the claim, as applied to this case, that it is competent evidence, or valid as a settlement of such rights, even if it were conceded that such an agreement might under some circumstances be permitted to stand. The court also found that this contract was procured by the husband through undue influence and by fraud. Our conclusions upon the point that it was against public policy make it unnecessary to consider the sufficiency of the evidence to sustain these findings.

2. The court found that the community property of the parties was of the value of $57,664.77. It is claimed that this is not sustained by the evidence.

There is practically no conflict on the subject; there being no witness to that point except the defendant. The findings state that this property consisted of the real estate on which the defendant carried on business, which was of the value of $45,000, and certain money on hand, making up the remainder. The evidence shows that the plaintiff and defendant intermarried on April 19, 1900. At that time the defendant was, and he ever since has been, carrying on a saloon and cigar business, then producing a net income of about $5,000 annually. He owned the cigar and saloon stock and fixtures, worth in all about $15,500, and had, besides, some $6,000 in cash. Soon after the marriage he bought the home wherein the parties afterwards lived, paying $2,700 therefor, and he afterwards expended thereon $2,300 in improving it. This home is adjudged to be his separate property, and plaintiff is given no interest in it. A year and a half after his marriage he bought the property in which he was carrying on business at the price of $40,000. He paid in cash therefor $5,000, and afterwards, out of his income, he paid the balance of the price and accumulated the cash on hand at the time of the trial, in addition, amounting to over $12,000. His net income at the time of the trial was about $11,000 a year. From the time of his marriage to the time of trial he allowed his wife $75 a month to run the house, and she made her own clothes. There is an unexplained discrepancy between the total amount of his income less the household expenses, and his total gains. He must have received more than he was willing to disclose, if his net income over household expenses amounted to as much as the money which he admits he has received, not allowing anything for his personal expenses.

The court may have believed that he had other property which he had succeeded in concealing. There was some justification for this inference, for he was caught in the act of attempting to conceal $7,761 of the cash on hand by means of a New York draft which he had carried in his pocket for the four months preceding the trial. It appears, however, that the decision of the court was made upon the theory that all of his gains received after marriage, from whatever sources, were to be classed as community property, and that no allowance was made in favor of his separate estate on account of interest or profit on the $15,500 invested in the business at the time of the marriage. This capital was undoubtedly his separate estate. The fund remained in the business after marriage and was used by him in carrying it on. The separate property should have been credited with some amount as profit on this capital. It was not a losing business, but a very profitable one. It is true that it is very clearly shown that the principal part of the large income was due to the personal character, energy, ability, and capacity of the husband. This share of the earnings was, of course, community property; but without capital he could not have carried on the business. In the absence of circumstances showing a different result, it is to be presumed that some of the profits were justly due to the capital invested. There is nothing to show that all of it was due to defendant's efforts alone. The probable contribution of the capital to the income should have been determined from all the circumstances of the case, and, as the business was profitable, it would amount at least to the usual interest on a long investment well secured. Boggess v. Richards, Adm'r, 39 W. Va. 576, 20 S. E. 599, 26 L. R. A. 537, 45 Am. St. Rep. 938; Trapnell v. Conkling, 37 W. Va. 252, 16 S. E. 570, 38 Am. St. Rep. 30; Penn v. Whitehead, 17 Grat. (Va.) 503, 94 Am. Dec. 478; Glidden v. Taylor, 16 Ohio St. 509, 91 Am. Dec. 98. We think the court erred in refusing to increase the proportion of separate property and decrease the community property to the extent of the reasonable gain to the separate estate from the earnings properly allowable on account of the capital invested.

It is true that the disposition of the community property by the superior court, in all particulars, including matters committed to its discretion, is subject to revision in this court on appeal. Civ. Code, § 148; Eslinger v. Eslinger, 47 Cal. 64; Brown v. Brown, 60 Cal. 580; Strozynski v. Strozynski, 97 Cal. 192, 31 Pac. 1130. In each of these cases the Supreme Court increased the wife's share of the community property from one-half, as given by the trial court, to three-fourths. But the wife has not appealed, and we cannot, upon the husband's appeal, change the judgment by increasing the share of community property given to the wife. The only error, in respect to community property, which we can consider upon this appeal by the husband, is the error in classing as community property that part of the gains which was derived from the "issues and profits" of his separate property (Civ. Code, § 163), the amount of which we cannot determine. It will be necessary to remand the case for a retrial of this issue. The court below will be free, upon such new trial, to apportion a larger share of the community property to the plaintiff, or to divide it between the parties in such shares as it shall deem just, under all the circumstances. The present division seems fair in point of fact.

3. The appellant further claims that, under the amendment of 1903 to sections 131 and 132 of the Civil Code, the court has no power, at or before the time of rendering the interlocutory judgment of divorce, to make any inquiry, finding, or decree with respect to the property rights of the parties, or with respect to any other subject connected with the divorce, except the right of the complainant to a divorce. Section 131 on this point is as follows: "In actions for divorce the court must file its decision and conclusions of law as in other cases and if it determines that no divorce shall be granted, final judgment must thereupon be entered accordingly. If it determines that the divorce ought to be granted an interlocutory judgment must be entered, declaring that the party in whose favor the court decides is entitled to a divorce." Section 132 provides that, when "one year has expired after the entry of such interlocutory judgment, the court on motion of either party, or upon its own motion, may enter the final judgment granting the divorce, and such final judgment shall restore them to the status of single persons, and permit either to marry after the entry thereof; and such other and further relief as may be necessary to a complete disposition of the action. * * * The death of either party after the entry of the interlocutory judgment does not impair the power of the court to enter final judgment as hereinbefore provided; but such entry shall not validate any marriage contracted by either party before the entry of such final judgment, nor constitute any defense of any criminal prosecution made against either." As these provisions were made after the other sections of the Code had been in force for many years, it was to be expected that the new provisions would not in all respects be consistent in language with other sections on the same subject. In section 146 the Code speaks of a disposition of the community property "in case of the dissolution of the marriage." In section 147 the Code declares that "the court in rendering a decree of divorce must make such order for the disposition of the community property and of the homestead as in this chapter provided," and in section 90 it declares that marriage is dissolved only by the judgment of a court of competent jurisdiction declaring a divorce. From these provisions it is argued by the appellant that the court's power to make a disposition of the property rights of the parties exists only at the time when the divorce judgment becomes final, and that any act attempted to be accomplished before that, in the way of a trial or interlocutory judgment declaring the property rights or the rights to the custody of children, is coram non judice and void.

We do not think that the Code provision requires such a narrow construction. When the history of legislation on the subject and the conditions existing at the time of the adoption of the amendment of 1903 are considered, the purpose, meaning, and effect of that amendment are not difficult to discover. While the law deems it necessary to provide that a divorce may be granted when conditions are such as to make the marriage relation intolerable, it is nevertheless true that the policy of the law does not favor the dissolution of marriages. It has been generally believed that many divorces were sought, not in good faith, but because a roving fancy had found another affinity more attractive, and that a dissolution was often desired solely for the purpose of forming a new marital connection. With the design of providing conditions under which it would be understood that ardent passions of this character must perforce have time to cool before a new marriage relation could be actually formed, the Legislature, in 1897, enacted a law in effect providing that no marriage should be entered into by any divorced person until at least one year had elapsed after the decree of divorce was rendered. St. 1897, p. 34, c. 36. It had become customary to avoid the provisions of this act by the expedient of going to an adjacent state for the purpose of entering into a new marital relation. This court was compelled to hold that marriages contracted in another state were valid in this state, although they were entered into within less than a year after a divorce had been granted in this state to one of the parties. Estate of Wood, 137 Cal. 129, 69 Pac. 900. The purpose of the amendment of 1903 was to carry into effect the object attempted to be attained by the statute in 1897. To do this the expedient was adopted of delaying the final judgment in divorce cases for the period of one year after it was judicially ascertained that a divorce should be granted. By thus making the right to a divorce ineffective for the period of one year, it became impossible for the parties to contract a valid new marriage anywhere until at least a year after the trial of the action of divorce had taken place. Except so far as was necessary to accomplish this object, it was not the intent of the statute to change in any respect the practice and procedure in actions for divorce. We do not doubt that the court has the same power now that it has always had to try and determine the issues between the parties in a divorce action with respect to property and custody of children, and that this may, and generally should, be done at the same time as the issues with respect to the cause for divorce are tried and determined. Unquestionably the court would have power under the present law, as it always has had the power under previous laws, to postpone the trial and decision of the property rights and custody of the children to any reasonable time after the rendition of the judgment of divorce, whether interlocutory or final. The amendment has not changed its power in this respect. It is proper in all actions for divorce to try the entire action at the same time as the issues respecting divorce are tried and to give an interlocutory judgment declaring the rights of the parties with respect to property and children.

We commend the action of the court below in this case in declaring, in its interlocutory decree concerning the property, that the rights therein specified should become final at the time the decree of divorce became final. We are not called upon here to determine whether the adjudication of property rights would or would not have been final at the expiration of six months from the time of the entry of the interlocutory decree, if no appeal had been taken, and the parties had, before the expiration of one year and after the expiration of the six months, by mutual consent, procured an order from the court annulling the interlocutory decree of divorce; or whether such annulment would have had the effect of setting aside the decree relating to property rights and children. These questions are not involved in this case, and it will be well to leave them for future disposition in some case where they are directly presented. In the present case the court determined all the issues in one trial and rendered an interlocutory judgment declaring the rights of the parties upon all the issues, and providing that the same should in all respects become final only at the time when the decree of divorce became final, in the meantime allowing temporary alimony. We see no objection to this practice and commend it as not only within the power of the court, but as a proper method of the exercise of that power.

The judgment as to the amount and value of the community property and as to the disposition thereof between the parties is reversed, and the cause is remanded for a new trial and judgment upon that issue alone. In all other particulars the judgment is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.; MELVIN, J.

On Rehearing.

PER CURIAM. Since the filing of the opinion in this case, the plaintiff has asked that, instead of remanding the case for a new trial of the issues as to the property, the judgment be modified in regard thereto, and has filed a written consent that the defendant be allowed, as part of his separate estate, out of the cash on hand, interest at the rate of 7 per cent. on the $15,500 found to be the capital invested in his business. This removes the objection to directing a modification of the judgment. The defendant introduced no evidence to show that the capital invested was entitled to a greater return than legal interest, and, in the absence of such evidence, the burden of proof being upon him, that would be the utmost he could claim. The wife would have been entitled to an opportunity to prove, if she could, that it earned a smaller proportion of the profits than legal interest, and, she being the respondent, it was for that reason considered necessary to order a new trial for that purpose. Her consent aforesaid avoids this necessity and leaves the case in such condition that a modification of the judgment will end the litigation with justice to both parties. Fox v. Hale & Norcross S. Min. Co., 122 Cal. 221, 54 Pac. 731.

Interest at 7 per cent. on the $15,500 from April 19, 1900, the date of the marriage, to November 3, 1905, the time of the trial, amounts to $6,012.70. Deducting this from $12,139.03, found to be the cash on hand at the time of the trial, leaves $6,126.33, as the part of the cash belonging to the community. The plaintiff's three-fifths of this is $3,675.86, and the defendant's two-fifths is $2,450.47.

It is ordered that the judgment be modified by changing the respective statements of the shares of each in the cash on hand therein, so that the part relating to the plaintiff's share shall read as follows: "Second. The sum of three thousand six hundred and seventy-five and 86-100 dollars ($3,675.86), in cash, being three-fifths of the sum of $6,126.33 in cash found by the Supreme Court to be community property of the plaintiff and defendant; and that no interest in defendant's separate property be awarded to plaintiff." And so that the part relating to the defendant's share shall read as follows: "Second. The sum of two thousand four hundred and fifty and 47-100 dollars ($2,450.47), in cash, being two-fifths of the sum found to be community property as aforesaid." And that as so modified the judgment stand affirmed; the plaintiff to recover all costs.

(156 Cal. 93)

LEWIS et al. v. CURRY, Secretary of State, et al. (S. F. 5,200.)

(Supreme Court of California. July 7, 1909.)

1. LICENSES (§ 19*)—TAX ON CORPORATION FOR PECUNIARY PROFIT.

A corporation is one for pecuniary profit, and so not within St. 1906, p. 22, c. 19, § 7, exempting certain corporations from license tax on corporations; it being formed, on the death of one of the partners of a firm possessing vast properties, to take over the properties, issuing shares of its stock to the owners, to dispose of it as soon as could be done without loss, and divide the proceeds among the stockholders, and, in the meantime, in order to preserve its value, to carry on the business and make annual dividends to the stockholders of the net profits.

[Ed. Note.—For other cases, see Licenses, Dec. Dig. § 19.*]

2. LICENSES (§ 32*)—LICENSE TAX—PAYMENT.

Though a foreign corporation was formed to acquire all the property of a California corporation and generally to take the place of the latter in the affairs for which it was organized, and did so, its payment of its license tax under St. 1906, p. 22, c. 19, for the privilege of doing business in the state, was not a discharge of the license tax on the state corporation, which is not imposed alone for the doing of business, but a condition for the corporate privilege and authority to do business.

[Ed. Note.—For other cases, see Licenses Dec. Dig. § 32.*]

3. CORPORATIONS (§ 599*)—LICENSE TAX—FORFEITURE OF CHARTER—PROCLAMATION.

Under St. 1906, p. 22, c. 19, providing that, where the Secretary of State shall have reported a list of all the corporations which are delinquent in payment of the license tax, the Governor shall issue a proclamation declaring that the charters of such delinquent domestic corporations and the right of such foreign corporations to do business in the state will be forfeited unless payment be made before a certain day, the proclamation, giving a list of the names of the corporations, is sufficient without specifying which are domestic and which foreign.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 599.*]

4. CORPORATIONS (§ 599*)—FORFEITURE OF CHARTER—PROCLAMATION AND PUBLICATION.

St. 1906, p. 23, c. 19, § 3, requiring the Governor "forthwith" on the filing, on or before September 15th, of the list of corporations delinquent in payment of their license tax, to issue a proclamation that the charters of such domestic corporations and the right of such foreign corporations will be forfeited unless the tax be paid on or before November 30th, and section 4, requiring that the proclamation shall be filed in the office of the Secretary of State "immediately," and the Secretary shall cause it to be "immediately" published in two daily newspapers of the state, is satisfied as to dispatch by the proclamation being issued September 18th and published September 21st.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 599.*]

5. WORDS AND PHRASES—"FORTHWITH" AND "IMMEDIATELY."

There is no precise definition, so far as time is concerned, of the words "forthwith" and "immediately"; but the meaning depends on the circumstances of the case and the act to be performed.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, pp. 2916–2925; vol. 8, p. 7665; vol. 4, pp. 3403–3410.]

In Bank. Application by Azro N. Lewis and another, as trustees, and by the former individually, for writ of mandate to be directed to Charles F. Curry, Secretary of State, and another. Denied, and writ discharged.

Charles S. Wheeler, for petitioners. Jos. Slye (Chas. W. Kitts, of counsel), for intervener. U. S. Webb, Atty. Gen., R. C. Van Fleet, and Edward F. Treadwell, for respondents.

SHAW, J. The respondent, Miller & Lux, was duly and regularly incorporated under the laws of California in the year 1897. It did not pay to the state of California the state license tax for the year 1907, which the law requires to be paid annually by corporations organized under the laws of this state. The petitioners are stockholders of said corporation and, as such, on behalf of said corporation, they tendered to the Secretary of State the amount due the state on account of such tax for the year ending June 30, 1909. The Secretary refused to receive the money on the ground that the corporation had forfeited its charter by its failure to pay the tax for the year 1907. The present proceeding is an application to this court for a writ of mandate to compel the Secretary of State to receive such license tax, either from said corporation, or from the petitioners as stockholders thereof.

An answer was filed on behalf of the respondent Miller & Lux. It alleges: That the managing officers of said corporation refused to pay the state license tax of said corporation which became due on July 1, 1907, intending thereby to cause a forfeiture of its corporate charter and the dissolution of the corporation; that thereupon, as the law provides, the Secretary of State reported said failure to the Governor, who, on September 18, 1907, duly issued his proclamation that said corporate charter would be forfeited, unless such tax were paid on or before November 30, 1907; that the tax was not paid; that, consequently, said charter became forfeited, whereupon the directors of the corporation took charge of its property as trustees, under the authority given by section 400 of the Civil Code; and that they are proceeding with the settlement of its affairs. The answer purports to be filed by said trustees of the corporation, as a dissolved corporation. The Secretary of State has submitted the case upon a general demurrer to the petition. Melissa A. Potter, a stockholder of the Miller & Lux corporation, has intervened and filed an answer giving a full history of the corporation and of the facts leading to its dissolution, and praying that the writ be denied. The facts are all admitted.

The statute expressly provides for the forfeiture of the charters of all domestic corporations at 4 o'clock p. m. on November 30th of each year, in all cases where there has been a failure to pay the annual charges required by law and a due report of delinquents and proclamation thereof by the Governor, and it further provides that it shall be unlawful for any such corporation thereafter to do any corporate business. St. 1906, p. 22, c. 19, § 5. It is conceded that if this law is valid, self-executing, and applicable to the Miller & Lux corporation, then the Secretary of State has no authority and is under no obligation to receive further state license taxes from or on account of that corporation, that his refusal to accept the tax was justifiable, and that the writ of mandate should not issue.

A number of objections are raised to the validity of the law. We presume it will be admitted that, if it is wholly invalid, no tax became due, and the secretary could not be compelled to receive for the state that which is not due. Admitting its validity, so far as it imposes an annual tax or charge, counsel for petitioners advance various reasons against the validity and effect of the provision declaring the forfeiture of the charters of delinquent corporations, and against its application to the particular corporation, Miller & Lux. The case of Kaiser Land & Fruit Co. v. Charles F. Curry, Secretary of State (S. F. No. 5,146) 103 Pac. 341, was pending before this court at the time the present case was submitted. It involved, with three exceptions, the same questions as are here presented. In the consideration of that case the briefs and arguments in this case were used. The points raised there are fully stated and treated in the opinion filed in that case, and the petitioners' contentions, so far as they are identical with those made here, are declared to be untenable. We refer to that opinion for a full statement and disposition of those questions. We will consider here only the questions peculiar to this case.

1. It is claimed that Miller & Lux is not a corporation for pecuniary profit, and hence that it is not subject to the operation of the law. Section 7 of the statute declares that: "All educational, religious, scientific and charitable corporations, and all corporations which are not organized for pecuniary profit, are exempt from the provisions of this act." The following facts show the purpose, object, and powers of said corporation. There was formerly a partnership between Henry Miller and Charles Lux, known as "Miller & Lux." It possessed vast properties in California and other states. Lux died, and his estate, including his interests in said firm, was ready for distribution by the probate court. The distributees were numerous, and the property of the firm was of such character and its business so large and complicated that it was believed that it would cause serious pecuniary loss and injury to all interested parties, and that it would be impracticable, also, to undertake to carry it on by so many persons as partners, and that it would involve a great sacrifice of its actual value to attempt to sell the property and distribute the proceeds, either in the administration proceedings then pending, or in a subsequent action for partition. To meet this condition the plan was conceived of forming a corporation, conveying and transferring to it all the property of said firm and dividing the corporation stock among the distributees and the surviving partners in proportion to their interests in the firm and in the estate of Lux. The respondent corporation was formed accordingly, under the name of "Miller & Lux," and the plan was carried out in all details. Its articles gave it power to acquire the property of said firm, to dispose of the same as soon as it could be done without loss, to divide the proceeds among the stockholders, and, in the meantime, in order to preserve the value of the property, to carry on the

business formerly conducted by the said firm, and in the same manner, and divide the net profits of the business among the stockholders annually as dividends. See Baldwin v. Miller & Lux, 152 Cal. 454, 92 Pac. 1030. We have no doubt that this was as much a corporation for pecuniary profit, in contemplation of law, as if its sole object had been to carry on the business and distribute the earnings as dividends. The fact that it was to take and hold the property as trustee and sell the same and distribute the proceeds among the former owners does not make it any the less a corporation for pecuniary profit. The main object of the entire scheme which led to its organization was to promote, preserve, and protect the property interests of its stockholders, by preventing the sacrifice thereof which the ordinary processes of law would entail. Its purpose and object was wholly of a pecuniary nature, and its powers were designed to either increase the property interests of its stockholders, or to prevent depreciation thereof. It would be immaterial, where such is the case, whether the corporation was required by its articles to declare direct dividends or not. A mere holding corporation which its stockholders formed because they believed it to be for their pecuniary advantage to do so and with that object in view, would be, in the sense of the law, a corporation organized for pecuniary profit.

2. It is claimed that the tax had been in fact paid, and hence that there could be no legal forfeiture. This point involves some facts not heretofore stated. In 1905, in pursuance of an agreement made between the holders of more than two-thirds of the stock of the corporation, "Miller & Lux," said corporation being also a party thereto, another corporation was formed under the laws of the state of Nevada, under the name and style of "Miller & Lux, Incorporated." This corporation was formed, as its articles declare, for the purpose of acquiring all the property and assets of the California corporation, "Miller & Lux," carrying on all the business and performing all the functions, duties, and obligations of that corporation, and generally to take its place in the affairs for which it was organized. The California corporation immediately afterwards assigned, conveyed, and transferred all its property and assets to "Miller & Lux, Incorporated," and ceased thereafter to do business as a corporation; the business and purposes which it was organized to do and perform being thenceforward done and performed by "Miller & Lux, Incorporated." The Nevada corporation did this business chiefly in this state, and it has regularly every year paid the license tax required of foreign corporations doing business in this state, by the statute under consideration; the amount being the same as in the case of California corporations having the same authorized capital stock. Its authorized capital stock was the same as that of the California "Miller & Lux" corporation. The argument that this payment by the Nevada corporation excuses the California corporation from paying the charge imposed by the statute as a condition for its continued corporate existence, or that it operates as a payment or satisfaction of the demand in favor of the state upon the California corporation for such tax, appears to us to be without force. It is based chiefly on the theory: That the tax is imposed upon California corporations in consideration of the actual transaction of business; that there should be, and was intended to be, but one tax upon the right to do or the doing of the same business; that, as the Nevada corporation has transacted all the business and the California corporation none, the payment by the Nevada corporation for the privilege of doing it, or for the transaction of it, completely satisfies the law and discharges both obligations. This argument is completely refuted by the conclusion reached in Kaiser, etc., Co. v. Curry, supra, that the charge is imposed not alone for the doing of business, but as a condition for the corporate privilege and authority to do business, and that it must be paid by a California corporation as a condition of continued corporate existence, regardless of whether any business is done by such corporation or not. There is no double tax. The Nevada corporation is charged as a condition of its right to do business here; the California corporation as a condition of its right to continue its corporate existence here or elsewhere.

3. It is also contended that the Governor's proclamation and the subsequent publication thereof were defective and ineffectual. The statute provides that when the Secretary of State, on or before September 15th, shall have reported to the Governor a list of all corporations which are delinquent in the payment of the tax, "the Governor shall forthwith issue his proclamation declaring under this act that the charters of such delinquent domestic corporations will be forfeited and the right of such foreign corporations to do business in this state will be forfeited unless payment of such license tax" be made on or before 4 o'clock p. m. of the following 30th day of November. We are not advised as to the date of the making of the report to the Governor by the Secretary of State in the year 1907; but, as the 15th of September of that year was Sunday, we may presume that it was made either on the Saturday preceding or the Monday following that date. The Governor's proclamation was issued on September 18, 1907. It recited the report of the list of delinquent corporations by the Secretary of State, named a large number of corporations as those so reported, and then proclaimed that, unless the payment was made within the time allowed by law, the "charters of domestic corporations of this state

above mentioned will be forfeited, and the right of foreign corporations above mentioned to do business in this state will be forfeited." There was nothing in the proclamation to show which of the corporations named in the proclamation were domestic and which were foreign, except that after stating in the list a number of corporations, the subheading "Foreign. A-Z" occurs, followed by a number of additional names of corporations. There is nothing in the act which requires that the proclamation shall distinguish between domestic and foreign corporations. It is possible that there may be corporations of another state having the same name as corporations of this state. In such a case a stockholder could not know with certainty, from the proclamation alone, whether the named corporation was the one in which he was interested or not; but he would have no difficulty in ascertaining the truth, if he was sufficiently interested to inquire. The contingency is not of such frequent occurrence as to make it of great importance, or to require us to hold such proclamation void unless it gives a more particular description of the respective corporations than that given by their true corporate name. Such designation is sufficient in any ordinary legal document, and even in proceedings in invitum for the levy and collection of taxes. We see no substantial reason for greater certainty here.

It is also claimed that the proceedings were not carried on with sufficient dispatch. Section 3, above quoted, requires the Governor to issue the proclamation "forthwith," upon receiving the Secretary's report. Section 4 requires that the proclamation shall be filed in the office of the Secretary of State "immediately," and that the Secretary shall "immediately" cause it to be published in two daily newspapers of the state. The publications of the proclamation were made on September 21st in newspapers in Oakland and Los Angeles. In our opinion the proceeding was sufficiently expeditious. There is no precise definition, so far as time is concerned, of the words "forthwith" and "immediately." In every case the meaning depends upon the circumstances of the case and the act to be performed. The law in question manifestly contemplates a speedy performance of the respective acts up to the publication of the proclamation, and any considerable delay therein might prevent an effectual forfeiture; but here there were, at most, but two business days between the date of the report and the date of the issuance of the proclamation and a like period thereafter before the ensuing publication. The Governor presumably has many duties to perform, and a delay for that space of time could not be said to be unreasonable. As to the publication, it being necessary to make it in two newspapers of the state, and it being a reasonable interpretation of the act to allow the publication in different parts of the state, some time must necessarily elapse between the time of the filing of the proclamation with the Secretary of State and the time of the issuing of the first publication thereof. A period of three days for this purpose indicates that the business was done with reasonable speed. See Anderson v. Goff, 72 Cal. 73, 13 Pac. 73, 1 Am. St. Rep. 34.

These comprise all the points urged by the argument, except those already considered in Kaiser, etc., Co. v. Curry, supra.

The petition for a writ of mandate is denied, and the writ discharged.

We concur: ANGELLOTTI, J.; MELVIN, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.

156 Cal. 101

LEWIS et al. v. MILLER & LUX et al.

(S. F. 5,201.)

(Supreme Court of California. July 7, 1909.)

CORPORATIONS (§ 617*)—DISSOLUTION—REISSUE OF STOCK.

A corporation having forfeited its charter and become dissolved, and its directors having thereupon, as directed by Civ. Code, § 400, taken charge of its affairs as trustees for purpose of settlement, it or they cannot be allowed or required to perform functions of a corporation or directors by reissuing stock in the name of one to whom it has been transferred by a stockholder.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 617.*]

In Bank. Application by Axro N. Lewis and another, as trustees, for writ of mandate to Miller & Lux and others. Denied, and writ discharged.

Charles S. Wheeler, for petitioners. Edward F. Treadwell, for respondents.

SHAW, J. This is a petition by certain persons claiming to be stockholders of a corporation known by the name of "Miller & Lux," organized under the laws of California, against the said corporation and its alleged directors, to obtain a writ of mandate from this court directing the corporation to reissue to the petitioners a certificate of stock of said corporation. The parties are the same as those mentioned in the case of Lewis v. Curry (S. F. No. 5,200, in which the opinion is this day filed) 103 Pac. 493. The stock was originally issued by said corporation in the name of one George W. Lewis, who had assigned the same to the petitioners. They tendered the certificate so assigned and asked that the said stock be reissued in their name as trustees. The respondents refused to reissue the said stock upon the ground that the said corporation has forfeited its charter and has ceased to exist.

The facts involved in the case concerning the existence of the corporation are precisely the same as those involved in the case of Lewis v. Curry, supra, and the two cases were submitted together. It is clear from what has been said in the opinion in the other case that the corporation, "Miller & Lux," has forfeited its charter by reason of its failure to pay the state license tax due for the year 1907. The directors of the corporation having taken charge of its affairs as trustees as provided in section 400 of the Civil Code, and the corporation having ceased to exist, neither the corporation itself nor its directors can be compelled to continue to do business by reissuing stock transferred from one of its stockholders to another person. The holders of such stock by assignment, of course, have a right to participate in the division of the corporate assets by virtue of such ownership; but the machinery of the corporation has been superseded by that of the trustees in liquidation, and they cannot be allowed or required to perform further functions in their capacity as a corporation or as directors thereof.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The petition is denied, and the writ discharged.

We concur: ANGELLOTTI, J.; MELVIN, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.

10 Cal. App. 734

RABIN et al. v. PIERCE, Justice of the Peace. (Civ. 706.)

(Court of Appeal, Second District, California. June 25, 1909.)

1. JUSTICES OF THE PEACE (§ 162*)—APPEAL—EFFECT.

An appeal from a justice's judgment on questions of both law and fact vacates the judgment and transfers the entire record to the superior court, as though the action had been originally brought there.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 603; Dec. Dig. § 162.*]

2. JUSTICES OF THE PEACE (§ 190*) — JUDGMENT — APPEAL — JUDGMENT OF APPELLATE COURT—EXECUTION.

The judgment of the superior court on an appeal from a justice of the peace on the law and the facts is executed in the same manner as if the action had been originally brought in the superior court; there being no remission to the justice's court for any purpose.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 734; Dec. Dig. § 190.*]

3. JUSTICES OF THE PEACE (§ 166*)—APPEAL—DISMISSAL—STATUTES.

Code Civ. Proc. § 980, giving a superior court power to dismiss an appeal for failure to prosecute the same, applies only to a failure to perfect the appeal, and does not authorize dismissal for appellant's failure to prosecute the perfected appeal with diligence.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 640; Dec. Dig. § 166.*]

4. JUSTICES OF THE PEACE (§ 166*)—APPEALS—DUTY TO PROSECUTE.

Where an appeal is taken by a defendant from a justice's judgment on questions of both law and fact, the plaintiff is the actor in the superior court, and he and not the defendant is bound to prosecute the action to a final determination.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 166.*]

5. JUSTICES OF THE PEACE (§ 196*)—CERTIORARI—SCOPE OF WRIT—RECALLING EXECUTION.

Since certiorari can only issue where an inferior tribunal, board, or officer is exercising judicial functions in excess of jurisdiction, it does not apply to review the ministerial act of a justice of the peace in issuing an execution on a judgment originally entered by him from which an appeal had been taken.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 763–765; Dec. Dig. § 196.*]

Petition by E. Rabin and another for a writ of review against H. A. Pierce, Justice of the Peace for Los Angeles Township. Petition denied.

Hanson, Hackler & Heath, for petitioners.

PER CURIAM. It is made to appear by the verified petition in this case that a judgment was regularly entered by the respondent justice against petitioners, in March, 1907; that within due time an appeal was perfected to the superior court of Los Angeles county, and the papers transmitted thereto, and said cause placed upon the calendar of said court; that afterwards, on the 27th of May, 1909, plaintiff moved the superior court to dismiss the appeal, assigning as a reason therefor that the same had not been prosecuted by appellant with reasonable diligence. On the 29th of May, the defendants, petitioners herein, moved to dismiss the action, for the reason that plaintiff had failed for a period of two years after said cause had been appealed to the superior court, and after the cause had been at issue, to bring said action to trial. Upon the hearing of these motions, the superior court denied the motion to dismiss the action, but entered an order granting the motion to dismiss the appeal, and instructed the clerk to send the files back to the justice's court. The justice, respondent herein, assuming authority by virtue of this last-mentioned order, issued an execution out of the judgment originally entered by him, and from which the appeal was taken, and the same is in the hands of a constable of the township, and the constable is seeking, by levy, to enforce the same. Petitioners ask this court for an order directing the justice to send up all papers in the cause before him, and that this court review the action of the justice, and command the justice to desist from any further proceedings in said action and to recall the execution issued.

The appeal in this case having been one upon questions of both law and fact, when the same was perfected, the judgment of the justice was vacated and set aside, and the cause was transferred, with the entire record, to the superior court, to the same effect as if the action had originally been brought therein. The judgment of the superior court upon such an appeal is executed just as if the action had originally been brought therein, and is not remitted to the justice's court for any purpose. Bullard v. McArdle, 98 Cal. 355, 33 Pac. 193, 35 Am. St. Rep. 176. Section 980 of the Code of Civil Procedure, which confers upon the superior court power to dismiss an appeal, with costs, or costs and penalty, for a failure to prosecute the same, has been by the Supreme Court of this state, in the case of Alexander v. Municipal Court of Appeals

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(Cal.) 4 Pac. 961, held to apply only to cases wherein there was a failure technically to perfect the appeal. There is no warrant for the superior court to dismiss an appeal, after the same is once fully perfected, upon the motion of the plaintiff, because the appellant has failed to prosecute the appeal with diligence. The authority last cited determines the proposition that, where the appeal is upon questions of both law and fact, the plaintiff is the actor in the superior court, and that it is his duty to cause the prosecution of the action to a final determination, and no duty in that regard devolves upon a defendant, who is the appellant, notwithstanding he is invoking the jurisdiction of the appellate court.

It is unnecessary for us upon this application to determine whether the order of the superior court dismissing the appeal was without jurisdiction, as held in Carlson v. Superior Court, 70 Cal. 628, 11 Pac. 778; Hall v. Superior Court, 68 Cal. 24, 8 Pac. 509, and other cases, or within its jurisdiction, but erroneous, as held in Buckley v. Superior Court, 96 Cal. 120, 31 Pac. 8. Under either view, this application must be denied. The only act of the justice of the peace complained of, or subject to complaint, as affecting the respondent, relates to the issuance of the execution out of the judgment originally entered by him and from which the appeal was taken. The issuance of an execution by such justice is a ministerial act only. Hamilton v. Tutt, 65 Cal. 57, 2 Pac. 878; Town of Hayward v. Pimental, 107 Cal. 390, 40 Pac. 545. The writ sought can only issue where it is shown that an inferior tribunal, board, or officer exercising judicial functions has exceeded its or their jurisdiction. The character of the act, and not that of the tribunal, is the proper subject of inquiry. If petitioners have any relief in the premises, it is not that of certiorari; and, whatever may be the effect of the action of the superior court, this application must be denied.

Application denied.

156 Cal. 119

In re MILLER'S ESTATE. (L. A. 2,378.)

(Supreme Court of California. Aug. 11, 1909.)

WILLS (§ 651*) — LEGACIES — FORFEITURE BY CONTEST—PUBLIC POLICY.

A provision that any legatee contesting the will should forfeit her legacy, which should pass to the others under the will, was not contrary to public policy; and hence the widow, having unsuccessfully contested the will, forfeited her legacy, though she had reasonable cause for such contest.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1542; Dec. Dig. § 651.*]

In Bank. Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Judicial settlement of the estate of R. R. Miller, deceased. From a decree of final distribution, Delia F. Miller appeals. Affirmed.

Walter M. Campbell, for appellant. T. R. Archer and Gregg & Surr, for respondents.

ANGELLOTTI, J. This is an appeal by Delia F. Miller from so much of the decree of final distribution in the matter of the estate of deceased as denies her the right to receive a bequest of $1,500, given her by the terms of his last will. The will of deceased, executed the day before his death, disposed of his estate, which was apparently his separate property, as follows:

"I give and bequeath to my wife, Mrs. Delia F. Miller, the sum of fifteen hundred ($1,500.00) dollars.

"Second. I give, bequeath and devise to my adopted daughter, Mrs. Florence M. Stevenson, of Los Angeles, Cal., all the rest, residue and remainder of my estate, both personal and real property and wherever situated.

"Third. I further provide that, in case any devisee or legatee under this will make any contest of this will, then the share herein provided for any such legatee or devisee shall not be paid, but the same shall be forfeited and passed to the others under this will."

When the will was offered for probate, said Delia F. Miller instituted a contest thereto on the grounds of incompetency to make a will and undue influence alleged to have been exercised by Florence M. Stevenson. An answer to her opposition to the probate was filed, and the issues made were tried by the court; a jury having been waived. The court found against the allegations of Mrs. Miller, and admitted the will to probate. No appeal was ever taken from the judgment of the court in the matter of the contest, and such judgment became final prior to the application for distribution. When the estate was ready for distribution, Florence M. Stevenson presented her petition, asking that the whole of said estate be distributed to her, claiming that by reason of the contest of the will made by Mrs. Miller the latter had forfeited all rights under the same and that she had become entitled to receive Mrs. Miller's share as well as her own. Mrs. Miller also filed her petition, alleging that she had made the contest believing and having good reason to believe that the will was invalid on the grounds stated in her opposition. The trial court found that at the time of the contest there was probable cause for the same on the ground of undue influence, but no probable cause for a contest on the ground of incompetency. It concluded that by reason of the contest Mrs. Miller had forfeited the legacy of $1,500 given her by the will, and distributed all of the estate to Florence M. Stevenson, the other beneficiary under the will.

The contest provision of the will is clear and unambiguous in its terms, and it cannot be disputed that Mrs. Miller, by reason of the facts hereinbefore set forth, has lost her right to receive the legacy given her by the will, if such provision is valid and is to be enforced according to its terms. The question of the validity of a condition against contests contained in a will is not now an open one in this state. In the recent case of Estate of Hite (S. F. No. 5,046) 101 Pac. 443, this question was presented, and the court held, following the principles enunciated in the Matter of Garcelon's Estate, 104 Cal. 570, 590, 38 Pac. 414, 32 L. R. A. 595, 43 Am. St. Rep. 134, that such a condition is not against public policy. This ruling was in accord with what is now the universally accepted doctrine. If it be not against public policy, we know of no reason why it must not be enforced according to its terms. A testator has the lawful right to dispose of his property upon whatever condition he desires, as long as the condition is not prohibited by some law or opposed to public policy, such as conditions in restraint of marriage or of lawful trade, "and when a testator declares in his will that his several bequests are made upon the condition that the legatees acquiesce in the provisions of his will, the courts rightly hold that no legatee shall without compliance with that condition receive his bounty, or be put in a position to use it in the effort to thwart his expressed purpose." Smithsonian Institution v. Meech, 169 U. S. 398, 415, 18 Sup. Ct. 396, 42 L. Ed. 793.

Appellant's principal contention is that there was no forfeiture in this case for the reason that she had probable ground for contest. A similar question was presented by the briefs in Estate of Hite, supra, but was there dismissed by the court without discussion. No such exception is stated in the contest provision contained in the will, and we know of no principle that authorizes us to declare it. To so do would be to substitute our own views for a clearly expressed intent of the testator to the contrary. We are aware that some text-writers have expressed views tending to support appellant's contention in this behalf, and that it is the rule adopted in Pennsylvania (see Estate of Friend, 209 Pa. 442, 58 Atl. 853, 68 L. R. A. 447); but we cannot perceive any proper basis upon which to rest such a conclusion. Like the doctrine accepted in many decisions to the effect that no forfeiture of the legacy results under such a provision when there is no gift over of the legacy in the event of a contest, although a forfeiture of land devised will result under such circumstances without a specific devise over, a doctrine repudiated by us in Estate of

Hite, supra, it is a mere attempt at an artificial distinction to avoid the force of a plain and unambiguous condition against contests. See Hoit v. Hoit, 42 N. J. Eq. 388, 7 Atl. 856, 59 Am. Rep. 43. See, also, Bradford v. Bradford, 19 Ohio St. 546, 2 Am. Rep. 419. This point was expressly made in the Matter of Garcelon, supra, and was disposed of in the opinion by a statement to the effect that the views set forth were really conclusive of every question discussed by counsel. This, we think, was necessarily so. If the forfeiture provision as plainly and unambiguously written is not against public policy, it must be enforced as written.

The portion of the decree of distribution appealed from must be affirmed, and it is so ordered.

We concur: SHAW, J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.; HENSHAW, J

156 Cal. 123

ROUGHTON v. KNIGHT. (L. A. 2,264.)

(Supreme Court of California. Aug. 11, 1909.)

PUBLIC LANDS (§ 49*)—FOREST LIEU ACT—REPEAL—EFFECT.

Act Cong. March 3, 1905, c. 1495, 33 Stat. 1264 (U. S. Comp. St. Supp. 1907, p. 499), repealed the "Forest Lieu Act" (Act Cong. June 4, 1897, c. 2, § 1, 30 Stat. 34 [U. S. Comp. St. 1901, p. 1541]), but provided that contracts entered into by the Secretary of the Interior prior to the passage of the act should not be impaired, and that lieu selections might be perfected and patents issued as though the repealing act had not been passed, etc. *Held*, that where complainant, owning a patent to forest reserve land in June, 1899, recorded a deed of his property to the United States pursuant to the forest lieu act and the regulations of the Interior Department, and on June 19th such deed and an abstract showing perfect title in the grantor were filed in the United States land office and forwarded and received by the Commissioner of the General Land Office on June 25, 1899, where they remained, without action or objection, until January 3, 1905, when they were returned to complainant, who made no application to select lieu land until after the repealing act took effect, the Commissioner of the General Land Office was then under no obligation to accept complainant's conveyance, since no contract of exchange could arise under the forest lieu act until a selection of lieu land was made and the conveyance of the base tract filed in the land department.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 49.*]

In Bank. Appeal from Superior Court, Kern County; Paul W. Bennett, Judge.

Action by T. L. Roughton against Harry L. Knight. Judgment for defendant, and plaintiff appeals. Affirmed.

Hannah & Miller and Rowen Irwin, for appellant. Maurice E. Power, amicus curiæ. Geo. E. Whitaker, for respondent.

MELVIN, J. According to the allegations of his complaint, appellant owned 160 acres within a forest reservation. Desiring to exchange it for vacant public land of like extent belonging to the United States, he sought to avail himself of the provisions of the act of Congress approved June 4, 1897, commonly known as the "Forest Lieu Act." Act June 4, 1897, c. 2, § 1, 30 Stat. 34 (U. S. Comp. St. 1901, p. 1541). This act, so far as it pertains to the case here discussed, is as follows: "That in cases in which a tract covered by a patent is included within the limits of a public forest reservation * * * the owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his * * * patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected. * * *"

After the passage of the forest lieu act the Secretary of the Interior promulgated a regulation by which the person contemplating an exchange under the terms of said statute was required to execute a quitclaim deed of his property within the forest reservation to the United States, to record said deed, and to furnish an abstract showing a chain of title from the government back again to the United States. It is averred in the complaint that on June 10, 1899, appellant recorded a deed of his property made in pursuance of the forest lieu act and the regulation of the Interior Department to which reference has just been made; that on June 19, 1899, said deed and an abstract showing perfect title in the grantor were filed in the United States land office at Visalia; that these documents were duly forwarded and received by the Commissioner of the General Land Office about June 25, 1899; that they were held in the Commissioner's office until January 3, 1905, when they were returned to appellant; but that during the time of the retention of the deed and abstract no objection was made by the Commissioner or any one else to their form or sufficiency. The complaint contains the further averment that on March 14, 1905, appellant filed in the land office at Visalia his application in writing whereby he sought to select the land with reference to which this litigation is conducted; that this application was accompanied by the deed and abstract of title above mentioned; but that nevertheless the United States of America, disregarding appellant's rights, on or about November 15, 1907, issued and delivered its patent conveying to respondent the legal title to the land thus chosen by appellant in lieu of his property in the forest reservation. There is also a statement in the complaint that defendant at all times had full notice and knowledge of all things therein set forth. It is further asserted that the legal title to the property in question is held in trust by respondent for appellant, and the prayer is for a decree requiring conveyance to appellant of said title. To this complaint a demurrer was offered. It was sustained, and, plaintiff refusing to amend, judgment went accordingly. From said judgment, plaintiff appeals.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

On March 3, 1905, Congress repealed that portion of the act of June 4, 1897, applicable to the exchange of lands within for public lands outside of forest reservations. This repealing act is in part as follows: "But the validity of contracts entered into by the Secretary of the Interior prior to the passage of this Act shall not be impaired: Provided, that selections heretofore made in lieu of lands relinquished to the United States may be perfected and patents issue therefor the same as though this act had not been passed, and if for any reason not the fault of the party making the same any pending selection is held invalid another selection for a like quantity of land may be made in lieu thereof." Act March 3, 1905, c. 1495, 33 Stat. 1264 (U. S. Comp. St. Supp. 1907, p. 499). It is admitted that plaintiff was not within the exceptions contained in the repealing act, because he had no pending selection, nor did he have any written contract with the Secretary of the Interior; but appellant is of the opinion that he obtained a vested right to make a selection of lieu lands as soon as he made and recorded his conveyance of his realty in the forest reservation according to law, and that this vested right could not be cut off by the subsequent repealing statute.

The very question here presented has been considered by the Secretary of the Interior in the case of Moses, L. S. & R. Co., 34 Land Dec. Dep. Int. 458. That case was one in its facts very similar to that here considered. The selector had complied with all the requirements of the act of June 4, 1897, but the selection of land in lieu of that which he had sought by deed to relinquish to the United States occurred after the adoption of the repealing act of March 3, 1905. His application was rejected solely because of the repeal by the last-mentioned statute of the act of June 4, 1897. In that case, as here, counsel asserted that the partial performance by the selector of the method of procedure prescribed under the forest lieu act entitled him to a completion of the transaction by the United States government, and that a refusal by the government to complete the exchange would be "tantamount to the repudiation by the United States of its own solemn agreement." In reply to this contention the Secretary of the Interior says, in part:

"The act of March 3, 1905, repeals, not merely the invitation to private owners to relinquish their lands, but all the other provisions looking to an exchange. An exchange is essentially a single contract. The rights in the things exchanged usually vest at the same point of time. Lessieur v. Price, 12 How. 59, 74, 13 L. Ed. 893. While the regulations under the act of June 4, 1897, require the private owner of such lands to record his deed and to prepare and file an abstract and deed at the time he makes his selection, it cannot be held that good equitable right to the land relinquished passes to the United States by record of the deed; for some officer of the United States must examine the title, pass upon its sufficiency, and accept it. Cosmos Company v. Gray Eagle Company, 190 U. S. 301, 312, 23 Sup. Ct. 692, 47 L. Ed. 1064. It is a general principle in the law of real estate that title does not pass until the deed is delivered to the grantee. Though acceptance of a title conveyed is, under some circumstances presumed from its being beneficial to the grantee, it will be seen from examination of such cases that there was a lapse of time, with an entry into possession by the grantee, or other evidence of circumstances raising a presumption of the grantee's acceptance of the conveyance. No case is cited, and none has been found by the department, where acceptance of a conveyance of title is presumed from mere filing of the conveyance for record by the grantor. If the grantee is bound to render an equivalent or consideration for the conveyance, it is manifest that to hold the grantee obligated to pay a consideration where he has not received the conveyance is unsound in principle as creating a contract which the grantee never actually considered or determined to enter into.

"The act of June 4, 1897, was a mere proposal for an exchange. No contract arises until a selection is made and the conveyance of the base tract is filed in the land department. Until it is so filed the United States can know nothing of it, and no officer authorized to act on part of the United States can determine whether such proposed exchange can be approved or not. There is not only no contract, but no existent facts from which a contract of exchange can arise. It all rests solely in the one mind of the private owner as something he merely contemplates doing, and there can be for that reason no concourse of two minds, which is essential to the relation of contract. Under the act of June 4, 1897, it is the filing of the deed in the local land office and the selection of land in lieu of that relinquished which initiates the exchange. Until that time the exchange is not initiated, and is merely a purpose in the private owner's intent.

"A proposal may be withdrawn at any time before acceptance. That the act of March 3, 1905, was a withdrawal of the proposal of exchange hardly admits of question. Were it not so intended, the proviso was wholly unnecessary. If it was intended that selections might be made to satisfy all relinquishments of land made with intent in future to make selections, then it was unnecessary to permit the perfecting of incomplete selections actually made, or to permit reselections upon bases assigned in previous ones that failed without the selector's fault. The proviso necessarily implies that Congress intended to withdraw its general proposal of exchange, and to limit future selections to the specified excepted cases. Congress has plenary power over the subject of disposals of public lands, and the land department is without authority to dispose of public lands, unless granted it by Congress."

We think that the views here expressed are sound, and that they are conclusive of the question presented by the case at bar. If the United States government was not bound to convey the land selected by plaintiff, obviously no trust could arise in his favor which might be enforced against defendant, because any obligation upon the part of the latter would have to draw its force from the contract, if there were one, between the government and the selector; and it would be necessary, additionally, that defendant should have full knowledge of such agreement. There is nothing in the opinion of this court in Farnum v. Clarke, 148 Cal. 617, 84 Pac. 169, in conflict with this conclusion. In that case the question to be determined was whether or not a person desiring to dispose of his land under the forest lieu act could compel his agent, to whom he had intrusted the duty of selection and exchange, specifically to perform the contract. The significant language of the opinion in that case is as follows:

"When a locator under the act files his selection in compliance with the rules and regulations of the land department, and accompanies it with proof that the lands of which he makes selection are vacant and open to settlement, and these facts are true, the Commissioner of the General Land Office has no arbitrary right to reject the selection, but must approve it, and upon such approval the right of the selector to the land takes effect by relation as of the date of his original selection. Kern Oil Company v. Clarke, 30 Land Dec. Dep. Int. 550. When such an approval is had by the Commissioner, the locator becomes the full equitable owner in the land selected; but it by no means follows that until then he had acquired no interest or right in the land by virtue of his selection. On the contrary, we are satisfied that he did. He was possessed of the right under the act to acquire public land, had exercised that right to become the owner of the particular land on which he filed the selection, and had done all that was required by him to do under the act in order to obtain a perfect title. Under these circumstances, if he acquired nothing more, he acquired at least an inchoate equitable right, a right which was capable of being enlarged into a complete title by the approval of the Commissioner of the General Land Office, and was a right which the land department itself, in effect, recognizes may be sold and assigned after such selection is filed. Matter of Mallory, 31 Land Dec. Dep. Int. 213."

The language in that opinion has no application to such a problem as the one here presented, where Congress withdrew the land from exchange before an application had been made to set it apart. There is no theory by which the duty of the Commissioner of the General Land Office to approve plaintiff's selection, if any existed, could be transferred to defendant; and unless defendant can be charged with responsibility for the omission of the Commissioner to perform such duty, if there was one, there can be no trust which defendant is bound to execute.

The demurrer was properly sustained, and the judgment is therefore affirmed.

We concur: HENSHAW, J.; LORIGAN, J.; SHAW, J.; ANGELLOTTI, J.; SLOSS, J.

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156 Cal. 135

LANE v. TANNER et al. (L. A. 2,253.)

(Supreme Court of California. Aug. 13, 1909. Rehearing Denied Sept. 11, 1909.)

1. APPEAL AND ERROR (§ 574*)—ALTERNATIVE METHOD—CERTIFICATION OF TESTIMONY.

Code Civ. Proc. §§ 941a-941c, as added by Laws 1907, p. 753, c. 410, providing a method whereby appeals may be taken without service of notice on opposing parties, the cause being transferred to the appellate court on the filing of notice with the clerk of the trial court, and providing that appeals taken by this method shall have the same force as those taken pursuant to sections 939-941, provided, however, that any question may be reviewed therein which could be reviewed on an appeal taken pursuant to section 939 and within 60 days of rendition of judgment, give no implied right to bring up the testimony in the transcript by merely having it certified; section 939 providing merely for the time within which certain appeals may be taken, the scheme for certification of the testimony being furnished elsewhere in the Code, and the fact that the right to appeal on the mere filing of the notice with the clerk does not give the right to so bring up the testimony, and relieve appellant of having either a statement or a bill of exceptions settled and certified, or a transcript approved, by the court, as provided in section 953a, as added by Laws 1907, p. 750, c. 408, if he would have the appellate court consider the testimony, as well as the judgment roll, being clearly indicated by the latter section, approved on the same day as sections 941a-941c, and with them forming a scheme or schemes of appeal, and therefore required to be read together, and pointing out two methods, neither of them the one in question, whereby one who desires to appeal or has appealed may have the testimony sent to the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2567; Dec. Dig. § 574.*]

2. APPEAL AND ERROR (§ 574*)—CERTIFICATION OF EVIDENCE.

Even if an implied right on one appealing by the alternative method there provided to bring up the testimony in the transcript by merely having the testimony certified were conferred by Code Civ. Proc. §§ 941a-941c, as added by Laws 1907, p. 753, c. 410, a certificate by the shorthand reporter would not be sufficient; the court or judge alone being empowered to make such a record authentic.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2567; Dec. Dig. § 574.*]

3. TRIAL (§ 388*)—FINDINGS OF FACT—NECESSITY.

Findings by the court on a defense are unnecessary; its judgment for defendants on another defense being correct.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 908; Dec. Dig. § 388.*]

4. APPEAL AND ERROR (§ 907*)—SUFFICIENCY OF EVIDENCE—PRESUMPTIONS.

In the absence of a bill of exceptions, the appellate court must conclude that the evidence justifies and sustains the findings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2911; Dec. Dig. § 907.*]

5. BANKRUPTCY (§ 149*)—PARTNERSHIP PROPERTY—ACTION BY TRUSTEE OF BANKRUPT PARTNER.

Five months before the filing of the petition in bankruptcy of A., who was an equal partner with W., they gave a chattel mortgage to T. on goods of the partnership to secure the note of W. and wife. The note became due 38 days before the filing of such petition, and, not being paid, T., as authorized by the mortgage, 16 days later took possession of the property, the possession by the terms of the mortgage relating to its date, and after due advertisement and notice sold part of the property, applied enough of the proceeds on the mortgage to satisfy it, paid the balance to W., and returned to the partnership the property unsold. *Held*, under Bankr. Act July 1, 1898, c. 541, § 5h, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3424), providing that if one, but not all, of the members of a partnership be adjudged bankrupt, the partnership property shall not be administered in bankruptcy, but the partner not adjudged bankrupt shall settle the partnership business, and account for the interest of the bankrupt partner, that, as lawful possession was taken of the property by T. before the filing of the petition in bankruptcy, the trustee in bankruptcy could not sue for the property or its equivalent.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 229; Dec. Dig. § 149.*]

Department 2. Appeal from Superior Court, Santa Barbara County; Walter Bordwell, Judge.

Action by H. P. Lane, trustee of the estate of Addie L. Allen, bankrupt, against Albert F. Tanner, George H. Gould, and Albert C. Williams. Judgment for defendants, and plaintiff appeals. Affirmed.

Ralph W. Schoonover, for appellant. G. H. Gould, for respondents.

MELVIN, J. This is an appeal from a judgment in favor of defendants. The plaintiff, as trustee for Addie L. Allen, a bankrupt, seeks recovery for the alleged fraudulent conversion of property belonging to the firm of A. C. Williams & Co., in which Mrs. Allen was a partner. The complaint contains averments to the effect that on April 22, 1905, while Addie L. Allen's petition in bankruptcy was pending before the federal court, the defendants unlawfully conspired to take certain personal property of A. C. Williams & Co., situated at the dairy of said firm, and by means of a sale thereof, to convert it to their own use and benefit, by applying it to the satisfaction of a pretended debt of defendant Williams, and thereby to hinder, delay, cheat, and defraud said Allen, her individual creditors, and the creditors of the firm of which she was a member, and to prevent her and these creditors from subjecting said property to their just claims. The answer, after traversing the material allegations of the complaint, set up by way of defense a certain chattel mortgage given by Williams and Allen in November, 1904, to secure the payment of a note in favor of Tanner, signed by Williams and his wife, and it is averred that on the 31st day of March, 1905, Tanner, in accordance with the terms of said mortgage lawfully took possession of the property described therein, advertised it for sale according to law, and that a portion of it was sold at public auction on the 22d day of April, 1905, to satisfy the said note. Another defense is urged, based upon a judgment dated May 13, 1905, in an action for an accounting brought by Allen against Williams, by which the court found that, in an accounting including all matters up to May 1, 1905, Allen was indebted to Williams in the sum of $561.07. This judgment is pleaded by way of estoppel of plaintiff's claim for any sum due from defendants, or any one of them, to plaintiff's bankrupt. According to the averments of the complaint, Mrs. Allen's petition in bankruptcy was filed on April 12, 1905, she was adjudged a bankrupt on December 5, 1905, and the appellant herein was subsequently selected as sole trustee of her estate. It will be seen that the date upon which Tanner received the property, according to the allegations of the answer, was before the filing of Mrs. Allen's petition in bankruptcy, but that the sale mentioned in both pleadings occurred after the petition had been presented to the United States District Court.

Respondents call our attention to the fact that, although the transcript contains a large number of pages of purported testimony certified by the court reporter, there is no properly authenticated bill of exceptions. Appellant freely admits that he has neither prepared a bill of exceptions nor has he given the notice prescribed by section 953a of the Code of Civil Procedure, nor observed any of the other requirements of that section. The contention in this behalf is that, although no express method of bringing up the record is provided by sections 941a, 941b, and 941c of the Code of Civil Procedure, as added by Laws 1907, p. 753, c. 410, there is an implied power derived from the provisions of those sections to bring up the testimony as appellant has sought to do here.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

This position is wholly untenable. The sections just mentioned provide a method whereby appeals may be taken without the necessity of service of notice upon opposing parties or attorneys. When such notice is filed, the cause is transferred to the appellate court without any further action on the part of appellant. It is provided that appeals taken by this method shall have the same force as those taken pursuant to the provisions of sections 939, 940, and 941 of the Code of Civil Procedure, "provided, however, that any question may be reviewed therein which question could be reviewed upon an appeal taken pursuant to the provisions of section 939 of this Code and within 60 days of the rendition of judgment." But section 939 of the Code of Civil Procedure provides for the time within which certain appeals may be taken. It contains no scheme for certification of the testimony in the case. That is furnished elsewhere in the Code. If appellant's contention was correct, appeals might have been taken under section 939 of the Code of Civil Procedure before the adoption of the new sections 941a, 941b, and 941c in 1907, and the testimony might have been considered without the necessity of a bill of exceptions or statement of the case; but the universal practice has been to follow those sections of the Code of Civil Procedure which provide for the due presentation, settlement, and authentication of such record of the testimony and proceedings. Even if the implied right for which appellant contends were conferred by the cited sections, the certificate of the shorthand reporter would not be sufficient. Nowhere is there provision for such certificate. The court or the judge alone is given power to make such a record authentic. But clearly the right to appeal from a judgment, order, or decree by the filing of appropriate notice with the clerk does not relieve appellant from the necessity of having either a statement or a bill of exceptions settled and certified, or having a transcript approved by the court as provided in section 953a of the Code of Civil Procedure, as added by Laws 1907, p. 750, c. 408, if he would have the court to which the appeal is taken consider the testimony as well as the judgment roll. Section 953a itself indicates this when it points out two methods whereby one who desires to appeal or who has appealed from any judgment, order, or decree may have the testimony sent to the higher court. This section was approved on the same day as sections 941a, 941b, and 941c of the Code of Civil Procedure. They all form a part of a scheme, or rather schemes, of appeal, and are to be read together. We cannot consider the purported testimony, which was erroneously inserted in the transcript. Sutton v. Symons, 97 Cal. 475, 32 Pac. 588.

It is stipulated by counsel that the judgment roll is set forth on designated pages of the transcript and that it consists of "the pleadings, the orders made on demurrers, and copy of the findings, and a copy of the judgment herein, and that the judgment roll herein contains no other document than those above named." The findings and judgment are in accordance with the allegations of the answer, except that the court did not find with reference to the alleged estoppel of the judgment in Allen v. Williams. This was not necessary, if the judgment on the other causes of defense is correct; and we hold that it is. There are findings that on April 12, 1905, Addie L. Allen and A. C. Williams each owned an undivided one-half interest in a certain dairy in Santa Barbara county and in the assets of such business, subject to an accounting between the partners and payment of debts; that the averments of the complaint with reference to the bankruptcy proceedings and the appointment of appellant as trustee are true; and that the allegations of conversion are untrue. As there is no bill of exceptions, we are bound to conclude that the evidence justifies and sustains the findings. Mock v. City of Santa Rosa, 126 Cal. 340, 58 Pac. 826. Additionally the court found that on November 18, 1904, Williams and his wife made a note for $2,000, payable to defendant Tanner, or order, before March 15, 1905, and that said Williams and said Allen executed the chattel mortgage which was copied in the answer; that the note was not paid when due; that Tanner took possession on March 31, 1905, of the personal property described in said mortgage, and no other property of the firm or either of its members; that after due advertisement, and actual notice to Allen and Williams, Tanner sold some of said property at public auction for the highest obtainable price; that the money so obtained was applied to the payment of the note, interest, and expenses of sale, and that the balance was paid to Williams; and that the property unsold was returned by Tanner to the copartnership. The court concludes, as matter of law, that the seizure, the sale and the application of the proceeds were all in accordance with law.

We think the conclusions of law are thoroughly justified by the findings. The bankrupt's petition could only affect the bankrupt's property, and, where the partnership is solvent, could only give the bankrupt the right to have the solvent partner account. Bankr. Act July 1, 1898, c. 541, 5h, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3424). But the bankrupt had no right to the possession of the mortgaged property at the time she filed her petition. The possession under the terms of the mortgage related to its date. As the seizure was authorized by the terms of the mortgage, and lawful possession was taken of the property before the filing of the petition in bankruptcy, it follows that the trustee had no power to sue either for the chattels or their equivalent. Perkins v. Maier & Zobelein, 133 Cal. 496, 65 Pac. 1030.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

156 Cal. 129

In re BOTTOMS' ESTATE.

DURAND v. RARDON. (L. A. 2,295.)

(Supreme Court of California. Aug. 12, 1909. Rehearing Denied Sept. 11, 1909.)

1. Executors and Administrators (§ 502*)—Intermediate Account—Form and Requisites.

While an administratrix is required by Code Civ. Proc. § 1622, in rendering an intermediate account, to state all matters necessary to show the condition of the estate, the court is only required to ascertain the accuracy of the account as far as the receipts and disbursements of money are concerned; the administratrix not being required to charge herself therein with all the property of the estate as disclosed by the inventory and appraisement, as required in a final account.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2150; Dec. Dig. § 502.*]

2. Executors and Administrators (§ 135*)—Acts Without Permission—Effect.

Where the court could have granted an administratrix authority to pay out certain funds of the estate to complete a purchase of real estate, the fact that the administratrix made the payment without the court's permission did not render the expenditure improper, but only left its propriety open to investigation on the settlement of her accounts.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 135.*]

3. Executors and Administrators (§ 510*)—Expenditures—Allowance—Review.

An expenditure by an administratrix in good faith and for the benefit of the estate, when duly allowed, will not be reviewed, unless there is no ground in the record on which it can be supported.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 510.*]

4. Executors and Administrators (§ 135*)—Expenditures—Allowance.

Intestate having purchased certain real estate, and the vendor having died before conveyance, leaving six heirs, intestate purchased the interests of four of the heirs and deposited with the vendor's administrator, as agent of the other two, the price of their interest, but died before he received a conveyance. On settlement of the vendor's estate, it was found that, before the property could be distributed to his heirs, administration expenses, etc., amounting to $455 would have to be provided for. *Held*, that payment by the administratrix of her pro rata share of such amount, based on the interests of the vendor's heirs in the property, instead of proceeding to compel a conveyance by the vendor's administrator, as authorized by Code Civ. Proc. § 1597 et seq., was justifiable, and was properly allowed as a credit on her account.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 135.*]

5. Executors and Administrators (§ 32*)—Letters—Revocation.

Facts *held* not to justify the revocation of letters of administration for alleged mismanagement of the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 32.*]

Department 2. Appeal from Superior Court, Kern County; Paul W. Bennett, Judge.

Judicial accounting by Kate B. Rardon, as administratrix of the estate of John Thomas Bottoms, deceased. From an order allowing an intermediate account over exceptions filed by Nellie A. Durand, and denying exceptant's application to revoke the administratrix's letters of administration, exceptant appeals. Affirmed.

T. R. Archer, for appellant. D. M. Adams, for respondent.

LORIGAN, J. The deceased died intestate about June 3, 1904, leaving an estate and as his heirs three daughters, the appellant and respondent here and Purle B. Athearn. On June 24, 1904, the respondent was appointed and qualified as administratrix of the estate of deceased, and took charge of the property belonging to it, which consisted of both real and personal property. No account having been filed by respondent of her administration of the estate up to January 17, 1907, the appellant petitioned the court for a citation to compel the filing of an account by her and for a revocation of her letters of administration. The respondent filed an account, which was assented to as correct by Purle B. Athearn, one of the sisters, and also filed an answer to the petition for the revocation of her letters. The appellant filed exceptions to all the items of the account. The hearing of the account and of the application for the revocation of letters of administration were brought on at the same time, and the court, after allowing certain objections of the appellant against the account, entered an order settling it, and likewise entered an order denying the petition for the revocation of her letters. The appellant appeals from both orders.

There is no merit in any of the points made by appellant with reference to the settlement of the account. The claim on her part that the decree of settlement should have charged the administratrix with all the property of the estate as disclosed by the inventory and appraisement of the estate is answered by saying that the account before the court for settlement was not a final account, but was in the nature of an annual account, filed under section 1622 of the Code of Civil Procedure, and contained all the matters required by that section. The court found that the administratrix had received certain moneys belonging to the estate and had made certain disbursements from it, and decreed that there was a balance of $856.64 in the hands of the administratrix belonging to the estate. It was only necessary for the court to examine into the accuracy of the account of the administratrix as far as the receipts and disbursements of money were concerned. These, and matters incidental thereto, were all that were embraced in the account considered strictly as an account, and were the only matters to be passed on by the court at that hearing. While it was the duty of the administratrix, in rendering her account as to those matters, to state also all other matters necessary to show the condition of the affairs of the estate, this she did by attaching to such statement a report showing all the property of the estate which had come to her hands other than money. But, while it was necessary under said section 1622 to make such a report, it was not necessary that a decree of settlement of account rendered under that section should charge the administratrix in the decree of settlement with the entire property of the estate in her hands, but simply to determine the accuracy of her accounts as to money transactions which she has had with the estate, to ascertain what money she has received and what proper disbursements of it she has made, and to determine the balance of money in her hands. As to all other items of property, personal or real, belonging to the estate, while, undoubtedly, she must account for it, such an accounting is to be made upon final settlement, and it is not necessary, in the settlement of an annual or preliminary account, that the decree of the court shall charge her with it.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It is next insisted that the court erred in allowing the administratrix credit for $235 as cash paid to the administrator of the estate of one Cochrane, deceased, on a contract made by the deceased Bottoms in his lifetime for the purchase of a certain piece of land. This transaction was as follows: One C. A. Cochrane in his lifetime had made a contract with Bottoms to sell him a certain 80-acre tract of land. It does not appear what the terms of this contract were. After the death of Cochrane, and while his estate was being administered, Bottoms purchased direct from four of the six heirs of Cochrane their interests in the tract and took deeds therefor. He also deposited with Lightner, administrator of the Cochrane estate, but really as agent of the two remaining Cochrane heirs, the purchase price of their interest (it is to be assumed under the contract of purchase made with Cochrane); but no conveyance was made by them to Bottoms, as he died a day or two following the deposit of the money. When it came to a settlement of the Cochrane estate, it was found that before a distribution could be had, and the 80 acres distributed to the heirs of Bottoms, deceased, the expenses of administration in the Cochrane estate, consisting of attorney's fees, commissions, and filing and recording fees, amounting to $455, would have to be provided for. As a proportionate part of this amount, based on the interest which the heirs of Bottoms had in the property of the estate of Cochrane amounting to this 80 acres of land, and in order to obtain a distribution thereof, the respondent, as administratrix of the Bottoms estate, paid the administrator of the Cochrane estate the $235 in question. While it is true that the propriety of this payment was an open question in the settlement of the account of the respondent, we do not think the order of the court ratifying or confirming the payment should be disturbed. While it may be assumed that the contract between Bottoms and Cochrane (it is not set out in the record) was sufficient to have entitled the former in his lifetime to compel a conveyance of the land to him from the administrator of the Cochrane estate under section 1597 et seq. of the Code of Civil Procedure, still it appears that Bottoms did not himself pursue that method, but obtained conveyances directly from four of the heirs of their interests, and had deposited the purchase price for the interests of the other two. In this condition of things the only way to have obtained a clear title to the entire tract by the heirs of Bottoms was by distribution of that property to them in the estate of Cochrane. But, if we assume that the administratrix might have proceeded to have obtained a conveyance from the administrator of the Cochrane estate, she would have been required to have followed the procedure pointed out in the Code sections referred to. This would have necessitated the employment of a lawyer, expenses of publication, and incidental expenses, and, if opposition was made to the conveyance, it might have involved a lengthy, and as to the outcome an uncertain, litigation.

Although the evidence is quite indefinite upon the subject, it appears that there was some contract made between Bottoms and the Cochrane heirs, when he purchased their interests in the property, about the payment of the expenses of administration in the Cochrane estate. It is indefinite because, while it appears that when Bottoms purchased these interests it was calculated that the expenses of administration in the Cochrane estate up "to that hour" were $100, and that the Cochrane heirs "were to bear it wholly," it does not appear what arrangement was made between them as to the subsequent expenses. It is quite a reasonable inference, however, that there was some arrangement made with reference to the payment of subsequent additional administration expenses, or there would have been no necessity for an agreement between them that the Cochrane heirs should bear those which had accrued up to a certain time. However that may be, the mere fact that the administratrix might have proceeded to have obtained title to the property in a proceeding to compel conveyance (as appellant insists she should have done) was not conclusive upon the power of the court to allow her for expenses incurred in procuring it otherwise. By the method she adopted the estate of Bottoms obtained possession of the property much earlier than if it had been involved with the Cochrane estate, or the heirs thereof, in a litigation either as to the right at all to a conveyance or as to whether the interest of Bottoms in the estate of Cochrane should be distributed to them only upon payment of an equitable proportional part of the accrued expenses of administration, or if measures for the sale of the property of the Cochrane estate had been taken to pay the expenses of administration and so postponed the time of distribution thereof. When the administratrix obtained possession of this property, it was immediately leased out to the advantage of the Bottoms estate, and necessarily to the advantage of the heirs thereof. If the administratrix, before making this payment, had applied to the court for leave to expend the $235 for the purpose of paying a part of the expenses of administration of the Cochrane estate proportionate to the value of the estate to be distributed to the Bottoms heirs, so as to secure possession of the property, instead of proceeding to compel a conveyance, with the expense attending such a proceeding and the delay and uncertainty of the litigation, the court would undoubtedly have power to have permitted the administratrix to do so. The fact that she made the payment without permission of the court did not render the expenditure improper, but only left its propriety open to question—her action to be approved or rejected as the court found it a proper or an improper expense. This was a question primarily for the court to settle, and its order of settlement in that respect will not be reviewed, unless there is in the record no ground upon which it can be supported. It cannot be said that that appears here. The court found that the payment was made in good faith, under circumstances which made it advantageous and beneficial for the estate to have made the payment, and has approved it, and, we think, under the circumstances shown, the action was right.

These are the only objections to the settlement of the account which have even apparent merit.

As to the appeal from the order denying the petition of the appellant for revocation of the letters of respondent: In her petition appellant alleged that respondent, as administratrix, had mismanaged the estate and had purposely and unnecessarily delayed the final closing thereof. These allegations were denied by the respondent, and were found by the court to be untrue, and these findings are abundantly supported by the evidence in the record. Referring to this matter briefly, it appears that when the administratrix took charge of this estate it was heavily indebted, and that by the advancement for its benefit of her own money, and by careful and judicious management of the property of the estate, and by judicious sales of the produce of the lands, she has succeeded in paying the large indebtedness left by the deceased and has preserved for the heirs by far the largest and most valuable portion of the real property. She appears to have so energetically, honestly, and faithfully handled the affairs of the estate as to make the charge of mismanagement entirely unwarranted. As to the claim that she delayed the closing of the estate, it appears that as to practically all matters concerning her administration of it the appellant was consulted, and that the appellant never asked her for an accounting, nor did the respondent ever refuse to file an account of her administration, and that the delay in filing her account, of which the appellant complains, was with the full consent and approbation of the appellant herself.

The decree appealed from is affirmed.

We concur: HENSHAW, J.; MELVIN, J.

156 Cal. 140

WILLIAMS v. ATCHISON, T. & S. F. RY. CO. (L. A. 2,249.)

(Supreme Court of California. Aug. 14, 1909.)

COSTS (§ 169*)—REPLEVIN BOND PREMIUM.

Code Civ. Proc. § 1033, allowing recovery of disbursements "necessarily" incurred in the action, does not make the premium paid a surety company for a replevin bond, procured pendente lite by a plaintiff ultimately successful, a proper item of costs; it not being a necessity to plaintiff's cause of action that he take into possession the property pending the action, but a privilege granted on filing the bond, and the filing of the bond by a surety company likewise being a privilege, and not a necessity.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 169.*]

Department 2. Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by J. H. Williams against the Atchison, Topeka & Santa Fé Railway Company. From an order as to costs, plaintiff appeals. Affirmed.

Haines & Haines, for appellant. T. J. Norton, J. Wade McDonald, and M. W. Reed, for respondent.

HENSHAW, J. This was an action of claim and delivery for the recovery of specific personal property or its value. To obtain possession of the property pending the action, plaintiff proceeded under the provisions of the Code, filed an undertaking in twice the estimated value of the property, and under this undertaking took the property into possession. He secured his bond from a surety company, as authorized by section 1056, Code of Civil Procedure, and in his memorandum of costs and disbursements included the item of $43.75, premium charge paid for the bond. On motion of defendant, the court, in taxing the costs, struck this item from the bill; and from its order so doing plaintiff appeals.

The sole question presented, therefore, is whether the reasonable charge paid to a surety company for a replevin bond, procured pendente lite by a plaintiff ultimately successful, is or is not a proper item in a cost bill. The right to recover costs is purely statutory, and, in the absence of a statute, no costs can be recovered by either party. Fox v. Hale & Norcross S. M. Co., 122 Cal. 219, 54 Pac. 731. Section 1023 of the Code of Civil Procedure is the statute which gives the right of the recovery of costs. Section 1033 prescribes the procedure for their recovery, and defines what costs and disbursements are recoverable. That section declares, in effect, that one may recover disbursements necessarily incurred in the action. The right accorded to a party, upon filing a proper bond, to take into possession the personal property in dispute, is a privilege accorded him by law. It is not a necessity to his cause of action. And while a replevin bond is a necessity, if he so desires to take possession, the filing of such an undertaking by a surety company is likewise not a necessity, but a special privilege accorded under the statute. The cases are numerous where specific items charged as costs have been disallowed for lack of statutory authority, and no authority in the statute can be found for the allowance of an item such as this. So far as the adjudicated cases are concerned, it will be found that the premiums paid for an appeal bond and for a supersedeas bond were allowed in the Circuit Court in Edison v. American Mutoscope Co., 117 Fed. 192; it being declared that, under authority for taxing legitimate and proper disbursements rendered necessary by rules of practice, "these premiums seemed to be such disbursements." On the other hand in Re Hoyt (D. C.) 119 Fed. 987, it is held that the amount paid as a premium on such a surety bond cannot be taxed as costs, since permission to give such a bond by a surety company is a privilege and convenience, and not a necessity. To the same effect is The Willowdene (D. C.) 97 Fed. 509, Lee Injector Mfg. Co. v. Penberthy I. Co., 109 Fed. 964, 48 C. C. A. 760, Somerville v. Wabash R. Co., 111 Mich. 51, 69 N. W. 90, and Wadleigh v.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Duluth St. Ry. Co., 92 Minn. 415, 100 N. W. 362.

If it shall seem desirable that such costs shall be permitted, it will be an easy matter for the Legislature to make provision to that end. In the present condition of the law, the order appealed from is affirmed.

We concur: LORIGAN, J.; MELVIN, J.

156 Cal. 162

LUCE v. HOLLOWAY. (L. A. 2,276.)

(Supreme Court of California. Aug. 17, 1909. Rehearing Denied Sept. 16, 1909.)

1. MASTER AND SERVANT (§ 315*)—RESPONDEAT SUPERIOR—INDEPENDENT CONTRACTOR.

One who contracts to perform certain work, lawful in itself and not inherently injurious to another, is in general not responsible for the negligence of a subcontractor, doing the work under an independent contract.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 315.*]

2. MASTER AND SERVANT (§ 316*) — INJURIES TO SERVANT — INDEPENDENT CONTRACTOR — STREET PAVING.

A city ordinance regulating the work of street paving provided that the contractor should observe all the ordinances as to the obstruction of the streets, and that all railroad tracks, etc., should be protected, and the contractor should be responsible for any damage caused by negligence of his employés. *Held*, that where a private street-paving contractor let to an independent contractor the work of grading a street, to be paved within two feet on either side of a railroad track, it appearing that it was probable, unless vigilance was exercised, that earth would be thrown on the track in the process of excavation, the contractor was liable for injuries to a locomotive engineer, caused by the derailment of the engine, due to earth thrown on the track by an independent subcontractor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1242, 1243; Dec. Dig. § 316.*]

Department 2. Appeal from Superior Court, Los Angeles County; G. A. Gibbs, Judge.

Action by George P. Luce against Andrew Holloway. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, he appeals. Affirmed.

James McLachlan and Louis Luckel, for appellant. Anderson & Anderson and Joseph Scott, for respondent.

MELVIN, J. Plaintiff and respondent was a locomotive engineer employed by the Atchison, Topeka & Santa Fé Railroad Company. While his engine was temporarily in charge of the trainmaster, but while Luce was on board, the locomotive was derailed on one of the streets of the city of Pasadena by some earth that had been piled on the track by workmen engaged in grading the street. The accident caused serious injury to plaintiff, and judgment in his favor was rendered against the appellant, who was the contractor to whom permission of the city council of Pasadena had been given to pave with asphalt the street on which the railroad track was located. This appeal is from the judgment, and from an order denying a motion for a new trial.

Appellant was the contractor for private owners. His contract was for paving all of the street except that portion occupied by the railroad track and two feet on either side of it. The actual grading was in charge of subcontractors. Defendant testified that he had nothing to do with the manner in which these subcontractors performed their work. At the time plaintiff received his injuries the graders were using a plow, and their operations had caused some of the loosened earth to fall on the track. The one question presented for our consideration is whether or not the contractor, Holloway, may be held liable for an injury due to the negligence of the subcontractors.

Undoubtedly the general rule is that one who contracts to perform certain work, lawful in itself and not inherently injurious to another, is not responsible for the negligence of a subcontractor engaged in executing the work under an independent contract. Appellant's position is this: The subcontractors were employed to grade the street to a line two feet from the track on either side. To perform this work there was no necessary entry upon that portion of the railroad company's right of way covered by its track, nor any compulsion upon the graders to use that space for depositing loose earth. Therefore, appellant maintains, the act which resulted in the injury of plaintiff was collateral to the main work then going on, and could not have been anticipated by appellant. In California we are undoubtedly committed to the general rule for which appellant contends. For more than 50 years, since the decision in the case of Boswell v. Laird, 8 Cal. 487, 68 Am. Dec. 345, this court has held consistently that, generally speaking, the rule of respondeat superior does not apply to cases in which injury results from the negligent acts of an independent subcontractor. Respondent concedes the force of this rule, but contends that this case on its facts comes within the well settled general exception to the nonresponsibility of the original contractor. He advances the following propositions for our consideration: (1) Appellant was granted his permit to do the work in question by the proper authorities of the city of Pasadena, and without such permission the digging up of the street would have constituted a public nuisance. (2) The grading was performed under the provisions of an ordinance which imposed upon the contractor certain duties. The compulsion of the ordinance was upon the contractor to whom the formal permission to dig in the street had been given, and the responsibility was of such nature that it could not be properly shifted to a subcontractor. (3) The piling of dirt upon the track arose logically, although not inevitably, from the nature of the work of grading the street. (4) Under the circumstances, the subcontractors, so far as the public was concerned, were merely agents of appellant. (5) Therefore the doctrine of respondeat superior applies.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

In considering these propositions, let us first examine the ordinance under which, by the terms of his license, appellant was to conduct the work of paving the street. The material part of it was as follows (the italics being ours): "The contractor will be required to observe all the ordinances of the city council, in relation to the obstruction of streets, keeping open passageways, and protecting the same where they are exposed or would be dangerous for public travel. * * * *All railroad tracks*, gas or water pipes, connections, electrical conduits, tubing or underground structures of any character, belonging to the city or others, *shall be properly protected*, and the contractor shall be *responsible for any damage* that may be caused by negligence or carelessness on the part of his employés." Other cautionary measures are enjoined on the contractor, and the conclusion seems inevitable that personal duty of an unassignable character was laid upon him. In other words, he is brought squarely within the doctrine of Colegrove v. Smith, 102 Cal. 223, 36 Pac. 411, 27 L. R. A. 590. That was a case in which plaintiff was injured by reason of the improper filling of defendant's trenches in a street of Pomona. The actual work had been done by a subcontractor. This court there said: "It is commonly stated, and in a large class of cases correctly, that the principle of respondeat superior does not apply where the negligent or wrongful act is that of an independent contractor, or of his servant or employé, unless the superior has been guilty of negligence in contracting with an unfit person. For a full discussion of the general doctrine above stated, see Boswell v. Laird, 8 Cal. 469, 68 Am. Dec. 345. But there are exceptions to the general doctrine, and this case, we think, is one of them. The board of trustees of the city was charged by the law with the care and maintenance of the streets in a safe and proper condition for the use of the public. Appellants could not lawfully dig trenches and lay water pipes without express authority from the city. If they had undertaken to do so, and had contracted with another to do the work, they would not by such contract have relieved themselves of liability to the city for the trespass, nor to individuals who might have sustained special injury. Nor does the fact that they obtained from the city a franchise or permission to dig up the street and lay their pipes relieve them from more than the unlawful character of the work. They stand in a contract relation to the public, represented by the city authorities, to do the work in the manner required by the ordinance, and cannot relieve themselves of the duty imposed by that contract by contracting with another to do the work. These trenches could not be dug in the street without danger to the public. If done without authority, a nuisance would necessarily be created; and, if not done in the manner required by the ordinance, the departure creates a nuisance."

The same doctrine has been frequently enunciated, notably in the well-considered case of Woodman v. Metropolitan Railroad Company, 149 Mass. 335, 21 N. E. 482, 4 L. R. A. 213, 14 Am. St. Rep. 427; in which Mr. Justice Holmes delivered the opinion of the court. The defendant was authorized to lay a railway track in a public street in Boston. The work was protected by a temporary barrier, but defendant's subcontractor allowed certain rails to project beyond this bulkhead into the street. Plaintiff fell over these rails and was injured. In that case the following language was used: "In some cases a party is liable notwithstanding the intervention of an independent contractor lawfully employed. A plain case is when he is made personally responsible by statute for the prevention of the cause of the damage complained of. Gray v. Pullen, 5 B. & S. 970. Thus it is settled in many states that a city charged with the duty of keeping the streets in repair is answerable for an improperly guarded excavation made by a contractor; for instance, in building a sewer. Storrs v. Utica, 17 N. Y. 104, 72 Am. Dec. 437; Detroit v. Corey, 9 Mich. 165, 80 Am. Dec. 78; Birmingham v. McCary, 84 Ala. 469, 4 South. 630; Logansport v. Dick, 70 Ind. 65, 36 Am. Rep. 166; Houston & Great Northern R. R. v. Meador, 50 Tex. 77; Circleville v. Neuding, 41 Ohio St. 465, 469; Baltimore v. O'Donnell, 53 Md. 110, 36 Am. Rep. 395; Robbins v. Chicago, 4 Wall. 657, 679, 18 L. Ed. 427; Water Company v. Ware, 16 Wall. 566, 21 L. Ed. 485. * * * Laying the track for the defendant necessitated the digging up of the highway and the obstruction of it with earth and materials. This obstruction would be a nuisance unless properly guarded against. The work was done under a permit issued to the defendant. Considering the general principle of the law, and also the special relations of horse railroads to the highway, and the policy of the statutes, so far as the Legislature has expressed itself upon the subject, we are of opinion that the defendant, having caused the highway to be obstructed, was bound at its peril to see that a nuisance was not created. Veazie v. Penobscot R. R., 49 Me. 119, 123. See, also, Darmstaetter v. Moynahan, 27 Mich. 188." See, also, North Chicago Street R. R. Co. v. Dudgeon, 184 Ill. 478, 56 N. E. 796. Many authorities have been cited to the same effect, and it is clearly the settled law in many jurisdictions, including California, that the doctrine of respondeat superior applies in cases like this.

Appellant insists that, even granting that the subcontractors are his agents, so far as his relations with the public are concerned, nevertheless he cannot be held liable for the consequences of their collateral act in piling the dirt beyond the limits of that part of the street upon which they were employed to work. There are two answers to this argument: (1) The usual method of loosening the earth in the street by a plow, the nearness to the rails of part of the area to be thus excavated, and the necessity for taking the plow sometimes across the track, all combined to make it probable that, unless vigilance should be exercised, dirt might be left on the track; and it was appellant's duty to see that the work performed under his license should be so executed as to wrong no one. (2) By the express terms of the ordinance of the city of Pasadena which, in his application for permission to do the paving on the street where the accident afterwards occurred, appellant promised to obey, he was bound properly to protect the railroad track.

The judgment and order from which this appeal is taken should be affirmed, and it is so ordered.

We concur: LORIGAN, J.; HENSHAW, J.

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156 Cal. 158

SAN PEDRO LUMBER CO. v. SCHROETER et al. (L. A. 2,268.)

(Supreme Court of California. Aug. 17, 1909.)

1. Mechanics' Liens (§ 277*)—Contract—Variance.

A recorded claim of lien declared that the contractor agreed to pay for lumber purchased of claimant at the current market or list prices on demand. Plaintiff's manager testified that there was an express contract between plaintiff and the contractor that the lumber was to be paid for when the building was completed, but in another place explained his meaning by stating that there was no special contract as to payment; the purchase having been made in accordance with plaintiff's custom to furnish a bill when the job was completed and to then make a demand. *Held*, that there was no fatal variance between the claim and the evidence as to the agreement for payment.

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 277.*]

2. Trial (§ 69*)—Reception of Evidence—Reopening Case—Discretion.

Where defendant moved for nonsuit on the ground of variance, the court had discretion to reopen the case and take further testimony thereon.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 164, 165; Dec. Dig. § 69.*]

3. Mechanics' Liens (§ 115*)—Payments—Contractor—Application.

A contractor, having agreed to construct two buildings for defendants, bought lumber for both from plaintiff, and, being financially involved, made an assignment of his assets to plaintiff. Defendants, in settlement with the contractor, gave him a check for $262.89, writing on it that it was the balance due for one of the buildings; but it covered money due on both buildings. There was no proof that defendants gave the contractor any directions as to how the money should be applied, nor that they expected the check would be given to plaintiff, who received it by indorsement because of the contractor's assignment, whereupon plaintiff credited the amount on the contractor's indebtedness for lumber furnished for the building other than that specified on the check. *Held*, that defendants could not object to such application.

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 115.*]

4. Evidence (§ 408*)—Parol Evidence—Explanation of Receipt.

Where the servant of a contractor's assignee for creditors, on receiving a check by indorsement which defendants had given the contractor in settlement of a balance for the construction of certain buildings, executed a receipt to defendants in full of all demands to date, without knowledge of plaintiff's claim against defendants for materials furnished the contractor for use in the buildings, parol evidence was admissible to show that such receipt was not intended as a release of such claim.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1829–1842; Dec. Dig. § 408.*]

Department 2. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by the San Pedro Lumber Company against H. M. E. Schroeter and others. From a judgment for plaintiff, and from an order denying defendants' motion for a new trial, defendants Schroeter appeal. Affirmed.

Davis, Kemp & Post, for appellants. Long & Baker, for respondent.

HENSHAW, J. This was an action brought to foreclose a materialman's lien. Judgment passed for the plaintiff, and from that judgment, and from the order denying defendants' motion for a new trial, they appeal. The appellants, H. M. E. Schroeter and his wife, are the owners, and George Beard was the contractor. The contract between the owners and the contractor was admittedly void. The material in question was lumber purchased by the contractor from the plaintiff

The first proposition advanced upon appeal is that there is a fatal variance between the terms of the contract as expressed in the recorded claim of lien and the evidence adduced at the trial. The claim of lien declares that "the said George Beard agreed to pay for the same at the current market or list prices for such lumber in the Long Beach market on demand." Goodhue, plaintiff's manager, testified at one place that there was an express contract between the plaintiff and Beard that the lumber was to be purchased and was to be paid for when the building was completed. Elsewhere he explains his meaning as follows: "Now, as to the time of payment, it is customary for us to furnish a bill when the job has been completed and make a demand for our payment. * * * It is always customary for us, and we expect our payment when the building is completed. He (Beard) made no special contract in writing, nor was it put on record, for the delivery of the material. Nothing particular was said between us and Mr. Beard with reference to the time of payment on this particular job." Taking the evidence as a whole, its natural interpretation is that the lumber was to be paid for on demand after delivery, but that it was the practice of the firm not to make such demand until after the completion of the building. So understood, there is no variance at all, or, if the most astute mind can detect a variance, it was one of trifling import, which could in no way have prejudiced the appellants. McGinty v. Morgan, 122 Cal. 103, 54 Pac. 392; Macomber v. Bigelow, 126 Cal. 9, 58 Pac. 312; Castagnetto v. Coppertown Min., etc., Co., 146 Cal. 329, 80 Pac. 74.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

At the conclusion of the taking of plaintiff's testimony, defendants moved for a nonsuit upon the ground of the variance above considered. The court permitted plaintiff to reopen the case and take further testimony from Goodhue in exposition of the matter. Its ruling in this regard was not error, but was made within the exercise of its well-recognized discretionary power. Gardiner v. Schmaelzle, 47 Cal. 588; Abbey Homestead Ass'n v. Willard, 48 Cal. 614; Clavey v. Lord, 87 Cal. 413, 25 Pac. 493; Tuller v. Arnold, 98 Cal. 522, 33 Pac. 445.

That there was due to plaintiff for lumber furnished upon the particular building involved in this litigation, known as the "Ramona Flats," the sum of $874.89, is not questioned. Appellants insist, however, that they gave to their contractor, Beard, a check for $262.89, which should have been credited by the plaintiff upon this account, and in support of their position they urge the concurring opinion of McKee, J., in Goss v. Strelitz, 54 Cal. 640. As to this opinion, it is to be noted that it was the especial concurring opinion of a single justice, and that the judgment of the court was in no way based upon it. Moreover, the facts in the case at bar render inapplicable the principle sought to be invoked. Here Beard, at the instance of the appellants, was constructing for them two buildings; the "Ramona Flats" being one, and the "Cynthia Annex" the other. For both of these buildings he was purchasing lumber from the plaintiff. He became financially involved, and made an assignment of his assets to plaintiff. At the time he so became involved he owed plaintiff for lumber purchased on account of both of the Schroeter buildings. Mr. Schroeter, in settling his affairs with Beard, gave him a check for $262.89, writing upon it "balance of Ramona," etc. This check was in no sense a payment on account of the lumber for either building. It was merely a personal settlement between Schroeter and Beard of their affairs, and covered moneys due Beard, not only on account of the Ramona building, but upon account of the Cynthia Annex as well. There is no evidence that Schroeter gave any direction at all as to how the moneys upon this check were to be applied by Beard. There was no privity whatsoever between Schroeter and the San Pedro Lumber Company, nor, so far as appears, any power in Schroeter to have directed the disposition by Beard of the money paid the latter. There is no evidence even to show, therefore, that Schroeter expected that the check would be given to the San Pedro Lumber Company at all. But in fact, because of the assignment made by Beard to the lumber company, the check was indorsed by Beard to the lumber company, which received it and receipted for it on account of the lumber bill of the Cynthia Annex. Thus is appears that the Schroeters received full credit of the payment in the one case, and here arbitrarily seek to have the credit transferred to another account. The mere statement of the facts establishes the untenability of the position.

An employé of the plaintiff became the assignee for the benefit of the plaintiff of the assets of the insolvent contractor Beard. When Beard made over the Schroeter check to this employé, the latter gave to him the following receipt: "Received of H. M. E. Schroeter $262.89 in full of all demands to date. San Pedro Lumber Company, per F., Assignee." Over the objection of appellants, Finch, the assignee and employé of plaintiff, was allowed to explain that Beard's assets showed that there was due to him from Schroeter this amount of money, and that when Beard turned over Schroeter's check he gave a receipt as assignee, meaning to declare that Schroeter had paid in full to the assignee Beard's claim, and that in no way did he mean the receipt to be an exoneration of Schroeter for the claim which the plaintiff had against him on account of the lumber, of which latter he knew nothing, and with which he had nothing whatever to do. Parol evidence was admissible for this purpose. Hawley v. Bader, 15 Cal. 44; Comptoir d'Escompte v. Dresbach, 78 Cal. 15, 20 Pac. 28; Snodgrass v. Parks, 79 Cal. 55, 21 Pac. 429.

The judgment and order appealed from are therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

156 Cal. 142

LANGE v. WATERS et al. (L. A. 2,241.)

(Supreme Court of California. Aug. 14, 1909.)

1. Appeal and Error (§ 842*)—Findings of Fact and Conclusions of Law.

So-called conclusions of law, finding as a fact that the description of the excepted acre, in a contract of sale of 20 acres excepting 1, is uncertain, and as a fact that because of the uncertainty of the description of the 1 acre the contract is made uncertain as to the 19 acres agreed to be conveyed, with the conclusion that for such reason alone the purchaser cannot recover for breach of contract, are findings of fact, so that their sufficiency to support the judgment may be attacked on appeal.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3315–3330; Dec. Dig. § 842.*]

2. VENDOR AND PURCHASER (§ 22*)—CONTRACT —EXCEPTION—UNCERTAINTY.

Where, in a contract for sale of two lots, as per map, containing 20 acres, excepting 1 acre, the 1 acre is incompletely described, the exception alone fails, and the contract is enforceable.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 27; Dec. Dig. § 22.*]

3. VENDOR AND PURCHASER (§ 68*)—CONTRACT —EXCEPTION.

The so-called reservation in a contract to convey 20 acres, reserving 1 acre, is an exception.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 68.*]

Department 2. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Charles Lange against W. B. Waters and others. Judgment for defendants. Plaintiff appeals. Reversed, with directions for judgment.

Denio & Monk and Swoffield & Hoodenpyl, for appellant. Tom C. Thornton, T. R. Archer, and O. P. Widaman, for respondents.

HENSHAW, J. Plaintiff sued to recover damages from defendants for their breach of a contract for the sale of realty. The defendants set up mutual mistake in the drawing of the contract, and that it was understood and agreed between the parties that, notwithstanding the language of the contract, it remained discretionary with the defendants whether or not they would convey the land. They further alleged that the contract was void for uncertainty. The court found against the defendants upon all questions saving that of the uncertainty of the contract. In this particular it found "that the plaintiff, Charles Lange, complied and offered to comply, and was at all times able, ready, and willing to comply, with all the terms and conditions of the said contract on his part, but that the defendants W. B. Waters and Hattie Waters wrongfully and arbitrarily refused to comply with the said contract on their part, and to deed to the plaintiff the 19 acres of land agreed by them to be sold to him on the terms and conditions herein mentioned and described and set out in the said complaint, and that, had said contract between plaintiff and defendants been certain in the description of the land therein mentioned, by reason of said refusal to comply with the said contract, the said plaintiff, Charles Lange, would have been injured and damaged in the sum of ($1,700.00) seventeen hundred dollars." Then, as conclusions of law, so termed, the court proceeded:

"(1) That but for the uncertainty in said contract, to wit, the uncertainty of the description of the property mentioned therein, by reason of the reservation of the 1 acre of ground where the house stands leaving the contract uncertain as to the 19 acres agreed to be deeded by the defendants W. B. Waters and Hattie Waters to the plaintiff, Charles Lange, that the said Charles Lange would be entitled to have and recover from the defendants W. B. Waters and Hattie Waters the sum of $100 paid to them as herein found at the time of the making of the said contract and $1,600 damages, to wit, would be entitled to recover the sum of $1,700."

"(3) The court finds that the contract set out in plaintiff's complaint is so uncertain as to the property agreed to be deeded by defendants W. B. Waters and Hattie Waters to the plaintiff that the said contract cannot be enforced, and that the plaintiff, Charles Lange, has no right to recover the damages which would have been suffered by him by reason of the refusal of the defendants W. B. Waters and Hattie Waters to comply with the said contract as herein found, had said contract been certain in the description of said land; and the court finds that by reason of the said uncertainty in said contract, and for no other reason, that the plaintiff's complaint fails to state a cause of action for damages, and for said reason, and no other reason, the said plaintiff, Charles Lange, is not entitled to a judgment for damages against the defendants W. B. Waters and Hattie Waters in the sum in these findings mentioned."

Plaintiff appeals from the judgment, and upon his appeal attacks the declarations of the court contained in the so-called conclusions of law Nos. 1 and 3, above quoted. Respondent makes answer that the appeal is without merit, because conclusions of law, no matter how erroneous, constitute no ground of reversal, if the judgment be in fact supported by the findings. Spencer v. Duncan, 107 Cal. 423, 40 Pac. 549. This proposition of respondents is sound; but the gist of appellant's attack is, not that the conclusions of law are erroneous, but that the conclusions of law are essentially misplaced findings of fact (see Sav. & L. Soc'y v. Burnett, 106 Cal. 514–538, 39 Pac. 922), and that, treating them as findings of fact, the judgment based upon them is erroneous. To the better understanding of this proposition it becomes pertinent to set forth such part of the contract as it will be necessary to consider in the discussion to follow. The contract admittedly was somewhat inartificially drawn by the parties to it, who were not learned in the law. Agreeing to sell a tract containing 20 acres, sufficiently described in the contract, the agreement continues: "I reserve all improvements and one acre of ground, inclusive of streets and five-foot alley on the south where the house now stands; but he is to have the engine and pump, with the shed, with me, the privilege of using it until arrangements can be made for water." This, it is to be remembered, is a contract for the sale of land, and not a deed of grant of the land, and much greater liberality is allowed in construing the descriptions contained in such contracts. The certainty required in deeds is not essential, where even by parol evidence the property in contemplation of the parties to be conveyed can be definitely ascertained. Lick v. O'Donnell, 3 Cal. 63, 58 Am. Dec. 383; Stanley v. Green, 12 Cal. 162; Marriner v. Dennison, 78 Cal. 202, 20 Pac. 386. And even in the case of deeds the ancient strictness of the rule is not adhered to. Fudickar v. East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. 1024. It would seem that in a contract such as this, where the so-called "reservation" which, of course, is in strictness an exception, is not a floating acre, but is located and anchored as being an acre "on the south where the house now stands," and is further bounded with some certainty as fronting on the streets and a five-foot alley, the land could with the aid of parol evidence, be located with sufficient definiteness.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

But as against this it must be conceded, since this finding is not attacked, and since it declares that the exception is too indefinite for location, that the court, after taking all appropriate evidence, was unable to delimit the excepted 1 acre. Here, then, the so-called conclusions of law of the court are, as we have said, but findings of fact. The court in the first so-called conclusion of law finds as a fact that the description of the excepted 1 acre is uncertain. It finds further as a fact that, because of the uncertainty of the description of the excepted 1 acre, the contract is made uncertain as to the 19 acres agreed to be conveyed. The second fact is drawn as a deduction from the fact first found, namely, the uncertainty of the description of the excepted 1 acre. The court concludes that by reason of this uncertainty and the consequences which flow from it, as expressed in the finding of the second fact, and for no other reason, plaintiff must fail. If, in declaring the second fact that the 19 acres to be conveyed became uncertain because of the uncertainty of the description of the excepted 1 acre, the court misconstrued and misapplied the law—if, in other words, it did not follow that it was a fact that the description of the 19 acres sought to be conveyed must fail because of the indefiniteness of the description of the excepted 1 acre—then the judgment is not supported by the findings and must be reversed. The legal proposition is precisely this: Under the circumstances above indicated, where the exception in a grant or contract of sale is void for uncertainty, does the grant fall with the exception, or is it the exception alone which is invalid and void? If it be the former, then the judgment of the court was clearly right. If it be the latter, it was clearly wrong.

By the terms of the contract there was to be conveyed, as the court finds, "lots (12) twelve and (13) thirteen, in block (21) twenty-one, of California Co-operative Colony Tract as per map recorded in Book 21, pages 15–16, Miscellaneous Records of Los Angeles County, California," containing 20 acres. From the conveyance of this whole tract there was to be excepted 1 acre of land, the location of which was incompletely described. That, while termed a "reservation," this acre of land was in fact an exception, is, of course, beyond dispute. "An exception is always a part of a thing granted and of a thing in being; and a reservation is a thing not in being, but is newly created out of lands and tenements devised, though the terms are often used promiscuously, and a reservation is construed an exception if it will fall within that definition and if such was the design of the parties." State v. Wilson, 42 Me. 9; Barnes v. Burt, 38 Conn. 541; Washington Mills, etc., v. Commercial Fire Ins. Co. (C. C.) 13 Fed. 646; Spencer v. Wabash R. Co., 132 Iowa, 129, 109 N. W. 453; Edwards v. Brusha, 18 Okl. 234, 90 Pac. 727. An exception in a private conveyance is to be construed strictly against the grantor. Duryea v. City of New York, 62 N. Y. 592; Klaer v. Ridgway, 86 Pa. 529. Clearly, under this contract and the findings of the court, the description of the land to be conveyed by the contract is in no way uncertain as it is the whole of the 20-acre tract. The excepted acre alone, the court finds, is insufficiently described. What legal result follows therefrom? The cases are numerous in answer. In accordance with the doctrine that an exception in such a deed is to be construed strictly against the grantor, the exception will fail, and not the grant. So we find it declared that "the invalidity of an attempted reservation for uncertainty does not necessarily vitiate the grant." Baldwin v. Winslow, 2 Minn. 213 (Gil. 174). "Ambiguity of description of land excepted from a conveyance does not make the conveyance void for uncertainty." McAllister v. Honea, 71 Miss. 256, 14 South. 264. "Where there is a description in a deed, followed by an exception which is uncertain, the exception may be void for uncertainty, but the description will stand." Torrey v. Thayer, 37 N. J. Law, 339. "The granting part of a deed is not avoided by a defect in the exception; but the exception itself becomes ineffectual thereby, and the grant remains in force." Waugh v. Richardson, 30 N. C. 470. To like effect may be cited Welch v. Str. Genevieve, 1 Dill. 130, Fed. Cas. No. 17,372; Mooney v. Cooledge, 30 Ark. 640; Winslow v. Patten, 34 Me. 25; Loyd v. Oates, 143 Ala. 231, 38 South. 1022, 111 Am. St. Rep. 39; Bromberg v. Smee, 130 Ala. 601, 30 South. 483; Nunnery v. Ford (Miss.) 45 South. 722; Darling v. Crowell, 6 N. H. 421. Thus, in Darling v. Crowell, supra, where in a grant of land there was an exception of an acre and a half reserved for the use of flowing water for a mill, without location of the land, the exception was held void for uncertainty. And in Mooney v. Cooledge, supra, where there was excepted out of the conveyance one acre of land, and there was nothing in the exception or evidence to locate it upon any particular part of the tract, the exception was held void for uncertainty, and the grantee took the entire tract.

Respondents' brief upon appeal combats none of these legal propositions, but rests entirely upon the technical objection, heretofore discussed and disposed of, that appellant is attacking the sufficiency of the conclusions of law to support the judgment, and not the sufficiency of the findings of fact. In this, as has been shown, respondents are in error.

Upon the findings, the judgment is reversed with directions to the trial court to enter judgment in favor of plaintiff in the amount which the court found would have been due saving for the indefiniteness of the contract.

We concur: MELVIN, J.; LORIGAN, J.

(156 Cal. 170)

WYATT et al. v. PACIFIC ELECTRIC RY. CO. (L. A. 2,273.)

(Supreme Court of California. Aug. 18, 1909.)

1. TRIAL (§ 36*)—EXCLUSION OF EVIDENCE—MATTERS CONCEDED.

Exclusion of evidence tending to prove only a matter which is conceded is not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 89; Dec. Dig. § 36.*]

2. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—INSTRUCTIONS.

Where the complaint for death of a passenger alleged as the direct and only cause of the accident the starting backwards of defendant's car after it had stopped and while deceased was alighting, and plaintiffs' proof was directed only to showing that cause, and the defendant attempted to rebut this only by evidence that deceased got off the car before it stopped and while it was still going forward, and defendant admitted that, if the accident occurred as claimed by plaintiffs, such backing of the car was negligence, and defendant was liable, and plaintiffs admitted, if the accident occurred as defendant claimed, they had no rights, and the court without objection submitted such issue only, with direction to find for plaintiffs or defendant according as they found thereon, refusal of an instruction as to presumption of negligence from the accident happening to deceased from operation of the car while she was a passenger on it, and the giving of an instruction excluding from consideration of the jury any other act of negligence of defendant, was immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219; Dec. Dig. § 1064.*]

3. CARRIERS (§ 316*)—INJURY TO PASSENGER—NEGLIGENCE—RES IPSA LOQUITUR.

Mere injury to a passenger while aboard a car or while alighting from it creates no presumption that it was caused by negligence of the carrier operating the car; but it must be first shown the injury came from the movement of the car by those in charge of it, or from something connected therewith, or in control of the carrier, and then it is presumed that the thing causing the injury was due to the carrier's negligence, throwing on it the burden of disproving the prima facie case.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1283; Dec. Dig. § 316.*]

4. CARRIERS (§ 318*)—INJURY TO PASSENGER—NEGLIGENCE—BURDEN OF PROOF.

If the alleged negligence in an action for injury to a passenger while alighting is denied, plaintiff must prove it "by a preponderance of the whole evidence."

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1314; Dec. Dig. § 318.*]

5. CARRIERS (§ 321*)—INJURY TO PASSENGER—NEGLIGENCE — EQUALLY BALANCED EVIDENCE—INSTRUCTIONS.

Where the only issue on which depended the liability of a carrier for death of a passenger was whether the car stopped and then started backward as the passenger was attempting to alight, or whether she voluntarily stepped from it while it was still going forward, an instruction to find for defendant if the evidence was equally balanced as between such theories was proper.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1326; Dec. Dig. § 321.*]

6. TRIAL (§ 62*)—RECEPTION OF EVIDENCE—REBUTTAL.

That a fact, if proved, would constitute contributory negligence of a passenger injured in alighting from a car, does not exclude consideration of evidence of that fact in rebuttal of the theory of plaintiffs as to how the accident occurred.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 149; Dec. Dig. § 62.*]

7. TRIAL (§ 255*)—INSTRUCTIONS—NECESSITY OF REQUEST.

In the absence of request for an instruction on the burden of proof as to contributory negligence, complaint may not be made that no instruction was given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 627; Dec. Dig. § 255.*]

Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Josephine C. Wyatt and others against the Pacific Electric Railway Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

M. C. Hester and Hester, Merrill & Craig, for appellants. Bicknell, Gibson & Trask (Dunn & Crutcher and Norman S. Sterry, of counsel), for respondent.

SHAW, J. This is an action by the heirs at law of Catherine Gray, deceased, to recover damages for her death, which it is alleged was caused by the negligence of the defendant. The verdict was in favor of the defendant. The plaintiffs appeal from an order denying their motion for a new trial.

The defendant was operating a line of street railroad cars in the city of Pasadena. The complaint alleges that the deceased was a passenger on defendant's car; that the car stopped, and she was in the act of stepping from the rear of the car to the street, when it was started backwards by the employés of the defendant with a sudden jerk, whereby she was thrown violently from the car to the ground and suffered injuries which caused her death. The errors assigned relate to the rejection of certain evidence and the giving and refusing of instructions. It is also alleged that the cars usually stopped at Green street; that she supposed the car she was on would stop there; that she told the conductor she wished to alight there; that it went beyond the crossing and stopped at an unusual place; that the conductor was not in his proper place at the rear and did not assist her to alight. It is important to note, however, that these acts are stated merely by way of inducement, and that it is not alleged or claimed that they caused the fall whereby she was injured. The act of starting the car backward, after it had stopped and while she was in the act of alighting, is alleged as the direct and only cause of the injury. Upon the trial, the plaintiffs' evidence was directed to proof of that act as the cause, and no attempt was made by them to show that the injury was caused in any other manner, or by reason of any other act of negligence. The defendant attempted to rebut this proof solely by evidence to prove that she got off the car before it had stopped and while it was in motion. The defendant then admitted that if the fall occurred, as claimed by plaintiffs, from the sudden backward motion of the car, such act would be negligence, and that the defendant would be liable. The plaintiffs, on the other hand, admitted that if she fell by attempting to get off the car before it had stopped, and while it was in motion, they had no right to recover. In accordance with these admissions, and upon these averments and proofs, the court, in instruction 8, asked by the defendant and not assigned as error by the plaintiffs, said to the jury: "I charge you that there is but one issue for you to consider, viz.: Did the car stop, and then, as Catherine Gray was attempting to alight therefrom, start backward? If so, the defendant is liable. * * * If, on the other hand, said Catherine Gray voluntarily stepped from the said car before the same had stopped and while it was in motion, the plaintiffs cannot recover." This was a direction to the jury that the act alleged as the cause of the injury, if proven, was a negligent act of itself, and sufficient in that respect to justify a recovery. This state of the issues, these admissions of the parties, and this instruction render the errors complained of for the most part unimportant and practically immaterial, as will appear from a mere statement of the points.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Certain rules of the company for the government of the employés operating its cars were not allowed in evidence. The most that could be said in regard to them is that they might tend to prove the admitted proposition that the particular act of starting the car backward, as the deceased was alighting, was negligent.

Instruction 6, asked by the plaintiffs and refused, purported to direct the jury that a presumption of negligence on the part of the defendant would arise from the fact that the accident happened to the deceased by the operation of its car while she was a passenger thereon. Instruction 9 and others given by the court are criticised on the ground that they excluded from the consideration of the jury any act of negligence on the part of the defendant, other than that which, as above stated, is alleged to have caused the deceased to be thrown from the car, and also upon the ground that they put upon the plaintiffs the burden of proving the negligence of defendant, without aid from the presumption of negligence arising from the happening of the accident to a passenger on its car. All these matters are made immaterial by the allegations, admissions, and instruction above mentioned, limiting the jury to the single act alleged, and directing them that that act was in itself negligent.

It is proper to say, in this connection, that the instructions given as aforesaid were not erroneous as claimed. The criticism of them is based upon what appears to be a misapprehension as to the effect of the maxim, "res ipsa loquitur." It is not the law, as the argument of the plaintiffs implies, that the mere fact that a passenger is injured while aboard a car, or while alighting therefrom, creates a presumption that the injury was caused by want of care on the part of the defendant operating such car. It must first be shown that the injury came from the movement of the car by those in charge of it, or from something connected therewith, or in control of the defendant. When this is done, the law then presumes, prima facie, that the particular thing thus shown to have caused the injury was due to the defendant's negligence, and the burden is thrown upon the defendant to disprove the prima facie case thus made. Such negligence is presumed, because such accidents do not ordinarily happen if due care is used, and because the defendant is usually better able than the plaintiff to show the actual truth of the matter. In Griffen v. Manice, 166 N. Y. 193, 59 N. E. 925 (52 L. R. A. 922, 82 Am. St. Rep. 630), the court, referring to this maxim, says: "It is not the injury, but the manner and circumstances of the injury, that justifies the application of the maxim and the inference of negligence. If a passenger in a car is injured by striking the seat in front of him, that of itself authorizes no inference of negligence. If it be shown, however, that he was precipitated against the seat by reason of the train coming in collision with another train, or in consequence of the car being derailed, the presumption of negligence arises." So here the fact that the deceased was injured by falling to the ground creates no presumption of negligence; but, if it is also shown that the fall came about from the sudden start of the car as she was stepping off the same, then it will be presumed that the sudden start was caused by the defendant's negligence. But the proof of the injury—that is, the bruise or hurt—or the proof that she fell to the ground, without proof as to why she fell, raises no presumption either that she was made to fall by the sudden starting of a car at rest, or by a careless attempt to get off while it was in motion and before it had stopped. Lincoln Tr. Co. v. Shepherd, 74 Neb. 372, 104 N. W. 882, 107 N. W. 764; Saunders v. Chicago, etc., Co., 6 S. D. 40, 60 N. W. 148.

Instruction 4a, given by the court, was approved in Patterson v. San Mateo, etc., Co., 147 Cal. 183, 81 Pac. 531, and the principle therein stated, that in a case like the present, if the alleged negligence of the defendant is denied, the plaintiff must prove it "by a preponderance of the whole evidence," was fully discussed in that case and in Kahn v. Triest-Rosenberg Co., 139 Cal. 345, 73 Pac. 164, and Valente v. Sierra Ry. Co., 151 Cal. 538, 91 Pac. 481, and declared to be correct.

Instruction 9 also stated: "If the evidence is equally balanced, as to whether the car stopped and then started backwards, as said Catherine Gray was attempting to alight therefrom, or as to whether Catherine Gray voluntarily stepped from the said car while it was in motion, then your verdict must be for the defendant." In view of the narrow issue upon which the case was presented and the admissions of the respective counsel aforesaid, this cannot be declared erroneous. Each theory was advanced as the opposite of the other, and it was not suggested by either party that any other explanation of the fall of the deceased was possible under the evidence. It is clear that the evidence tending to show that she got off the car before it stopped and while it was in motion, even if not weighty enough to prove the fact affirmatively in support of the defense of contributory negligence, upon which the defendant had the burden of proof, might nevertheless be sufficient to balance the proof of the plaintiffs that she was caused to fall by the sudden movement backward when she was properly alighting; and if it would avail for that purpose, the plaintiff, who was required to prove the latter fact by a preponderance, must fail. The instruction was not erroneous in this particular. Lincoln Tr. Co. v. Shepherd, supra. It did not purport to instruct the jury upon the subject of the burden of proof of contributory negligence, and it could not fairly have been understood by them as a direction that the defendant could establish that defense without proving it by a preponderance of the evidence. The circumstance that the fact that she alighted voluntarily while the car was moving, if proven, would constitute contributory negligence on her part, does not exclude the evidence of that fact from the consideration of the jury in rebuttal of the contrary theory that the car was at rest and suddenly started while she was alighting. No instruction as to the burden of proof of contributory negligence appears in the record, nor does it show that it contains all the instructions, or that any instruction on that subject was asked. In the absence of such request, the plaintiffs cannot complain that none was given.

It is further claimed that the verdict was not justified by the evidence. It is sufficient to say that the evidence is conflicting, and that the jury were the judges of the credibility of the witnesses. If they believed the testimony favorable to the defendant, they could not have properly returned a different verdict.

The order is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

156 Cal. 154

CROUSE v. BARROWS et al. (L. A. 2,257.)

(Supreme Court of California. Aug. 16, 1909.)

1. MUNICIPAL CORPORATIONS (§ 293*)—STREET IMPROVEMENT—RESOLUTION—REQUISITES.

Under Street Improvement Act, § 3 (Gen. Laws 1906, p. 1280), providing that a city council's resolution of intention to improve a street shall contain a description of the work, a resolution reciting that it was the intention of the council "to sidewalk and curb Date street" was fatally defective for failure to specify the character of materials to be used in the sidewalk and the materials for the curb.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 293.*]

2. MUNICIPAL CORPORATIONS (§ 567*)—STREET ASSESSMENT—FORECLOSURE—COMPLAINT.

Code Civ. Proc. § 456, declaring that in pleading a determination of an officer or board it shall be sufficient to allege that the determination has been "duly given or made," did not sustain a complaint to foreclose a street assessment for constructing a sidewalk and curb, alleging that the city duly passed and adopted a resolution of intention to order the following street work to be done, to wit, "to sidewalk and curb Date street on both sides thereof, in the city of San Diego, California," between certain specified streets, as such allegation attempted to set out the resolution, and not its legal effect, and the resolution alleged was wholly insufficient.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 567.*]

Department 2. Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Action by Warren M. Crouse against H. L. Barrows and others. From a judgment foreclosing a street assessment lien, defendants appeal. Reversed, with instructions.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Luce, Sloane & Luce, for appellants. Stearns & Sweet, for respondent.

LORIGAN, J. The defendants appeal from a judgment foreclosing a street assessment on their property. The only point to be considered is whether the general demurrer interposed by defendants to the complaint should have been sustained; the trial court having overruled it. The complaint alleged "that on the 14th day of August, 1905, at the city of San Diego, state of California, the common council of said city duly passed and adopted a resolution of intention, in writing, wherein and whereby said common council duly resolved and determined that it was the intention of said council to order the following described street work to be done in said city, to wit: 'To sidewalk and curb Date street, on both sides thereof, in the city of San Diego, California, from the east line of Front street to the west line of Fifth street.'" Immediately following it is alleged: "That thereafter, to wit, on the 2d day of October, 1905, at said city of San Diego, said common council, deeming that the public interest and convenience required it, duly passed and adopted a resolution, in writing, wherein and whereby said common council duly gave and made its order and determination in writing, ordering said work to be done."

It is insisted by appellants that the complaint is radically defective, because the description of the work to be done, set forth in the resolution of intention referred to in the first-quoted allegation, is not such a description of the work as is required by section 3 of the street improvement act (Gen. Laws 1906, p. 1280). This point is well taken. The act requires that the resolution of intention shall contain a description of the work, and all that appears in the resolution of intention is that it is the intention of the common council "to sidewalk and curb Date street" on both sides between certain streets. There is no specification of the character of the materials to be used in laying the sidewalks, nor of what materials the curb shall be constructed, and a resolution which fails to make specifications of that character is void, and a complaint which sets forth a resolution of intention which is deficient in those particulars states no cause of action. San Jose v. Auzerais, 106 Cal. 499, 39 Pac. 859; Schwiesau v. Mahon, 128 Cal. 114, 60 Pac. 683; Williamson v. Joyce, 137 Cal. 107, 69 Pac. 854. It is conceded by respondent that, in order to acquire jurisdiction to order street work done under the act, a resolution prescribing the work to be done—embracing a specification of the materials of which it is to be constructed—must in fact be passed; but he contends that the question here is one of pleading solely, and that it is not necessary, in a complaint to foreclose a street assessment, to set forth in full the resolution of intention, in order to show that the common council acquired jurisdiction to proceed with the improvements, but that it was necessary only to plead, in the method provided for by section 456 of the Code of Civil Procedure, the determination of the common council ordering the street improvement work to be done.

The section of the Code referred to provides "that in pleading a judgment or other determination of a court, officer or board it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made"; and it is insisted, as the complaint alleged that the common council "duly passed and adopted a resolution of intention," accompanied by the subsequent allegation that the council "duly passed and adopted and duly gave and made its order ordering said work to be done," that this constituted a sufficient pleading under the Code section, and was in legal effect a sufficient allegation that everything necessary to be done—including the passage of a requisite resolution of intention—was done in order to give the council jurisdiction to make the subsequent order providing for the doing of the work. There would be ground for this claim of respondent, if there were no allegation in the complaint showing the resolution of intention that the council did in fact pass, and the pleader was relying for the sufficiency of the complaint upon the allegation solely that the common council "duly passed and adopted a resolution * * * whereby said common council duly gave and made its order and determination in writing, ordering said work to be done." This was the condition of the complaint in Pacific Paving Company v. Bolton, 97 Cal. 8, 31 Pac. 625. In that case there was no allegation that before ordering the work done a resolution of intention so to do was passed, but it was alleged that the common council "duly gave and made its determination to order the work done." It was held that this allegation, pleaded in the language provided for in section 456 of the Code of Civil Procedure, was in legal effect a statement that the common council had taken all the requisite, preliminary, statutory steps, including the passage of a sufficient resolution of intention to give the order for doing the work validity, and that it was not necessary to plead the passage of a resolution of intention.

But in the complaint here under consideration the pleader did not content himself with an allegation that the common council "duly gave and made an order" ordering the work to be done, from which, under the section of the Code, the legal implication would follow that the council had acquired jurisdiction to proceed in the matter by the preliminary passage of a resolution of intention which sufficiently described the work; but he has set forth the resolution of intention which the common council did in fact pass. As to such allegation of the terms of the resolution of intention it may not be said that it is simply an allegation that it described the work generally, and does not pretend to contain all the matters with reference to such work which were contained in the resolution of intention. On the contrary, it is alleged that the common council determined to order "the following described street work," specifying it and placing it in quotation marks in the allegation, as indicating it to be a literal statement of the description of the work as contained in the resolution of intention, and it is the work so described in said resolution of intention that it is further alleged the common council subsequently "duly gave and made its order * * * ordering said work to be done." So that whatever legal intendment might follow, had the complaint merely alleged that the common council "duly gave and made" its order and resolution ordering "said work to be done," is rendered ineffectual in the face of the resolution of intention which it is pleaded was in fact actually passed, and which shows that the common council, on account of a failure to state the nature of the materials to be used in the proposed work, never acquired jurisdiction to make the subsequent order for the work to be done or to take any proceedings in the matter of the street improvement in contemplation. In Buckman v. Hatch, 139 Cal 53, 72 Pac. 445, which was an action to foreclose a street assessment lien, a complaint similar in its allegations to the one here in question was under review. There it was alleged that the common council "duly made and passed" a resolution of intention describing the work, followed by a further allegation that the board subsequently "duly gave, made, and * * * passed its order and resolution ordering said work to be done," and there, as here, the resolution of intention, which was actually passed and was set forth in the complaint, contained no description of the materials to be used in the proposed improvement. In that case the same reliance was placed on section 456 of the Code of Civil Procedure to sustain the complaint, on account of the allegations made under the terms of the section, as is now urged; but it was held that, as it affirmatively appeared in the resolution of intention which was pleaded that the common council had acquired no jurisdiction at all to proceed in the matter of the improvement on account of the radical insufficiency of the resolution, the complaint stated no cause of action. On the authority of that decision it must be held that the complaint at bar likewise stated no cause of action, and that the trial court should have sustained the demurrer to the complaint on that ground.

The judgment is reversed, with instructions to the trial court to sustain the demurrer to the complaint, with leave to plaintiff to amend if he should so desire.

We concur: HENSHAW, J.; MELVIN, J.

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158 Cal. 167

MILLS v. ROSSITER et al. (L. A. 2,274.)

(Supreme Court of California. Aug. 18, 1909.)

1. VENDOR AND PURCHASER (§ 214*)—ASSIGNEES OF CONTRACT OF PURCHASE.

M., being in possession of land under an executory contract of purchase, assigned the contract by a separate instrument to defendant, retaining the original contract unindorsed and possession of the land; defendant not making any payment under the contract, nor recording his assignment, nor otherwise giving notice that M. was not the owner of the contract and in possession under it. Plaintiff afterwards bought of M. his interest for a fair consideration, took the original contract, indorsed to him, made payments, delinquent and current, on the original contract, went into possession, and received no notice of defendant's claim till two months later. *Held*, that though the assignee of an executory contract of purchase is not within the protection of the rule of bona fide purchaser, and even admitting defendant to be equally innocent with plaintiff, plaintiff's title would prevail over defendant's, under Civ. Code, § 3543, providing that, where one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must be the sufferer.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 214.*]

2. ESTOPPEL (§ 73*)—BY CONDUCT.

Where defendant, having taken an assignment from M. of his contract to purchase land, left M. in possession "to handle the property," he made M. his agent, and on the principle of estoppel by conduct cannot assert superiority of his equity over that of plaintiff, who bought of M., supposing M. to be the owner of the contract; there being no notice to the contrary.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 189–197; Dec. Dig. § 73.*]

Department 2. Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by M. H. Mills against H. B. Rossiter and others. Judgment for plaintiff. Defendant J. H. Whitney appeals. Affirmed.

Kendrick, Knott & Ardis, for appellant. Alfonso Moore, Moore & Evans, and J. H. Coverley, for respondent.

HENSHAW, J. The action was to quiet title. Defendant Whitney alleged an interest in the land growing out of an assignment to him of a certain contract for its sale. Judgment passed for plaintiff, and defendant Whitney appeals.

The undisputed facts are that one E. M. Morton went into possession of the land in controversy on the 21st day of July, 1906, under a duly executed executory contract to pay for the land at the rate of $10 a month for 40 consecutive months. While so in possession he entered into a contract with defendant Whitney to the effect that he would sell to Whitney his equity in the land for the sum of $250, and that, in the event that Whitney did not sell the property within 6 months from date, then Morton agreed to pay to Whitney a premium of $100 above and in excess of the amount that Whitney "has in said property at the end of the said 6 months." Whitney, in identical language, agreed to pay $250 for Morton's interest, and further agreed that, in the event that he failed to sell the property within six months from the date, he would deliver it to the party of the first part "in consideration of a premium of one hundred dollars ($100) above and in excess of the amount that the said second party has in said property." This contract was never recorded, Whitney never took possession under it, and Morton remained in possession of the land and of the original executory contract for the sale thereof. Morton made improvements upon the land at his own cost and expense; these improvements consisting of a two-story frame store building and a dwelling house. Morton and plaintiff came into negotiation while the former was so in possession of the land. The negotiation ended in plaintiff paying to Morton for his interest in the land about $4,000, a full and fair equivalent. Morton was delinquent upon the monthly payments, and plaintiff also made these. Morton surrendered to plaintiff possession of the property, and likewise made written assignment of the original contract by indorsement thereon, and surrendered this contract to plaintiff. Upon January 22d of the following year plaintiff first became advised of defendant's claim by a note from the latter which declared that he would like to meet plaintiff "in regard to a lot in Redondo of which Mr. E. M. Morton has sold his equity to me, and I understand has since sold same to you, and has since skipped." At the time this intimation was received, plaintiff had been in possession of the property for about two months, had made all payments, delinquent and current, under the contract, and had added substantial improvements. He fulfilled the contract according to its terms, received the deed from the vendors, and began this action.

Upon appeal, appellant invokes the familiar equitable maxim that between two equities, otherwise equal, the prior must prevail, and the further principle, recognized with proper limitations growing out of the circumstances of each case, that the assignee of an executory contract of purchase is the holder of a mere equity, and not within the rule which protects a bona fide purchaser for value and without notice of the real or apparent legal title. Dupont v. Wertheman, 10 Cal. 369; Taylor v. Weston, 77 Cal. 538, 20 Pac. 62. It is not necessary here to consider any modification of this rule touching the holder of an equity under an executory contract which may have been worked by the recordation acts. Civ. Code, §§ 1214, 1215. It is sufficient in this case to point out the very obvious fact that the equities of plaintiff and defendant were not equal, and that the rule as to the priority which applies in such cases has no application here. Appellant in a separate instrument took what purported to be an assignment of Morton's equity. He did not record this assignment. He did not even procure an indorsement and delivery to him of the original contract. He did not enter into possession. He did not make payments under the contract. He held out no notice to the world that Morton was other than what he represented himself to be, the owner of the executory contract and in possession under the rights conferred by that contract. By his conduct he suffered plaintiff to purchase from Morton, to pay full value for the purchase without notice of any intervening right and enter into possession, and to remain in possession for two months before he first asserted this claim. If appellant, under these circumstances, be regarded as equally innocent, though it is somewhat difficult so to regard him, then must he submit to the equitable maxim expressed in section 3543 of the Civil Code that, "where one of two innocent persons must suffer by the act of a third he by whose negligence it happened must be the sufferer." Or, again, appellant's own testimony is to the effect that he permitted Morton to remain in possession, with right "to handle the property," meaning thereby to sell it. Morton thus, by appellant's own statement, became his agent, and upon the plainest principles of estoppel by conduct Whitney will not be heard now to assert that his equity is superior to that of Morton's vendee. Dolbeer v. Livingston, 100 Cal. 617, 35 Pac. 328.

For the foregoing reasons, the judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; MELVIN, J.

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10 Cal. App. 741

ELLIOTT v. BUNCE. (Civ. 589.)

(Court of Appeal, Third District, California. July 10, 1909. Rehearing Denied by Supreme Court Sept. 7, 1909.)

1. Appeal and Error (§ 1097*)—Disposition—Law of Case on Remand.

The ruling on appeal upon a point distinctly made is the law of the case on a subsequent appeal between the same parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358–4368; Dec. Dig. § 1097.*]

2. Appeal and Error (§ 1099*)—Law of Case—Former Appeal.

A holding on appeal that an action to charge part of certain property as a trust fund was barred by laches is the law of the case on a subsequent appeal, though the complaint filed on remand sought to charge a trust upon the whole property.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370–4379; Dec. Dig. § 1099.*]

3. Equity (§ 72*)—Defenses—Laches.

Equity does not favor a suit brought long after the transactions involved took place, and after the death of the original parties thereto, for the reason that testimony can be easily fabricated under such circumstances.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 207–226; Dec. Dig. § 72.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by F. A. Elliott, as administrator, against Jeannette W. Bunce, as administratrix. From a judgment for defendant, plaintiff appeals. Affirmed.

R. F. Mogan and Mastick & Partridge, for appellant. M. C. Hassett, for respondent.

BURNETT, J. The facts of the case are stated by respondent substantially as follows: On December 21, 1853, Ada M. Hudson and George Hudson were married in the city and county of San Francisco, and lived together as husband and wife until she died, May 17, 1897. He died March 12, 1898. On June 24, 1898, F. A. Elliott was appointed administrator of the estate of said Ada M. Hudson, deceased, and on June 16, 1898, Charlotte K. Clark was appointed special administratrix of the estate of said George Hudson, deceased. This action of Elliott v. Clark was begun on June 16, 1899, and on May 17, 1904, a judgment was rendered for plaintiff, decreeing that a trust existed, and that the defendant held the whole property for the plaintiff, as the administrator of the said estate of Ada M. Hudson, deceased. An appeal from the judgment was taken to the Supreme Court. The cause was transferred to the District Court of Appeal for the First District for hearing, and the special administratrix having died during the appeal, the present defendant was substituted. On February 8, 1907, said Court of Appeal rendered its decision reversing the judgment of the lower court and directing that an order be made sustaining the demurrer to the complaint on the ground that no cause of action was stated. The lower court acted accordingly, but permitted the plaintiff to file an amended complaint. A demurrer to this was sustained, and, plaintiff declining to amend further, judgment was entered for the defendant, from which this appeal is taken by plaintiff.

It is not disputed that the ruling of an appellate court upon a point distinctly made upon a previous appeal becomes the law of the case, and is conclusive between the same parties upon a subsequent appeal, from which the court cannot depart, nor the parties relieve themselves; or, as stated in Tally v. Ganahl, 151 Cal. 421, 90 Pac. 1050: "Where the Supreme Court, in deciding the appeal, states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the lower court and upon a subsequent appeal, and in any subsequent suit for the same cause of action; and this, although in its subsequent consideration this court may be clearly of the opinion that the former decision is erroneous in that particular. * * * It is a necessary corollary of this doctrine that the former rule is not binding upon the second hearing, except as to questions which involve and are controlled by the same principle." There can be no doubt as to what rule or principle of law was determined by the former decision in this cause. The court declares it as follows: "We think the facts set forth in the complaint bring the case within the rule laid down in Kleinclaus v. Dutard, 147 Cal. 245, 81 Pac. 516, where the defense of laches raised by demurrer to a complaint to enforce an alleged trust growing out of a transaction 35 years old was sustained. * * * From the whole complaint it is apparent that the court could only arrive at the respective rights of the parties by going into an investigation of the particulars of purchases and sales of property covering a period of over 40 years. Both parties to the original transaction, out of which plaintiff's alleged claim arose, being dead, it is manifest that it would be practically impossible for a court at this late day to do complete justice. This is a ground for a court of equity to refuse relief. We think the complaint upon its face shows such laches as to bar any right of action in plaintiff, and the demurrer should have been sustained."

Appellant seeks to escape the operation of the rule by virtue of the contention that "the decision of the District Court of Appeal could only be justified upon the ground that it appeared from the complaint that the original purchase was made partly with the funds of Hudson and partly with the funds of Mrs. Hudson. * * * But we make it apparent in the amended complaint that Mr. Hudson had no interest in this original property, but that it was purchased entirely with Mrs. Hudson's funds. Moreover, the original complaint left it a matter of speculation as to how the original funds were transmuted into the property sued for. The amended complaint, on the other hand, traces the funds through every piece of property until the death of Mr. Hudson. There is no difficulty whatever in doing exact justice, if the allegations of the amended complaint are true." But it is clear that the cause of action is the same, and no additional fact is alleged to excuse or justify the delay in instituting the proceeding in question. There is no difference in principle between an action to recover the whole interest in property which is claimed to be the product of a trust fund and an action which seeks to charge said property pro tanto with a trust. In either case the purpose of the suit is to recover the proceeds of the money actually invested for the beneficiary. It is difficult, also, to understand how the more elaborate exposition in the complaint of the chain of title, or, in other words, the averment of unnecessary and evidentiary matter, affects in the slightest degree the question of laches.

It is manifest that in view of the rule, as declared in the Kleinclaus Case, supra, "that only conscience, good faith, and reasonable diligence can call a court of equity into activity, and that entirely independent of any statutory period of limitation stale demands will not be aided, where the claimant has slept upon his rights for so long a time and under such circumstances as to make it inequitable to enter upon an inquiry as to the validity thereof," the appellate court in the former decision of this cause determined that it would be inequitable to even enter upon an inquiry as to whether the purchase of certain property in 1853 by one George Hudson created a trust. Would it be any less inequitable because claimant demands the whole of the property, instead of only a part, or because he sets out in the complaint gratuitously some of the evidence by which he seeks to support his claim? Indeed, the argument of appellant seems to proceed upon the theory that equity declines to entertain such demands because of the difficulty encountered by claimants in tracing, to their own satisfaction, trust funds, or in consequence of their reluctance in testifying to facts in support of their claims. The truth is, however, that equity looks with disfavor upon suits like the one before us, for the reason that testimony in support of the claim is so easily obtained and can be fabricated with such facility, and the circumstances afford such strong inducement to commit perjury and involve such peril of doing injustice to those whose lips are sealed by death, that it is deemed against sound public policy to even investigate the cause.

Again, while the court in the former opinion went no further than to determine that the demurrer to the complaint should have been sustained, it really had before it in the record the testimony of plaintiff's witnesses disclosing substantially the additional matters set out in the amended complaint. As this testimony was admitted without objection, and treated by the parties as within the allegations of the complaint, and as the trial court found that all the property was charged with the trust, no doubt, the appellate court, if it deemed them material, would have considered these additional matters as though constituting a part of the complaint. If appellant, instead of amending his complaint by inserting the evidence received at the trial, had added some fact extenuating or justifying his delay, a different question, of course, would be presented. We feel entirely satisfied that the said decision of the appellate court is not only the law of the case, but that it is just, and, furthermore, that there is added reason for holding now, after 55 years since the original transaction, that no trial should be had of plaintiff's stale demand.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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11 Cal. App. 7

TOGNI v. TAMINELLI et ux. (Civ. 469.)

(Court of Appeal, First District, California. July 12, 1909.)

1. APPEAL AND ERROR (§ 927*)—REVIEW—SCOPE—NONSUIT.

In determining, on appeal from a judgment of nonsuit, whether the evidence suffices to sustain findings for plaintiff, the evidence must not only be considered as absolutely true, but all reasonable inferences that may be drawn must be resolved in plaintiff's favor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3748; Dec. Dig. § 927.*]

2. DEEDS (§ 70*)—FRAUD—FAILURE TO READ—ESTOPPEL.

Defendant contracted to convey land to plaintiff and two others, and subsequently conveyed the whole of the land to plaintiff for a good consideration. Thereafter, representing that the other two vendees had abandoned the contract, defendant showed plaintiff a copy of a release of the contract, asking him to make a copy thereof, that he could show to the other vendees as evidence that plaintiff was willing to sign such release. After making the copy plaintiff was tendered an instrument by defendant, who stated that it was the release, and, believing it to be a release, and the one of which he had made a copy, plaintiff signed it, not knowing that an additional clause, conveying all the interest of the vendees to defendant, had been added. *Held*, that plaintiff's failure to read the paper before signing it did not constitute such negligence as precluded him from having the deed set aside.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 70.*]

Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

Action by C. Togni against Pio Taminelli and wife. From a judgment of nonsuit, plaintiff appeals. Reversed.

Will M. Beggs and C. H. Herrington, for appellant. W. P. Veuve, Hiram D. Tuttle, and R. R. Syer, for respondents.

COOPER, P. J. This action was brought for the purpose of having a certain deed made to defendant Pio Taminelli to lands described in the complaint, situate in Santa Barbara county, set aside as being fraudulently obtained from plaintiff without consideration, and to have plaintiff's title restored, or, in case that cannot be done, for the recovery of $10,700, the amount which it is alleged said Pio Taminelli received by reason of the sale of such lands. At the close of plaintiff's testimony the court granted the motion of defendants for a nonsuit, and judgment was accordingly entered. This appeal is from the judgment, and is accompanied by a bill of exceptions.

It becomes our duty to examine the evidence, and if it is sufficient to sustain findings or a verdict for the plaintiff, in case the court or a jury had found for plaintiff, it is our duty under well-settled rules to reverse the judgment. In determining such question we must consider all the evidence in the record as absolutely true. Not only this, but it is our duty to resolve all reasonable inferences that may be drawn in favor of the plaintiff. The questions, therefore, for our consideration, are as to whether or not the plaintiff was the owner of the land, whether the deed was obtained from him by fraud and without consideration, and whether the money received by Pio Taminelli for the land is in equity and good conscience the money of plaintiff. The evidence in brief shows the following facts:

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Plaintiff first met defendant Pio Taminelli (who will hereinafter be referred to as the defendant) about June, 1900. Defendant represented to plaintiff that he owned the tract of land described in the complaint, and that it was very valuable for asphaltum, and perhaps oil. After some negotiations, and on June 11, 1900, the defendant, as party of the first part, entered into an agreement with plaintiff, F. E. Allyn, and C. H. Herrington, as parties of the second part, by the terms of which agreement defendant was to convey the land to the parties of the second part for the consideration of certain payments, amounting to, in round figures, $6,000. The second payment, $1,400, was to be made within one year, $2,000 within two years, $1,000 within three years, and the final payment was to be 1,000 shares of the capital stock of a corporation, which the parties of the second part contemplated organizing for the purpose of operating and exploring the lands for oil and asphalt and other mineral substances. This contract gave the parties of the second part the right to the immediate possession of the said lands, together with the tools, tracks, and cars then upon the same, and will be referred to herein as the "Herrington contract." In May, 1901, the plaintiff sold to defendant an undivided one-half interest in a grocery store which plaintiff had been conducting in San José, and gave to defendant a bill of sale of such undivided one-half interest in such store. The consideration for the sale was $3,500, of which $1,500 was paid by defendant in cash, and the balance, $2,000, by a conveyance of an undivided one-half interest in the lands herein described. The plaintiff and defendant were thus partners in the grocery business from May 2 to June 17, 1901. On this last-named date the plaintiff sold to defendant his remaining one-half of the grocery store for $3,500; the consideration paid by defendant being $1,500 cash or its equivalent, and a conveyance by defendant of his remaining undivided half of the lands at the price of $2,000. The deed was delivered to plaintiff, and a bill of sale made by plaintiff to defendant of the store and merchandise. Defendant thus became the sole owner of the grocery store and appurtenances, and plaintiff became the sole owner of the lands. The deed was delivered to the plaintiff, and he placed it in the safe at the store, to which defendant had access. Plaintiff, at defendant's request, continued to conduct the store until about the 7th of July following the sale, at which time he went away on a vacation for about a month, and when he returned he was informed by defendant that he had overdrawn his account and that defendant had taken the deed as security. Plaintiff made no objection at the time to the deed being held as security, although it does not appear that he consented that it should be so held. On December 11, 1901, defendant gave to plaintiff a statement of his account, showing a balance due of $50.04; but among the credits given to the plaintiff were two promissory notes given by plaintiff to defendant, one for $400 and the other for $273. This statement of account was receipted by defendant as a statement and settlement in full. Some time during the year 1902 the plaintiff turned over to defendant some accounts and a half interest in a house and lot in East San José; but it does not appear clearly what was the value of the accounts or of the half interest in the house and lot. Defendant never surrendered or delivered up the $400 note or the $273 note to plaintiff.

It seems that the contract or agreement made on June 11, 1900, by defendant to plaintiff, Allyn, and Herrington, had not been complied with, or at least had been abandoned. Some time prior to August, 1902, defendant stated to plaintiff that Herrington and Allyn had not complied with their contract, and had failed to make the payments as therein provided, and showed to plaintiff a copy of a release of the Herrington contract, and asked plaintiff to make a copy of such release in his own handwriting, so that he could show such copy to Herrington and Allyn as evidence of the fact that plaintiff was willing to sign such release. Thereupon plaintiff made in his own handwriting a copy of the paper or release which defendant had given him, and which is as follows: "Know all men by these presents that for and in consideration of one dollar to me in hand paid, the receipt whereof is hereby acknowledged, that certain lease dated June 11, 1900, and recorded in Book 71 of Deeds, page 221, the 18th day of July, 1900, in the county records of Santa Barbara county, California, and executed by and between Pio Taminelli of the county of Santa Barbara, party of the first part therein, and C. Togni, C. H. Herrington, and Frank E. Allyn, of the county of Santa Clara, state of California, the parties of the second part therein, is hereby canceled, annulled, and made void, and is of no further effect whatever, and we do hereby sell, assign, and transfer to said Pio Taminelli all our rights, title, and interest in and to said above lease.

In witness whereof we have signed our names. C. Togni." Some time after this copy had been made by plaintiff, the defendant asked plaintiff to come up and "sign the release." Plaintiff went up to Herrington's office, where were present Herrington, Allyn, and defendant. Defendant said to plaintiff, "There is the release ready," and plaintiff, believing it to be a release, and the one of which he had made a copy, signed a paper, which contained the substance of the paper which had been previously copied by him, together with an additional clause at the end thereof as follows: "And the said parties of the first part herein do, for a good and sufficient consideration, grant, bargain, and sell unto the said party of the second part herein all of their and each of their right, title, and interest in and to all the property described and mentioned in the said agreement of June 11, 1900; it being the intent of this instrument to vest in the said party of the second part herein the same title in the premises in said indenture of June 11, 1900, described as said party of the second part herein, had and held before the execution and delivery of said agreement of June 11, 1900." The above release and conveyance was duly acknowledged by plaintiff, Herrington, and Allyn, and, being delivered to defendant, he placed it on record.

Plaintiff had never had any conversation with defendant about making a deed of the lands to defendant. He received no consideration for the execution of the instrument. He had heard nothing said, except as to getting a release of the Herrington contract. Allyn testified that defendant referred to the paper as a "release," and that they were all ready to release the Herrington contract. Herrington testified that defendant said to plaintiff when he came in, "Here is the release," and that they all signed it; that plaintiff did not read it. There is not a word of evidence tending to show that defendant ever mentioned "deed" to plaintiff, or to Herrington or to Allyn. Plaintiff was not in good health after he sold the grocery business, and had a stroke of apoplexy some time afterwards. He appears to have placed implicit confidence in defendant, who had been his partner, and who told him that he was holding the deed as security for a small balance. After getting the deed signed by plaintiff and placing it of record, defendant sold the land for $60 an acre, as testified to by himself. Defendant also testified that he destroyed the deed that he had executed to plaintiff. It clearly appears that after this deed was duly executed and acknowledged and delivered to plaintiff, defendant took possession of it without plaintiff's consent, claiming to hold it as security, and that he afterwards destroyed it without plaintiff's consent or knowledge. Defendant thus, from this testimony, has the store and business, valued at $7,000, which he paid for by a conveyance of the lands; and he also has the proceeds of the sale of the very same lands, amounting to more than $10,000; and plaintiff has nothing. Defendant executed and delivered a deed to plaintiff, and afterwards, while a partner of plaintiff, took the deed from the safe into his own possession. The deed he not only destroyed, but to make assurance doubly sure he obtained a reconveyance by calling the paper a "release." These matters all appear by the evidence and the reasonable inferences to be drawn from such evidence. It may be that defendant can show the facts to be different; but the court should carefully look into and examine every fact and circumstance in order to arrive at the truth. If defendant paid any consideration for a reconveyance of the land, he will be allowed to show it. If he legally held the title to the land as security, the court can determine the amount of indebtedness due him by plaintiff. Surely the defendant should not be allowed to keep the proceeds of the sale of the lands if the above facts are true; and, as before stated, we must here consider them true.

It is said that the plaintiff cannot complain because he was guilty of negligence in not reading the paper before he signed it. If such were the rule, it would indeed be a harsh one, and one that would work injustice upon many nonsuspecting persons. When the plaintiff had been asked to copy the release, and had done so, when he had heard nothing else spoken of but a release, and was asked to sign the release with Allyn and Herrington, who were parties to the contract which was released, it is not surprising that he did not read it through to see if hidden within there was a deed of conveyance. He appears to have had confidence in defendant, and relied upon the statements made by defendant to him. It would hardly be presumed that defendant would call the paper a release in the presence of Allyn and Herrington, unless he intended thereby to get it signed as a release. The authorities fully sustain the proposition that relief will be granted under such circumstances.

In Higgins v. Parsons, 65 Cal. 280, 3 Pac. 881, the contract was that a certain note secured by mortgage should bear interest at the rate of "1 per cent. per month," but by mistake the note was made to read "1 per cent. per annum." The trial court held that the mistake could not be corrected in a court of equity on account of defendant's negligence in not reading the note. The Supreme Court held otherwise, and reversed the case, and in the opinion said: "The finding that plaintiff might have discovered the mistake which he seeks to have rectified is an immaterial one. The right to have an instrument revised so as to have it truly express the intention of the parties is not made to depend upon the fact whether the party seeking to have it so revised might have discovered the mistake before signing such instrument." In Calmon v. Sarraille, 142 Cal. 639, 76 Pac. 488, it appeared that the agent of plaintiff, in negotiating for the purchase of certain lands for $11,500, falsely represented to plaintiff that the vendor of the land insisted upon a deed of a lot belonging to plaintiff, and presented a deed as a part of the consideration, representing that it was a deed to the party from whom plaintiff was purchasing, when in fact it was a deed to the agent, and the party selling to plaintiff had not heard of such deed, and only received the $11,500. Plaintiff, relying upon the representations of such agent, did not read the deed, but signed it. The court gave relief, and in the opinion said: "The proposition of the appellant that inasmuch as the contents of the instrument were open to the plaintiff equally as to Garnier, and that as they signed it without reading it or having it read to them they are bound by its terms, is without merit. * * * Even when contracting parties are adverse to each other, either has the right to rely upon an express statement made by the other of an existing fact, of which the truth is known to the other and not to him. Mead v. Bunn, 32 N. Y. 275; Bank of Woodland v. Hiatt, 58 Cal. 234."

In Resh v. First National Bank, 93 Pa. 397, where a suit was brought upon a promissory note, the defendant was allowed to prove that he signed the note believing it to be a receipt for moneys that had been paid to him, and that he relied upon a statement that it was a receipt for the money that he had so received. No suggestion was even made that defendant should have read the paper which was falsely represented to him to be a receipt. In Pomeroy's Eq. Jurisprudence (3d Ed.) § 896, note "d," the author quotes the language of Jessel, M. R., from Redgrave v. Hurd, L. R. 20 Ch. Div. 1, as follows: "Nothing can be plainer, I take it, on the authorities in equity, than that the effect of false representation is not got rid of on the ground that the person to whom it was made has been guilty of negligence."

In our opinion the above-quoted authorities lay down the correct rule which should govern courts of equity in such matters. Nothing is more common than for a party who has agreed to give a deed or other contract relating to some specific subject to sign it upon being told that it is the deed or contract which had been orally agreed to. The party who so signs has not exercised the greatest degree of care; but that will not excuse the party who intentionally misleads him. No one has a right, either in law or in morals, to complain because another has placed too great reliance upon the truth of what he himself has stated. In this case it comes with poor grace from defendant to say that plaintiff had no right to rely upon the statements made by himself to the effect that the instrument was a release.

It follows that the judgment should be reversed, and it is so ordered.

We concur: KERRIGAN, J.; HALL, J.

11 Cal. App. 27

NAIL v. SUPERIOR COURT et al.

(Civ. 709.)

(Court of Appeal, Second District, California. July 13, 1909.)

1. ATTACHMENT (§ 1*)—NATURE OF PROCEEDING.

An "attachment" is merely a proceeding ancillary to the action by which a party may acquire a lien for the security of his demand, and is a provisional, independent proceeding, initiated by affidavit forming the basis for the writ, and can only be made available through a judgment, which neither changes the nature nor determines the validity of the attachment.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 1; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 1, pp. 616–620.]

2. APPEAL AND ERROR (§ 445*)—EFFECT OF APPEAL—JURISDICTION OF TRIAL COURT.

The trial court, if a court of record, retains jurisdiction of the proceedings designated by the Code as provisional remedies, notwithstanding an appeal is taken from its judgment, and may take such steps as may be necessary to preserve the rights of parties interested therein.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2205; Dec. Dig. § 445.*]

3. JUSTICES OF THE PEACE (§ 181*)—APPEAL—JURISDICTION OF THE SUPERIOR COURT.

Under Code Civ. Proc. §§ 976, 977, 980, providing that on an appeal on questions of law and fact the justice must transmit the papers in the cause, and the action is tried anew in the superior court, etc., the superior court, on appeal on questions of both law and fact, has no jurisdiction to review an order of the justice denying a motion to dissolve a provisional attachment, executed when the action was begun, though the transmission of all the papers in the cause vests the superior court with jurisdiction of the attachment proceeding, incidental to the execution of the judgment which may be rendered in the principal action.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 704; Dec. Dig. § 181.*]

Application for a writ of mandate by Mrs. Samuel Nail against the Superior Court in and for the County of Los Angeles and another. Writ denied.

William Lewis, for petitioner.

PER CURIAM. Application for a writ of mandate to compel the superior court, on an appeal from a justice's court taken on questions of both law and fact, to review an order of the justice denying petitioner's motion to dissolve a provisional attachment issued at the time the action was begun.

Waiving consideration of two matters which suggest themselves as having a probable bearing on the right of petitioner to the writ, but which are presented on the application, we think the petition should be denied on the points and authorities presented. The first of the two matters referred to as not considered in what is here said is the possibility that a showing upon all the record might disclose that the attachment had become merged in the execution, and thus rendered the question involved in the ruling upon the motion to dissolve the attachment a moot question, since, if the personal property attached were now held by the sheriff under an execution regularly entered, it might be urged that this court should not issue its extraordinary writ, when it would be idle and ineffective to accomplish the purpose stated on its face, even though it would enable one of the parties to gain some advantage in moving to tax costs. The second matter is that the refusal of the superior court to review the order dissolving the attachment should, for the purpose of sustaining the court's action, be regarded simply as a denial of the motion to dissolve.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Taking up the application as presented, and we find that petitioner, in support of her contention that the order of the justice may be reviewed on an appeal from the judgment, even after final judgment in the appellate court, cites the cases of Griswold v. Sharpe, 2 Cal. 17, and Taaffe v. Rosenthal, 7 Cal. 515. These cases, as well as that of Reiss v. Brady, 2 Cal. 132, to the same effect, were overruled in Allender v. Fritts, 24 Cal. 447. From the latter case it appears that the practice act, as then in force, contained no provision for an appeal from an order of the district court dissolving or refusing to dissolve an attachment, and it was sought to secure a review of such an order by the Supreme Court upon an appeal from the judgment, as well as to appeal from the order itself. Sawyer, J., delivering the opinion of the court, says: "This is not an appealable order within the meaning of those sections (Prac. Act, §§ 347, 336), and an appeal, therefore, cannot be taken from it directly as an order; and it is not an order 'involving the merits and necessarily affecting the judgment,' within the meaning of section 344. The attachment is merely a proceeding ancillary to the action, by which a party is enabled to acquire a lien for the security of his demand by a levy made before, instead of after, the entry of a judgment. * * * Neither the action nor the judgment, under our law, in any manner depends upon the attachment, although the attachment depends upon the action. The judgment in the case is precisely the same, whether the attachment is dissolved or not." It "is not in any respect affected by the attachment. We could neither reverse nor modify the final judgment in any particular in consequence of any error in the attachment proceedings. * * * It is a case for which the practice act has made no provision." The Allender Case is recognized as authority in Myers v. Mott, 29 Cal. 360, 363, 89 Am. Dec. 49, and Herman v. Paris, 81 Cal. 625, 22 Pac. 971; it being said in the latter case: "The attachment papers in no way affected the validity of the judgment or order denying a new trial, and the questions in relation to them cannot be considered on the appeals taken." There was an appeal from the judgment and from an order refusing a new trial in that case.

In line with this same distinction, Chief Justice Parker observes in Kittredge v. Warren, 14 N. H. 510, 530: "It [the attachment] is originated by the suit, and sustained by the suit, but is not part of it. It can only be made available through a judgment, but the judgment neither changes its nature nor determines its validity; nor does it operate to perfect the attachment. The judgment establishes the existence of the demand upon which the attachment is predicated, and the security taken; whereas, it was before only alleged, and presupposed for the purpose of the security." Notwithstanding an appeal be taken from its judgment, the trial court (if a court of record) has been held to still retain jurisdiction of the proceedings designated by our Code as provisional remedies, with power to take such steps therein as may be necessary to preserve the rights of the parties interested therein. Baughman v. Superior Ct., 72 Cal. 572, 14 Pac. 207; Havemeyer v. Superior Ct., 84 Cal. 382, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192; Broder v. Conklin, 121 Cal. 289, 53 Pac. 797. So it is said in Elliott on Appellate Procedure that, while a general appeal brings up the whole case, the appellant is not necessarily entitled to have all the questions which the papers present reviewed. There is a clear and important distinction between bringing up questions, and presenting questions for review. A general appeal removes from the jurisdiction of the trial court all questions concluded by its judgment (section 544), but nothing else.

While we recognize the force of the reasoning upon which the decisions in Bullard v. McArdle, 98 Cal. 359, 33 Pac. 193, 35 Am. St. Rep. 176, Rossi v. Superior Court, 114 Cal. 371, 374, 46 Pac. 177, and Maxson v. Superior Court, 124 Cal. 468, 57 Pac. 379, are based, we are of opinion that the rule as to review of merely ancillary proceedings is the same on the appeal before us as if the appeal were from a judgment of the superior court. This appears to be borne out by the provisions of the Code in relation to appeals on questions of fact or law and fact. When an appeal is taken on questions of both law and fact, no statement is or need be prepared (Code Civ. Proc. § 976); but the justice certifies and transmits all the papers in the cause, including a copy of his docket, to the superior court (Code Civ. Proc. § 977), and the action is tried anew in that court. Section 980 provides, when this is done, the trial must be conducted in all respects as other trials in the superior court, and all the provisions as to trials in the superior court are made applicable and the judgment rendered on appeal has the same effect and is enforced in the same manner as if the action had been commenced in the superior court. Where the appeal is heard on a statement, the court is given power to review certain enumerated orders; but, where the statute provides for a new trial as a matter of right, no provisions are made for the review of either intermediate or subsequent orders or rulings. The principal action is, by the appeal, restored to the same position it occupied before the trial as to all matters leading to the judgment, and the superior court tries the case as if there had been no trial in the justice's court.

The attachment proceeding is not a part of every civil action. It is a provisional, independent proceeding initiated by the affidavit. Finch v. McVean, 6 Cal. App. 272, 91 Pac. 1019. The basis for the writ is the affidavit (Baldwin v. Napa Wine Co., 137 Cal. 649, 70 Pac. 732), and if the transmission of all the papers in a cause to the superior court on appeal be to vest that court with jurisdiction of an attachment proceeding pending in connection therewith, such jurisdiction is not for the purpose of reviewing the rulings of the justice court in connection with the attachment, but as incidental to the execution of the judgment which may be rendered in the principal action. No provision for a review is made by the statute, and whatever other action the superior court may be authorized to take in connection with the attachment proceedings before it by reason of an appeal on questions of both law and fact, in the absence of some statutory authorization to review the rulings of the justice court, we are of opinion that it has no jurisdiction to do so.

The writ, therefore, is denied.

11 Cal. App. 32

ELIZALDE v. MURPHY et al. (Civ. 682.)

(Court of Appeal, Second District, California. July 14, 1909. Rehearing Denied by Supreme Court Sept. 10, 1909.)

1. Executors and Administrators (§ 45*)—Property Held by Decedent in Trust—Duty of Executor.

While property held by a decedent in trust is not part of his estate, and cannot be applied in satisfaction of his debts, or be distributed to his heirs, and while the claimant of such property may sue therefor without presenting a claim, the administrator is not released from his duty to maintain the right of the estate to such property until it has been judicially determined that it does not belong to the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 296; Dec. Dig. § 45.*]

2. Executors and Administrators (§ 528*)—Property Held by Decedent in Trust—Liability of Sureties.

An administrator receiving a fund held by decedent in trust must account for it to his successor as part of the estate, and that he is also individually liable to the owner of the fund does not release his sureties from the primary obligation incurred by him as administrator.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2378; Dec. Dig. § 528.*]

3. Negligence (§ 136*)—Questions of Law and Fact.

Negligence becomes a question of law only in the exceptional case, being generally a mixed question of law and fact.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 280; Dec. Dig. § 136.*]

4. Appeal and Error (§ 1097*)—Former Appeal—Law of Case.

An inference of fact drawn on appeal does not become the law of the case on a subsequent appeal, where the facts from which the inference is to be drawn are different.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4358; Dec. Dig. § 1097.*]

5. New Trial (§ 79*)—Grounds—Findings of Court—Omission.

While an erroneous conclusion of law from the facts found is not a decision against law for which a new trial will be granted, such a matter being reviewable properly under Code Civ. Proc. §§ 663 and 663½, by motion to vacate the judgment or by appeal from the judgment, yet, where a finding as to an essential fact is omitted, the remedy is by retrial of the issue of fact that the court may make a finding thereon.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 165½; Dec. Dig. § 79.*]

6. New Trial (§ 128*) — Specification of Grounds—Sufficiency.

Under Code Civ. Proc. § 657, subd. 6, providing that a new trial may be granted for insufficiency of the evidence to justify the verdict or other decision, a specification of the insufficiency of the evidence to support the judgment is insufficient on motion for a new trial; the decision of the court being found in its findings and not in the giving of the judgment.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 261; Dec. Dig. § 128.*]

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by Eliza P. Elizalde, as administratrix of Marcos A. Elizalde, deceased, against P. W. Murphy and others. There was a judgment for plaintiff for less than the amount demanded, and from an order denying her motion for a new trial she appeals. Reversed and remanded.

See, also, 87 Pac. 245.

B. F. Thomas, for appellant. Louis Lamy, W. H. Spencer, and Wm. Shipsey, for respondents.

TAGGART, J. This is an action against the sureties on an administrator's bond, by his successor in office, to recover the balance found upon an accounting, to be due from said administrator to the estate of the deceased. Plaintiff, being dissatisfied with the amount of the judgment in favor of the estate, appeals from an order of the superior court denying her motion for a new trial. This is the second appeal taken by plaintiff based upon the alleged improper allowance by the trial court of items of credit on behalf of defendants.

On the former appeal (4 Cal. App. 117,

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

87 Pac. 245) the judgment of the trial court was reversed because of the improper allowance of two items, then before the court, and a new trial ordered. Under the law of the case declared with respect to them, and the failure of respondent to appeal, these two items have passed out of consideration; but two other allowances made on the second trial are claimed by appellant to have been erroneous. One of these (hereinafter spoken of as the Dargie note) was considered by this court in connection with the findings of the trial court made, and the evidence given, upon the first trial, and it is contended by respondents that the decision of this court then rendered has become the "law of the case" as to that item also. On the new trial, in addition to the findings of formal facts necessary to the judgment, the execution of the undertaking, relations of the parties, etc., the trial court found that Ernest Graves, as administrator of the estate of Marcos A. Elizalde, deceased, on the 28th day of May, 1898, filed the last account made by him of his administration of said estate, wherein he charged himself with the sum of $8,142 received, and credited himself with disbursements in the sum of $3,008.50; among the items going to make up the former amount being one as follows: "Money in hands of administrator as per decree of this court, August, 1897, $6 392." This account of Graves was, by an order of the superior court made July 9, 1898, settled and allowed, as filed, except that an additional allowance of $500 for attorney's fees was made. It is also found that after the filing of the account of May, 1898, said Graves collected the sum of $405 in rents, and the sum of $157.50 on account of the Dargie note, and paid out on account of disbursements on behalf of said estate the sum of $1,195; the latter sum including the $500 attorney's fees allowed. From this showing it appears that there is a balance due said estate from defendants of $4,501; whereas the judgment in favor of plaintiff is for only $3,501 and costs. The finding upon which the court based this reduction of the amount of the judgment is as follows: "Third. That the item of $6,392 contained in the account set forth in paragraph 10 of the complaint herein (the balance on hand from prior account above mentioned) includes the sum of $1,000, to wit, the $1,000 claimed by the defendants to be the property of one Francisco Elizalde, an incompetent person. That said $1,000 never belonged to Marcos A. Elizalde or the estate of Marcos A. Elizalde." This finding appellant contends is not supported by the evidence. It is further found, as to this item of $1,000: That the same was money held in trust by Marcos A. Elizalde for the benefit of one Francisco Elizalde, an incompetent person, which after the death of Marcos A. Elizalde came into the hands of said Graves, and was held by him in trust for the benefit of the incompetent and without prejudice to the right of said incompetent or his guardian to take any lawful means for the collection thereof; that an action was brought by said incompetent against Graves as administrator of the estate of Marcos A. Elizalde, deceased, to recover the same, and the said action is still pending; that an appeal was taken from a judgment rendered therein, which is referred to as reported in 137 Cal. 634, 66 Pac. 369, 70 Pac. 861, and from which it appears that a judgment rendered against plaintiff in this action as administrator, payable in "due course of administration," was reversed; that this action is still pending in the superior court of Santa Barbara county; that said Graves died pending the appeal; and that plaintiff herein was, on the death of said Ernest Graves, substituted as the defendant in said action. From the decision on appeal it appears that the substitution took place prior to the reversal of the former judgment, and the order made on the appeal is predicated in part at least upon the fact that the change of administrators would make some difference in the judgment that might be entered.

The evidence relating to the $1,000 item shows an acknowledgment in the account of C. A. Thompson, executor of the will of Marcos A. Elizalde, the probate of which was revoked, that he held that sum to be paid to the guardian of Francisco Elizalde, a report by him, accompanying said account, to the effect that the sum of $1,000 was held by Marcos A. Elizalde in his lifetime as trustee under the will of Maria Ignacia Elizalde for the benefit of the incompetent, an order settling said account and directing the executor to pay over to the special administrator of the estate (Ernest Graves) said sum, without prejudice to the right of the guardian of the incompetent to apply for an order directing said sum to be paid over to him by the special administrator, and that the money was received by Graves as special administrator, and retained by him as general administrator of the estate of Marcos A. Elizalde, deceased. In the reports accompanying three several annual accounts filed by Graves as administrator of the estate he reports that an action has been brought, or is pending, against the estate to recover the said sum, and in the order settling the last account filed by him is contained the recital that judgment had been obtained against him as administrator in favor of said incompetent for $2,109.50. It is stipulated that this judgment was reversed, and that the action has never been retried, but is still pending in the superior court. The effect of all this is merely to establish that $1,000 of the estate is in litigation. While, as was said in the department opinion in Elizalde v. Elizalde, 137 Cal. 634, 642, 66 Pac. 639, 70 Pac. 861, property held by a decedent in trust is not a part of his estate, and cannot be applied in satisfaction of his debts, or form a portion of his estate to be distributed to his heirs, and no presentation of a claim is required before the claimant of such trust property can maintain an action therefor, nevertheless the administrator of the estate is not released from his duty to maintain the right of the estate to such property until it has been finally judicially determined that it is not the property of the estate. In considering the question of the superior court having awarded interest on the judgment obtained by the incompetent against the administrator Graves, it is said in the opinion of the court in bank (137 Cal. 638, 70 Pac. 862): "The heirs or executors will take the trust property, and they must settle the accounts of the testator in relation to the trust. They must also see that the property is protected and preserved. Perry on Trusts (3d Ed.) § 344. It thus becomes the duty of the personal representative to preserve the trust fund, in common with the other funds which have come into his possession. * * * The reason is plain. It may often happen that a personal representative takes possession of funds which may be proved to be trust funds without any knowledge that such is the fact. Not knowing the fact, it would be his duty to resist, on behalf of the heirs, legatees, and creditors of the estate, any attempt to deprive it of a part of its assets; that is, he is bound to assume for this purpose that the trust fund constitutes a part of the assets of the estate."

If Graves, as administrator, had prevailed in the action brought by the incompetent, there is no question that the fund would have remained a part of the assets of the estate, and that defendants would have been responsible for its preservation by him. If Graves had lived and continued as administrator, and the action remained pending, as it does, it cannot be doubted that it would have been his duty, as administrator, on behalf of the estate, to continue to defend against the claim. Unquestionably he would have been administering the estate in respect to this fund. No distinction can be drawn between the right of the estate to this fund and its right to any other part of the estate which may have been in litigation when Graves died. If Marcos A. Elizalde was the trustee of the fund under an express trust, his estate was not relieved from liability for the $1,000 by his death. This liability of the estate did not change with the death of Graves, and if it be conceded, as respondent contends, that Graves also became individually liable to the incompetent, this would not release his sureties from the primary obligation incurred by Graves as administrator. To say that Graves was not liable as administrator is to say to the incompetent that his right to have the trust declared was lost by the death of Marcos A. Elizalde. Having received the fund into his possession by virtue of his office, Graves must account for it to his successor as part of the assets of the estate. This view renders it unnecessary to pass upon appellant's contention that defendants are estopped to deny that there is due to the estate of Marcos A. Elizalde, deceased, from the defendants, the balance reported by Ernest Graves in his last account as settled and allowed by the probate court in its order of July 9, 1898, or by reason of the adjudication of the matter by this order.

While there is some doubt in our minds whether the matter of the Dargie note can properly be considered on the record before us, as the same questions presented in relation thereto must, or, at least, may, arise on the new trial required because of the error of the trial court in allowing the defendants credit for the $1,000 item, we will state our views of the law applicable. The points presented by appellant in regard to this note are: (1) That the finding of the court that Graves was not guilty of negligence in failing to collect this note is not supported by the evidence; and (2) that the findings show that Graves converted the Dargie note to his own use on April 4, 1894, when he took from Dargie notes in lieu thereof executed to Graves as an individual, and that the intention to appropriate is established by the findings as to Graves' further action in connection with the notes so made to him as an individual. No express finding of fact was made by the trial court as to whether or not Graves converted or appropriated the note. Neither does the finding relieving him from negligence clearly cover this matter. This finding is that "Graves, as such administrator, was not guilty of negligence in not collecting the amount due." There is an uncertainty in the context which renders it difficult to determine whether this finding relates to the amount due on the original note or on those given to Graves. Accepting it as relating to the original note, it was misconduct, rather than neglect, to take the notes in lieu thereof in his own name rather than to collect the note. Considered in connection with the notes "taken in lieu," it is apparent that when Graves invested the funds of the estate in his own name he created the relation between himself and the estate of debtor and creditor to the value of the property taken by him, and as between him and the estate it became unimportant whether he was negligent in collecting these three notes. He was liable to the estate for the property taken whether he collected these notes or not. There is no pretense that there was any necessity for his taking the notes in his individual capacity. There is no evidence that he ever reported the exchange to the court or asked its approval in the six years he lived after the transaction. He never mentioned the notes in any account or report filed by him, and the matter was not brought to the attention of the court until this action was tried. This brings the case directly in line with the facts in Matter of Bane, 120 Cal. 533, 538, 52 Pac. 853, 65 Am. St. Rep. 197. Upon the new trial there should be a finding of fact on the issue of the appropriation or conversion of the original note by Graves, as this is a mixed question of law and fact; so, also, in order that the court may determine whether or not the principal sum should bear interest, it is important that the trial court also make a finding of the good or bad faith of Graves in taking the notes in his own name, the latter finding being necessary to the determination of the right of the estate to interest, but having no application to the question of the conversion of the principal sum. Estate of Cousins, 111 Cal. 441, 44 Pac. 182; Matter of Bane, supra, 120 Cal. 536, 52 Pac. 853, 65 Am. St. Rep. 197.

Respondents object to the consideration of this question on this appeal upon the grounds: (1) That the decision of this court on the former appeal has, as to the Dargie note, become the law of the case; (2) that the matter of appropriation and conversion as here presented is a question of law which cannot be considered on an appeal from an order denying a new trial; and (3) that there is no specification of insufficiency of evidence in the record which can be considered to cover the matter. Negligence becomes a question of law only in the exceptional case, and is generally a mixed question of law and fact, and we think what is said as to the Dargie note in the decision of this court on the former appeal is of the latter character. Without examining the record on that appeal, it appears from the opinion (4 Cal. App. 117, 87 Pac. 245) that the finding considered by this court was that "there was no negligence upon the part of the administrator in his failure to realize upon this asset," and what was said in the opinion in this regard was based chiefly upon evidence that Dargie was at all times insolvent; whereas, there is a finding in the record before us that Dargie was at all times solvent. The facts being dissimilar, it cannot be said the inference of fact drawn therefrom by the court on that appeal becomes the law of the case here. Wallace v. Sisson, 114 Cal. 42, 45 Pac. 1000.

When considered solely as a deduction from the findings made by the trial court, the question of appropriation or conversion is, of course, a mere conclusion of law. While there are earlier cases cited as holding that an erroneous conclusion of law from the facts found is a decision against law for which a new trial has been granted, it is now held otherwise (Kaiser v. Dalto, 140 Cal. 167, 73 Pac. 828); such a matter being said to be reviewable properly on a motion under sections 663 and 663½, Code Civ. Proc., or by appeal from the judgment. In the case at bar, as in the case cited (Kaiser v. Dalto), however, there was a failure to find upon an issue of fact. In that case this "decision against law" was not especially urged by appellant, while here it comes within one of the grounds mentioned in the motion for a new trial, and, though it receives but little attention in the brief, we think it proper for us to consider it. There is also the further distinction between the Dalto-Kaiser Case and that before us, that the finding there under consideration was not material to the judgment, while here the absence of such a finding precludes the appellant from successfully availing herself either of a motion under section 663, or an appeal from the judgment. The remedy for appellant here is by a retrial of an issue of fact that the court may make a finding thereon.

Under the distinction drawn in Swift v. Occidental M. Co., 141 Cal. 161, 166, 74 Pac. 700, 701, the "decision against law" here considered must be classified with those properly reviewable by a motion for a new trial. Says the chief justice, writing the opinion in that case: "An example of the first class (decisions against law reviewable by motion for a new trial) is where the trial court has failed to make any finding upon some material issue. The omitted fact being essential to the judgment, a new trial for the purpose of determining the issue is the appropriate remedy, and the refusal to grant it is reviewable on appeal from the order." This is not a case in which every material issue of fact has been decided in favor of the appellant, and in which, a new trial being clearly ineffective, the only remedy is by motion under section 663, or by appeal from the judgment. Sharp v. Bowie, 142 Cal. 462, 467, 76 Pac. 62, 66. Under such a state of the record, we think it proper for us to resolve such doubts as we have as to the proper practice in favor of a hearing of the question on its merits. This is rendered all the more necessary by the fact that there appears to be no specification of the insufficiency of the evidence to sustain the decision (findings) of the court under which the matter can be considered.

The third specification, which appears to be the one addressed to this matter, makes no reference to any finding, but is stated as follows: "That the evidence is insufficient to justify the decision of the court in giving the plaintiff judgment for the sum only of $3,501, without interest, as the evidence shows," etc. The "decision" of the court is found in its findings and not in the giving of the judgment. The ground of motion for a new trial based on the sufficiency of the evidence relates to the insufficiency of the evidence to justify the inferences of fact included in the verdict of the jury or "other decision"—that is, finding of fact—by the court, and a specification of insufficiency of the evidence to support the judgment cannot be considered. Boston Tunnel Co. v. McKenzie, 67 Cal. 485, 8 Pac. 22; Code Civ. Proc. § 657, subd. 6. While the more recent decisions of the Supreme Court have receded from the strictness of the rule as to specifications declared in De Molera v. Martin, 120 Cal. 544, 52 Pac. 825, and now construe them liberally in favor of the right of the moving party to be heard (Swift v. Occidental M. Co., supra; American Type Co. v. Packer, 130 Cal. 459, 461, 62 Pac. 744), it can hardly be said that the rule has been so relaxed as to include the specification before us as a specification of the insufficiency of the evidence to sustain the decision.

The order of the trial court is reversed, and cause remanded for further proceedings in accordance with the foregoing views.

We concur: ALLEN, P. J.; SHAW, J.

11 Cal. App. 1

LANGE et al. v. SUPERIOR COURT et al.

(Civ. 618.)

(Court of Appeal, Third District, California. July 10, 1909.)

1. PROHIBITION (§ 10*)—SUBJECTS—PROCEEDINGS OF COURTS—CONTEMPT.

Under Code Civ. Proc. § 1102, providing that a writ of prohibition shall arrest the proceedings of any tribunal, etc., when such proceedings are without or in excess of the jurisdiction of such tribunal, prohibition will not lie to restrain a court from passing judgment of contempt where it did not appear that the court exceeded its jurisdiction in any respect.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 37; Dec. Dig. § 10.*]

2. PROHIBITION (§ 3*)—GROUNDS—ADEQUACY OF REMEDY BY APPEAL.

Under Code Civ. Proc. § 1103, providing that a writ of prohibition may be issued in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law, prohibition will not lie to restrain a court from passing judgment in contempt proceedings on petitioners for violating an injunction; petitioners' remedy being by appeal.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 4–19; Dec. Dig. § 3.*]

3. PROHIBITION (§ 10*)—GROUNDS—WANT OF JURISDICTION.

That the complaint in an action for an injunction was defective, and that there was a failure of proof of the violation of the injunction, did not show lack of jurisdiction in the court so that prohibition would lie to restrain it from punishing defendants in the action for contempt in violating the injunction.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 37–56; Dec. Dig. § 10.*]

4. COURTS (§ 1*)—"JURISDICTION."

"Jurisdiction" is authority to hear and determine a cause.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1–9; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 4, pp. 3876–3885; vol. 8, pp. 7697, 7698.]

5. PROHIBITION (§ 11*)—GROUNDS—WANT OF JURISDICTION.

A wrong decision by a court as to the sufficiency of the evidence to support a finding cannot be questioned in a proceeding by prohibition.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 36; Dec. Dig. § 11.*]

Petition by Charles Lange and others for a writ of prohibition against the Superior Court of the State of California for the County of Solano and A. J. Buckles, Judge. Denied.

Morrisey & Jocks and Keogh & Olds, for petitioners. F. R. Devlin, for respondents.

BURNETT, J. Petitioners are two of the defendants in an action pending in said superior court in which the Vallejo Ferry Company (a corporation) is plaintiff. In the complaint the said corporation, among other things, alleged: "That on the 18th day of March, 1896, the city of Vallejo by ordinance No. 132 of ordinances of said city [a copy of the ordinance being set out in the complaint], in consideration of the sum of $10,151.00 paid said city of Vallejo by one William Whitney, duly granted, sold, and conveyed to said William Whitney and to his assigns, the franchise, right, privilege, and authority to construct, keep, and take tolls upon a public ferry running between said city of Vallejo and the United States Navy Yard at Mare Island for the term of 20 years from said date, which said ordinance and grant of franchise has ever since March 18, 1896, been, and now is, in full force and effect. That on or about the 28th day of March, 1896, said William Whitney duly granted, bargained, sold, and conveyed said ferry franchise and all his rights under said franchise and ordinance to the Vallejo Ferry Company, plaintiff herein, and plaintiff ever since March 28, 1896, has been, and now is, the sole owner and holder of said ferry franchise and of all the rights and privileges granted to said William Whitney by said ordinance and by said city of Vallejo." Then follow the allegations that ever since said date the plaintiff by virtue of said franchise and ordinance has operated said ferry, and that said defendants, without any franchise or license, have for the past year established and conducted a ferry between said points and have carried passengers and freight contiguous to and within one mile of plaintiff's ferry, and that these acts of defendants have resulted in substantially diminishing plaintiff's business and the value of its franchise, and that defendants threaten to continue to maintain said ferry. The prayer was for an injunction and for damages. The complaint was verified.

Afterwards, on March 10, 1909, upon affidavits, an injunction pendente lite was issued commanding the defendants "to absolutely desist and refrain from running, operating, maintaining, or conducting a ferry or boats for the transportation of passengers, goods, or merchandise from the city of Vallejo or from any point within one mile of the ferry landing of said plaintiff without first obtaining a franchise or license therefor, until further order of this court." Thereafter, on the 5th day of April, 1909, the plaintiff filed an affidavit charging the defendants with a violation of said injunction and praying for an order directing that they show cause why they should not be adjudged guilty of contempt and punished therefor. The order was made, and it and the affidavit upon which said order was based were served upon said defendants. In pursuance thereof, and in response to said order, on April 9, 1909, the defendants appeared by counsel and filed their affidavits, and tne matter was thereupon heard, and the defendants were found guilty of violating said injunction and were declared to be in contempt of said court and were ordered to appear on the 20th day of April for judgment and sentence. Thereupon application was made to this court for a writ of prohibition to restrain respondent from passing judgment upon said defendants or either of them. An alternative writ was issued, and upon the return thereof an answer was filed by respondent denying some of the allegations of the petition; but, as we understand it, there is no controversy between the parties as to the material facts, the difference being rather as to the legal conclusion to be drawn therefrom.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The application of petitioners for a peremptory writ should be denied for two reasons: First, it does not appear that the court exceeded its jurisdiction in any respect; and, second, petitioners had a plain, speedy, and adequate remedy in the ordinary course of law of which they should have availed themselves. Sections 1102 and 1103, Code Civ. Proc. It is evident from the recital already made of the allegations of the complaint that the superior court of Solano county had jurisdiction of the subject-matter of the litigation. The action is admittedly one in equity, and the acts of which complaint is made were committed within the territorial limits of said county. If plaintiff had the franchise and was being deprived of the fruits of it, as alleged in the complaint, it cannot be and really is not disputed that the superior court of Solano county is the proper tribunal under the Code for the redress of plaintiff's grievance. Again, there is no question but that plaintiff complied with the requirement of the statute (section 527, Code Civ. Proc.) in obtaining the injunction. The sufficiency of the affidavit upon which the order was based is, indeed, not challenged, and it appears that proper service was made upon petitioners. The subsequent proceedings, also, culminating in the finding of the court that petitioners were guilty of contempt, were strictly in accord with the provisions of the law. The act complained of was "disobedience of a lawful order of court" and therefore punishable as a contempt. Section 1209, Code Civ. Proc. It was not committed in the immediate view and presence of the court or of the judge at chambers, and therefore an affidavit was presented, reciting the facts showing a disobedience of the said order. Petitioners filed counter affidavits raising an issue of fact which the court determined against them.

It thus appears from beginning to end that no element of jurisdiction is lacking, and therefore petitioners are mistaken in their remedy if they are entitled to any. Their argument, indeed, proceeds from a misconception of the meaning of "jurisdiction." They argue that jurisdiction is wanting because the complaint is defective and because there was a failure of proof of the violation of the injunction. Neither of these considerations is involved in the question before us. "Jurisdiction" is "authority to hear and determine a cause. Since jurisdiction is the power to hear and determine, it does not depend upon the regularity of the exercise of that power or upon the rightfulness of the decisions there made." Am. & Eng. Ency. of Law, vol. 17, p. 1041. In the matter of the Estate of James, 99 Cal. 376, 33 Pac. 1123, 37 Am. St. Rep. 60, it is said: "If the facts stated in the complaint are not sufficient to entitle the plaintiff to the relief demanded therein and awarded by the judgment, the action of the court in deciding otherwise and rendering its judgment in accordance with the prayer of the complaint can be nothing more than error. Head v. Daniels, 38 Kan. 1, 15 Pac. 911; Rowe v. Palmer, 29 Kan. 337; Frankfurth v. Anderson, 61 Wis. 107, 20 N. W. 662; Van Fleet's Collateral Attack, § 61. See, also, Blondeau v. Snyder, 95 Cal. 521, 31 Pac. 591." In Brush v. Smith, 141 Cal. 469, 75 Pac. 55, it is said: "Whether the complaint states a cause of action or not was for the court of original jurisdiction to determine, and it was within the province of such court to allow the pleading to be amended. If the court below should hold a complaint sufficient, when as a matter of law it failed to state facts sufficient to constitute a cause of action, such ruling would be erroneous; but nevertheless the court had jurisdiction. It had jurisdiction to determine the question and to determine it wrong as well as right. If it committed error, the remedy was by appeal." It is equally well settled that a wrong decision by a court as to the sufficiency of the evidence to support a finding cannot be questioned in this proceeding. Beaulieu Vineyard v. Superior Court, 6 Cal. App. 250, 91 Pac. 1015; Wreden v. Superior Court, 55 Cal. 504. We deem it therefore unnecessary to discuss either the authority of the board of trustees of the city of Vallejo to grant the said franchise, as it involves simply a question of the sufficiency of the complaint, or the adequacy of the showing made as to the violation of the injunction by petitioners. Besides, as stated by counsel at the oral argument, the case was set for an early trial and the validity of said ordinance can be properly adjudicated in the regular way.

Again, if petitioners believed the trial court had improperly granted the injunction, they should have moved to have it dissolved, or should have appealed from the order granting it. The practice of violating such an order, taking the chances on a favorable decision by a higher court on application for a writ of prohibition when there is a remedy by appeal, should not be countenanced. The contention of petitioners would be entitled to greater consideration, indeed, if any effort had been made to secure a modification or dissolution of said injunction, or if petitioners upon a showing of great loss to themselves in case of its continued operation had applied for its suspension until the cause could be determined upon its merits. At any rate, they should not have courted the penalty for disobedience of a deliberate order of an important judicial tribunal but should have pursued the ordinary course. In Agassiz v. Superior Court, 90 Cal. 103, 27 Pac. 50, it is said: "Petitioners had the right to appeal from the order refusing to dissolve the attachment, and would have an appeal from any final judgment in the case; and such an appeal being a 'plain, speedy and adequate remedy in the ordinary course of law within the meaning of section 1103 of the Code of Civil Procedure,' prohibition does not lie. A remedy does not fail to be speedy and adequate because by pursuing it through the 'ordinary course of law' more time would probably be consumed than in the proceeding here sought to be used; and it makes no difference that in this instance a question of jurisdiction incidentally depends upon the validity of an attachment. If that were so, then in every ordinary civil action, wherein a defendant chose to raise a point of jurisdiction, either of the person or of the subject-matter, he could by prohibition stop the ordinary progress of the action toward a judgment until this court had passed upon the intermediate question, and thus this tribunal would, in innumerable cases, be converted from an appellate to a nisi prius court." Therein is quoted with approval the rule as stated by High on Extraordinary Legal Remedies, § 770, as follows: "Like all other extraordinary remedies, prohibition is to be resorted to only in cases where the usual and ordinary forms of remedy are insufficient to afford redress; and it is a principle of universal application, and one which lies at the very foundation of the law of prohibition, that the jurisdiction is strictly confined to cases where no other remedy exists; and it is always a sufficient reason for withholding the writ that the party aggrieved has another and complete remedy at law."

The order to show cause is therefore discharged, and the peremptory writ is denied.

We concur: CHIPMAN, P. J.; HART, J.

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11 Cal. App. 67

CARTER v. FOX. (Civ. 672.)

(Court of Appeal, Second District, California. July 21, 1909. Rehearing Denied by Supreme Court Sept. 16, 1909.)

1. VENDOR AND PURCHASER (§ 186*) — CONTRACT—TIME OF ESSENCE.

Plaintiff and defendant agreed in writing for the sale of land, plaintiff to pay a sum in cash and the balance upon receipt of a deed conveying clear title, with certificate of title, which defendant covenanted to deliver on or before 90 days from the execution of the agreement, it being further agreed that plaintiff should pay the costs of the certificate, and that time should be of the essence of the agreement. Defendant did not convey within the required time, being unable to secure a certificate of title. *Held* that, as defendant's conveyance within the stipulated time was a condition precedent to plaintiff's covenant to pay the balance within that time, plaintiff was not in default for not paying the balance within 90 days.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 373; Dec. Dig. § 186.*]

2. VENDOR AND PURCHASER (§ 334*)—REMEDIES OF PURCHASER—DISAFFIRMANCE—RESTORATION OF BENEFITS.

Where plaintiff agreed to purchase land from defendant, and pay part cash and the balance within 90 days if defendant delivered to him a good deed within that time, which defendant covenanted to do, time being made of the essence, upon defendant's failure to convey within the agreed time, because of his inability to do so, plaintiff could disaffirm the contract and recover the cash payment; there being a total failure of consideration.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 959–980; Dec. Dig. § 334.*]

3. VENDOR AND PURCHASER (§ 339*) — REMEDIES OF PURCHASER—RESCISSION—RESTORATION OF BENEFITS—NECESSITY.

Where defendant breached his covenant to convey land to plaintiff free from incumbrances, with certificate of title, within a stipulated time, so that plaintiff received nothing under the contract, a formal rescission or the return of the nominal benefits received by plaintiff was not necessary to entitle him to sue for a payment made; there being a total failure of consideration.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 994–1002; Dec. Dig. § 339.*]

4. VENDOR AND PURCHASER (§ 85*)—REMEDIES OF PURCHASER—"RESCISSION BY CONSENT."

Where the vendor was unable to convey good title within a stipulated time, as agreed, and plaintiff, instead of asserting his rights under the contract, acquiesced in defendant's repudiation thereof, and demanded the return of the purchase money paid, there was a rescission of the contract by consent of the parties within Civ. Code, § 1689, subdiv. 5, authorizing rescission by consent of the parties.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 141–143; Dec. Dig. § 85.*]

Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by J. E. Carter against Edwin R. Fox. From a judgment for defendant, plaintiff appeals. Reversed and remanded, with directions to render judgment for plaintiff.

Chas. Silent and Frank J. Thomas, for appellant. Hutton & Williams, for respondent.

SHAW, J. On September 8, 1905, plaintiff and defendant entered into a written contract whereby defendant agreed to sell and convey to plaintiff, and the latter agreed to buy, certain real estate therein fully described. According to the terms of the contract, the consideration for the purchase was $10,000, payable as follows: $2,000 cash, upon the execution of the contract, and the balance of $8,000 upon the execution and delivery by defendant to plaintiff of a deed, conveying the title thereto, free and clear of all incumbrances, liens, etc., together with an unlimited certificate of title of the Title Insurance & Trust Company of Los Angeles showing the title to the property to be vested in defendant free and clear of such incumbrances, which deed, duly acknowledged, so conveying said property, together with such certificate of title, defendant covenanted and agreed to deliver to plaintiff and place him in possession of the premises on or before ninety days from the date of the execution of the agreement. Plaintiff further agreed that at the time of making said payment of $8,000 he would also pay the charges of the Title Insurance & Trust Company for making said certificate of title. It was further stipulated that, if plaintiff failed to comply with the terms of the contract on his part, defendant should be released from all obligation to convey the property, and as to all acts and things to be done under the terms of said contract by either party thereto time was the essence of the agreement. Upon the execution of the agreement plaintiff paid to defendant the sum of $2,000 in accordance with the provisions thereof. Defendant did not deliver, or tender any deed of conveyance of, the property, whereupon, plaintiff brought this suit to recover the $2,000 paid upon the execution of the contract. Judgment went for defendant, from which plaintiff prosecutes this appeal upon the judgment roll, accompanied by bill of exceptions.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

In addition to setting forth the terms of the contract, the payment of the $2,000 specified therein to be paid upon its execution, the neglect and failure of defendant to make conveyance of the property within 90 days, or at all, as he agreed to do, the complaint alleges: That on December 14, 1905, plaintiff tendered to defendant the balance of the purchase price of $8,000, together with the sum of $350, which was the charge of the Title Insurance & Trust Company for furnishing the certificate of title, and demanded of defendant that he comply with the terms of his contract, but defendant refused so to do; that neither at the time of making the contract, nor at any time thereafter, did defendant have title to the property therein described, and that at no time since the date of the execution thereof was he able to procure from said Title Insurance & Trust Company a certificate of title showing the title to the property to be vested in defendant, free and clear of incumbrance; that on December 20th plaintiff made demand upon defendant that he return and repay to plaintiff said sum of $2,000 so paid as a part of the purchase price of the property, but this defendant also declined to do—all of which allegations, other than the demand for the return of the $2,000, which is not denied, the court found to be true. The only allegations of the answer material to a consideration of the case are: That plaintiff did not within 90 days from the date of the execution of the contract make any tender to defendant of the balance of $8,000 due upon the purchase price thereof, or within said period perform or offer to perform the contract on his part. It is further alleged in the answer "that at no time has the said plaintiff ever rescinded the said agreement in writing, nor restored nor offered to restore to defendant anything of value which he, the plaintiff, has received from the defendant under the said contract, nor has the said plaintiff ever reconveyed or offered to reconvey to defendant any interest which he has under said contract in any part of the lands described in said contract, nor has the said plaintiff ever canceled or offered to cancel or discharge the said contract or the record thereof," which allegations of the answer the court found to be true. From these findings the court found as a conclusion of law that plaintiff was not entitled to recover. In arriving at this conclusion the court erred.

Respondent contends that as time was made the essence of the agreement, and, as plaintiff did not tender the balance due upon the purchase price, he was in default and hence could not, in the face of such default, maintain an action to rescind the contract and recover what he had paid on account of the purchase price of the property. It is unnecessary to cite authorities in support of this proposition. It may be conceded. An analysis of the contract, however, fails to disclose any covenant made on the part of plaintiff as to the performance of which he was in default. The sole obligation imposed upon him was to pay the $8,000 and the cost of the certificate of title, but these sums were not payable within 90 days from the date of the execution of the agreement, unless defendant performed his covenant to convey the property, as well as perform other conditions of the contract, all of which the court finds he failed to perform. As defendant had the full period of 90 days within which to comply with the terms of the agreement, he could not be in default, and plaintiff could have no right to complain, until the expiration of such period. Therefore, as payment of such balance was due from plaintiff only upon delivery of the deed conveying good title to the property, and this was not done, it follows that there was no default on the part of plaintiff and no covenant on his part contained in the contract as to which the provision that time was the essence of the contract could apply. Defendant having failed and refused to convey the property within the time specified and in accordance with his covenant, and as to which covenant time was expressly made the chief factor of importance, and plaintiff not being in default, the latter had a legal right to disaffirm and insist upon the repayment of the money which defendant had received on account of the proposed sale which defendant refused to consummate. Conceding, however, that plaintiff had such right, respondent insists that he was not entitled to recover by reason of the finding that plaintiff did not, prior to bringing his suit, rescind the contract and return what he had received of value from defendant, nor cancel or offer to cancel the contract. This appears to have been the theory upon which the learned trial judge disposed of the case.

A formal rescission was not a prerequisite to plaintiff's right to recover. The action is not based upon the contract, but is a suit to recover money paid where there has been a total failure of consideration. All that plaintiff received from defendant was a covenant to convey, within a specified period, certain lands free and clear of incumbrance, together with the delivery of a certificate of title of a designated title and insurance company. showing title to such lands to be vested in defendant, who was to place plaintiff in possession thereof, as to all of which covenants the complaint alleged, and the court found, defendant was at the time of the execution of the contract, as well as at the time of the trial, wholly unable to perform. Plaintiff therefore received nothing of value from defendant, and hence there was nothing to restore. "It was not necessary to return or offer to restore the contract as a condition precedent to the right to recover the money paid. The defendant's conduct was, in effect, a positive refusal under any circumstances to return the money already received, and this positive refusal relieved the other parties from the necessity of offering to return or cancel the contract prior to beginning the action." McDonald v. Pacific Debenture Co., 146 Cal. 668, 80 Pac. 1090. In Russ Lumber & Mill Co. v. Land & Water Co., 120 Cal. 521, 527, 52 Pac. 995, 997 (65 Am. St. Rep. 186), it is said: "Practically there is no difference in the effect upon the contract between the successful defense of a plea of want or total failure of consideration and the successful termination of an action to rescind it. In either case the contract is rendered incapable of enforcement, the judgment being a bar to any future action, so far at least as parties to the action, or those concluded by it, are concerned. Where the failure of consideration is total, as where nothing of value has been received by the defendant under it and the plaintiff cannot perform it, no notice of rescission is required, but the defendant may plead want or failure of consideration." In discussing a similar question in the case of Richter v. Union Land, etc., Co., 129 Cal. 373, 62 Pac. 40, the court expresses itself as follows: "Nor where the failure of the consideration is total—which implies, of course, that nothing of value has been received under the contract by the party seeking to rescind—is it necessary that a formal rescission be made before bringing suit. In such cases a suit may always be maintained for the recovery of the consideration paid. [Citing cases]. Practically there is no difference in the effect upon the contract between the successful defense of a plea of a want or total failure of consideration (or, it may be added, an action to recover back the money paid on a contract of which the consideration has wholly failed), and the successful termination of an action to rescind it. In either case the contract is rendered incapable of enforcement; the judgment being a bar to any future action." In the case of Glock v. Howard & Wilson Colony Co., 123 Cal. 10, 55 Pac. 716, 43 L. R. A. 199, 69 Am. St. Rep. 17, the court in discussing the remedies for a breach of contract upon the part of the vendor says: "Treating the vendor's breach as an abandonment, he (the vendee) may himself abandon it, when, the contract having thus come to an end, he may sue at law to recover what he has paid, in an action for money had and received; for, the contract being at an end, the vendor holds money of the vendee to which he has no right, and to repay which, therefore, the law implies his promise." See, also, Chatfield v. Williams, 85 Cal. 518, 24 Pac. 839; Duncanson v. Walton, 111 Cal. 516, 44 Pac. 174; Hooe v. O'Callaghan (Cal. App.) 103 Pac. 175.

Moreover, we are of the opinion that the facts alleged in the complaint and admitted or found by the court to be true constituted a rescission under subdivision 5 of section 1689 of the Civil Code. When defendant refused to perform the covenants of the contract on his part, and plaintiff, instead of asserting his rights thereunder, acquiesced in and assented to such repudiation and demanded the return of the money paid, such facts were sufficient to constitute a rescission of the contract by consent of the parties.

It therefore follows from what has been said that the finding of the court as to want of rescission on the part of plaintiff as well as the fact that plaintiff within 90 days following the execution of the contract made no tender of the balance of the purchase price are facts wholly immaterial, and do not affect plaintiff's right to recover upon the findings herein. Under the circumstances disclosed by the record, it would be grossly unjust and inequitable to permit defendant to retain the money so received, particularly in view of the fact that he has not parted with anything of value constituting a consideration for the $2,000, and could not compel specific performance against plaintiff on account of being unable to comply with his part of the contract. "In such a case there is a complete failure of the consideration, and the vendor has no more right to keep the purchaser's money than he would have to compel specific performance of the contract." Maupin on Merchantable Title to Real Estate, § 238a.

The judgment is reversed and the cause remanded, with instructions to the trial court to render judgment upon the findings in favor of plaintiff in accordance with the prayer of his complaint.

We concur: ALLEN, P. J.; TAGGART, J.

156 Cal. 191

MARTIN et al. v. LAWRENCE et al.

(L. A. 2,305.)

(Supreme Court of California. Aug. 23, 1909.)

1. LIS PENDENS (§ 26*)—PURCHASERS PENDING SUIT—INTERVENTION.

One purchasing an interest in land from a defendant in an action for the land because of defendant's fraud, after defendant's default and the recordation of the lis pendens, takes title with notice and may not intervene in the absence of an effort on his part or on the part of defendant to excuse and open the default.

[Ed. Note.—For other cases, see Lis Pendens, Dec. Dig. § 26.*]

2. CANCELLATION OF INSTRUMENTS (§ 37*) — COMPLAINT—FRAUD.

A complaint, which alleges that a corporation was organized to carry on fraudulent transactions, that its officers induced plaintiff to convey to it land under an agreement that the corporation would at the end of five years convey to plaintiff other land on which a five year old orange grove was growing, that the corporation did not own the land which should be thus conveyed and took no steps to acquire the same nor improve it, and that the contract which plaintiff received from the corporation was worthless, states a cause of action as against a general demurrer, though there is no offer to restore any consideration received; Civ. Code, § 1572, subd. 4, providing that a promise made as part of the consideration without intent to perform is a species of fraud.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 73; Dec. Dig. § 37.*]

3. CANCELLATION OF INSTRUMENTS (§ 37*)—COMPLAINT—CONDITIONS PRECEDENT.

One seeking a rescission of a contract must, as required by Civ. Code, § 1691, offer to restore anything of value which he may have received, except where it is asserted that no consideration has passed, or that the purported contract is worthless.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 73; Dec. Dig. § 37.*]

Department 2. Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by Isaac N. Martin and others against James W. Lawrence, Jr., and others, in which Ocean Park Bank intervened. From a judgment for plaintiff and from an order dismissing the complaint of the intervener and vacating the order granting leave to intervene, defendant James W. Lawrence, Jr., and the intervener, appeal. Affirmed.

Tanner, Taft & Odell, for appellants. R. Y. Williams, Works, Lee & Works, and Smith, Miller & Phelps, for respondents.

HENSHAW, J. The complaint charged: That the California Fruit Growers' Association was a corporation organized for the purpose of carrying on fraudulent transactions and swindling operations; that through its officers it induced plaintiffs to convey to it certain of their lands under contracts and agreements, whereby in turn the corporation would at the end of five years convey to plaintiffs other lands which in the meantime they would plant to oranges, nurture, and care for. It is alleged: That all the plaintiffs received for the lands which they deeded to the corporation were executory contracts to this effect; that the terms and representations were made to deceive and without any intention upon the part of the corporation to fulfill them; that they did not own the lands; and that the contracts were worthless. Defendant James W. Lawrence was impleaded as having been a participant in these frauds, and it was further alleged that he had taken a conveyance of the legal title to plaintiff's lands from the Fruit Growers' Association without consideration and with full knowledge of all the fraudulent transactions. Notice of the pendency of the action was recorded at its commencement. The California Fruit Growers' Association and defendant Lawrence both suffered default. Subsequently the Ocean Park Bank, a corporation, upon ex parte application and without calling to the notice of the court the fact that defendant Lawrence was in default, obtained permission to intervene. The complaint in intervention alleged that the California Fruit Growers' Association was indebted to the Commercial Bank of Ocean Park in the sum of $1,500, and that as security for this indebtedness it made a deed absolute in form to Lawrence, and that, subsequent to the commencement of this action and to the recording of the lis pendens, the Ocean Park Bank had acquired the note evidencing the indebtedness, and Lawrence had made and executed to it his deed to the land in controversy as security therefor. Thereafter plaintiff moved to set aside the order granting the Ocean Park Bank leave to intervene and to dismiss the complaint in intervention. The motion came on regularly for hearing, and all the foregoing facts being made to appear to the court, and it being further established without controversy that there was no attempt on the part of Lawrence, or his successor in interest, the intervener, to defend the action upon its merits, and that the intervener had become the successor of Lawrence after recordation of the lis pendens and after entry of Lawrence's default, the court dismissed the complaint in intervention and vacated the order granting leave to intervene. At the conclusion of these matters a judgment was entered in favor of the plaintiffs under stipulation of the remaining parties to the controversy. From this judgment and from the order dismissing the intervener's complaint and vacating the order granting leave to intervene, Lawrence and the Ocean Park Bank prosecute their appeal.

Upon the appeal it is contended that it was error for the court to strike out the complaint in intervention, and that plaintiff's complaint fails to set forth facts sufficient to constitute a cause of action. Respondent objects to a consideration of the bill of exceptions offered in support of the appeal on the first proposition upon the ground that it was not prepared in time. We waive the consideration of this question for the reason that the court's order under the circumstances was correct: First, because the intervener's claim upon the land admittedly comes through Lawrence, an original defendant in the action, and was acquired after Lawrence's default and after the recordation of the lis pendens. Lawrence, by his default, having admitted the fraudulent charges preferred against him, was entitled to take nothing and had no valid claim upon or interest in the property. His successor, the intervener, taking its title with notice and after the default of Lawrence, with no effort upon the part of either to excuse and open the default, was not entitled to be heard in the action. The case here presented is much stronger than that of Hibernia, etc., v. Churchill, 128 Cal. 633, 61 Pac. 278, 79 Am. St. Rep. 73, where the action of the court in dismissing a complaint in intervention, as was here done, is upheld.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It is contended that the complaint is obnoxious to a general demurrer. The right of the defaulting defendant Lawrence to urge this matter upon this appeal from the judgment is, of course, assured. Alexander v. McDow, 108 Cal. 29, 41 Pac. 24. The complaint is sufficient against general demurrer. It alleged that the corporation and its officers represented and promised that they would set out the land to be exchanged, to oranges, and would care for it for five years, and would then convey it to plaintiffs with a five year old orange grove growing thereon. It is alleged that the defendants had not only failed to carry out each and every provision of the contract, but that they "never at any time intended to carry out any of the provisions of the contract." Where a defendant makes a promise touching a substantive part of the consideration moving to the plaintiff, in bad faith and without intent to perform the promise, it constitutes a species of fraud well recognized in equity and in terms denounced by the Code. Civ. Code, § 1572, subd. 4; Brison v. Brison, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189; Langley v. Rodriguez, 122 Cal. 580, 55 Pac. 406, 68 Am. St. Rep. 70; Becker v. Schwerdtle, 141 Cal. 386, 74 Pac. 1029; Montgomery v. McLaury, 143 Cal. 83, 76 Pac. 964.

It further alleged that the defendants did not own the land which they agreed to exchange, had taken no steps to acquire the same, and had done nothing toward the improvement of it, and that the contracts which plaintiffs received from the California Fruit Growers' Association were absolutely worthless. In seeking a rescission the Code requires an offer of restoration of anything of value which the plaintiff may have received (Civ. Code, § 1691); but, where it is asserted that no consideration has passed and, as here, that the purported contracts are absolutely worthless, an offer to restore becomes unnecessary. Kelley v. Owens, 120 Cal. 502, 47 Pac. 369, 52 Pac. 797; California Farm & Fruit Co. v. Schiappa-Pietra, 151 Cal. 732, 91 Pac. 593.

The court properly found that the Ocean Park Bank was the successor in interest of the defendant Lawrence, and no just complaint can be predicated upon this finding. It appears that three months elapsed after discovery of the fraud by plaintiffs before the commencement of their action. This, under the circumstances, was not an unreasonable delay.

The judgment and order appealed from are therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

156 Cal. 148

CITY OF LOS ANGELES v. McCOLLUM et al. (L. A. 2,254.)

(Supreme Court of California. Aug. 16, 1909.)

1. Dedication (§ 15*)—Intent.

Dedication is a question of intention.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 13; Dec. Dig. § 15.*]

2. Dedication (§ 19*)—Offer to Dedicate.

The filing of a map showing a subdivision of land into lots and blocks, followed by a sale of lots as designated on the map, constitutes an offer to dedicate the spaces marked thereon as streets.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 35; Dec. Dig. § 19.*]

3. Dedication (§ 19*)—Designation on Maps—Intent to Dedicate—Sufficiency of Evidence.

Though a strip was not on the face of the map of platted property described and named as a street, it was not numbered as a lot, nor by lines cut off from the adjoining streets and bounded, as were the lots shown on the plat. It joined a public street, and, so far as the map showed, furnished the only means of access to such street, and through it to the numbered lots of the subdivision. *Held*, that the fact that the strip was not named or designated as a street, nor that the northerly end of the strip was cut off by a dotted line, did not overcome the inference that it was intended to mark a street or public highway.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 37; Dec. Dig. § 19.*]

4. Dedication (§ 29*)—Offer to Dedicate—Revocation.

Where the rights of individuals have not intervened, an offer to dedicate may be revoked before acceptance by the proper public authorities.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 79; Dec. Dig. § 29.*]

5. Dedication (§ 35)—Acceptance—Sufficiency.

Where an offer to dedicate streets, etc., on a plat was duly accepted by ordinance of the city council accepting in general terms all streets, parks, etc., theretofore offered to the public for dedication, there was a sufficient acceptance.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 70; Dec. Dig. § 35.*]

6. DEDICATION (§ 44*)—REVOCATION PRIOR TO ACCEPTANCE—SUFFICIENCY OF EVIDENCE.

Evidence *held* to support a finding that there was no revocation of an offer of dedication of a street shown on a plat prior to the acceptance by the proper authorities.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 85; Dec. Dig. § 44.*]

7. DEDICATION (§ 43*)—INTENTION OF LANDOWNER—EVIDENCE.

Where a map of platted property filed by a landowner was used as the basis of sales of lots delineated thereon, and clearly manifested an intent to offer for dedication a certain strip as a street, testimony of the owner that she had a contrary intent was properly excluded.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 84; Dec. Dig. § 43.*]

8. APPEAL AND ERROR (§ 1056*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

On the issue as to an offer to dedicate a strip on a plat for a street, the exclusion of testimony of the owner showing an intent not to dedicate, if erroneous, was harmless, where such testimony would have been entitled to no weight as against the owner's prior unequivocal acts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4187; Dec. Dig. § 1056.*]

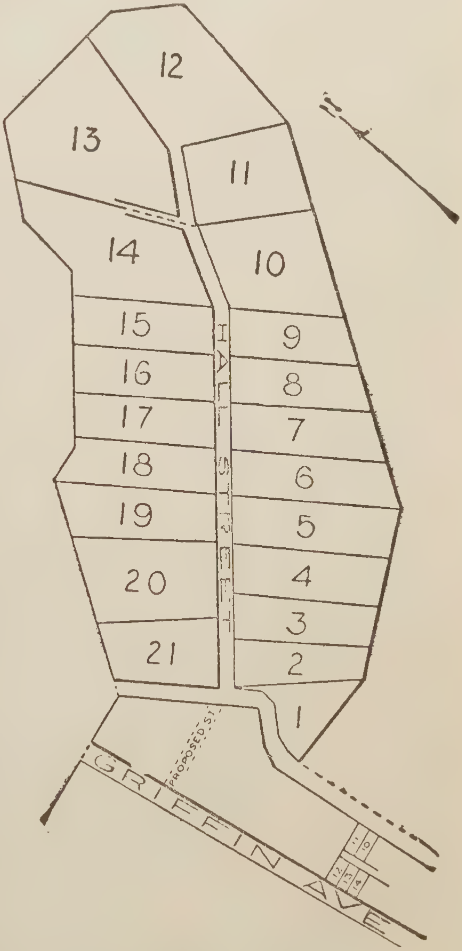
Department 1. Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by the City of Los Angeles against John McCollum and others. From a judgment for plaintiff, and from an order denying a motion for new trial, certain defendants appeal. Affirmed.

Elizabeth L. Kenney and Charles L. Batcheller, for appellants. Leslie R. Hewitt, City Atty. (Hass, Garrett & Dunnigan, of counsel), for respondent.

SLOSS, J. Action by the city of Los Angeles to recover possession of a parcel of land claimed to be part of a public street. Judgment went for plaintiff, and four of the defendants appeal from the judgment, and from an order denying their motion for a new trial.

The court finds that on June 27, 1884, the defendant Elmira Hall, then the owner of a tract of land including the parcel in controversy, caused to be recorded a plat or map, in which said tract was divided into lots and blocks, and streets were laid out in connection with the plat for the use of prospective purchasers of said lots and blocks. By such recording, she offered to dedicate as public highways of the city of Los Angeles the streets shown upon the map. The strip of land in controversy was shown upon the map as a public street, and formed a continuation or extension of Johnston street, a then public and accepted street of the city. The street was thereupon opened for public travel, and remained so until August, 1894. In December, 1890, the city council, by ordinance, accepted said street so offered to be dedicated as a public street. The offer to dedicate was never withdrawn or rescinded prior to August, 1904. The appellants attack, as unsupported by the evidence, the findings that there was an offer to dedicate, and that such offer, if any was made, was not revoked prior to acceptance. We think the evidence fully sustains each of these findings. The questions presented can be best explained by a reproduction of the essential features of the map filed by Mrs. Hall in June, 1884:



The land in controversy is the undesignated strip, 94 links in width, running along the westerly line of lot 21. That this strip, south of its intersection with "Hall street," as shown on the map, was and is a public street, known as "Johnston street," is not disputed by appellants; but they contend that no street was created north of Hall street. It seems perfectly clear that the court was at least authorized, if not bound, to conclude, from a mere inspection of the map itself, that its filing constituted an offer to dedicate, as a public street, the whole of the strip bordering on lots 1 and 21. Dedication is, in each case, a question of intention. Harding v. Jasper, 14 Cal. 643; San Francisco v. Canavan, 42 Cal. 541. The filing of a map showing a subdivision of land into lots and blocks, followed by a sale of lots as designated on the map, constitutes an offer to dedicate to public use the spaces marked thereon as streets. Logan v. Rose, 88 Cal. 263, 26 Pac. 106. We have no doubt that this map did mark the disputed strip as a street. It is true that it is not, on the face of the map, described or named as a street. On the other hand, it is not numbered as a lot, nor is it, by lines, cut off from the adjoining streets and bounded, as are the lots shown on the plat. It joins Hall street, and, so far as the map shows, furnishes the only means of access to Hall street, and through it to the numbered lots of the subdivision. There is nothing to indicate any distinction or demarcation between the part of the strip north and that south of the northerly line of Hall street; the latter, as we have said, being concededly a public street. As against all this, the fact that the strip is not named or designated as a street does not overcome the inference that it was intended to mark a street or public highway. San Francisco v. Burr, 108 Cal. 460, 41 Pac. 482; London & S. F. Bank v. City of Oakland, 90 Fed. 691, 33 C. C. A. 237; Rowan v. Town of Portland, 8 B. Mon. (Ky.) 232, 246; Hanson v. Eastman, 21 Minn. 509; Elliott, Roads and Streets (2d Ed.) § 119. Nor is any force to be attributed to the circumstance that the northerly end of the strip was cut off by a dotted line. In each of the cases last cited, the land held to be dedicated constituted a cul-de-sac.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Where rights of individuals have not intervened, an offer to dedicate may be revoked before acceptance by the proper public authorities. Prescott v. Edwards, 117 Cal. 298, 49 Pac. 178, 59 Am. St. Rep. 186; Los Angeles v. Kysor, 125 Cal. 463, 58 Pac. 90. Here, however, the offer was duly accepted by ordinance of the city council, accepting in general terms all streets, parks, etc., theretofore offered to the public for dedication. This was a sufficient acceptance. City of Eureka v. Armstrong, 83 Cal. 623, 22 Pac. 928, 23 Pac. 1085. On the question of revocation before acceptance, the most that can be said in support of appellants' position is that the evidence was conflicting. There was testimony tending to show that the strip in question had never been used as a road, that natural conditions were such as to preclude such use, and that the defendant Hall had at all times kept it fenced at both ends, had a house standing upon it, and had exercised acts of ownership inconsistent with the existence of a public right of way. But, if these circumstances evidenced a revocation of the offer to dedicate, they were met by testimony showing that parties having occasion to reach the land beyond the strip did use it as a passageway from time to time, and that the southern end of the strip was not closed until after the passage of the ordinance of acceptance. This testimony supports the finding that there had been no revocation prior to acceptance.

A point is made on the refusal of the court below to permit Mrs. Hall to testify that she had not intended to dedicate the alleged street. The position of the appellants is that, inasmuch as the ultimate question, in cases of dedication, is one of intention, the party may be asked to state his intention in performing the acts relied on as evidencing a dedication. Such testimony has, in cases of this character, been held to be admissible for the purpose of throwing light upon the real nature of acts which were in themselves consistent with the intent to dedicate or not to dedicate. Bidinger v. Bishop, 76 Ind. 244; Pittsburgh, etc., R. Co. v. Noftsger, 148 Ind. 101, 47 N. E. 332; Goodfellow v. Riggs, 88 Iowa, 540, 55 N. W. 319; City of Chicago v. Chicago, R. I., etc., Ry. Co., 152 Ill. 561, 38 N. E. 768. In Helm v. McClure, 107 Cal. 199, 40 Pac. 437, this court said that the testimony of the alleged dedicator that he had had no intention to dedicate "was relevant, but not conclusive, evidence of his actual purpose." On the other hand, the rule that the party may give testimony of his actual intent should, we think, be limited to cases where the acts done by him do not manifestly indicate an intent to dedicate. Where they are inconsistent with anything but such intent, he cannot destroy the effect of his own conduct by subsequent declarations that he did not mean to be bound by the necessary import of that conduct. No weight should be given to declarations of an intent contrary to that plainly shown by acts done and acted on long before. "The intention to which courts give heed is not an intention hidden in the mind of the landowner, but an intention manifested by his acts. It is the intention which finds expression in conduct, and not that which is secreted in the heart of the owner, that the law regards." Indianapolis v. Kingsbury, 101 Ind. 201, 213, 51 Am. Rep. 749; Fossion v. Landry, 123 Ind. 136, 24 N. E. 96. See, also, Morgan v. Railroad Co., 96 U. S. 716, 24 L. Ed. 743; 4 Wigm. Ev. § 2413, note. In accordance with these views, this court has held it proper to exclude evidence of the unexpressed intention of the landowner, where her acts and deeds plainly indicated that she intended to dedicate, and did dedicate, a street to public use. Brown v. Stark, 83 Cal. 636, 24 Pac. 162. What we have already said concerning the map filed by Mrs. Hall will be sufficient to make clear our reasons for holding, as we do hold, that the paper itself, taken in connection with the fact that it was made and filed as the basis for sales of lots delineated thereon, so clearly manifested an intent to offer the strip in question for dedication that the court was fully justified in excluding Mrs. Hall's offer to prove by her own statement that she had a contrary intent. In any view, the exclusion of the proffered testimony, if erroneous, was without prejudice, as her statement would have been entitled to no weight as against her prior unequivocal acts.

It is also urged that the court erred in striking out some of Mrs. Hall's testimony with reference to the preparation of the map. The court's ruling went no further than to strike out her testimony that she had instructed her surveyor to leave a street from Griffin avenue, and that she did not intend to leave Johnston street open beyond the north line of Avenue Twenty-Eight, or to have a line drawn across the space marked "Proposed Street." If she was entitled to show that she was ignorant of the real condition of the map when it was filed, any testimony which she may have given tending to show such ignorance was allowed to stand. Her instructions to her surveyor were mere hearsay. The exclusion of her testimony as to what she intended the map to represent was correct, for reasons already stated.

The judgment and order appealed from are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

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156 Cal. 187

SARVER v. LOS ANGELES COUNTY et al.

(L. A. 2.286.)

(Supreme Court of California. Aug. 21, 1909.)

COUNTIES (§ 116*) — CONTRACTS — "FURNISHINGS"—"BUILDINGS."

Cells in a jail, consisting of steel tanks or cages erected in but independent of the jail building, are not within Pol. Code, § 4041, subd. 8 (St. 1907, p. 368, c. 282), requiring a county board to award contracts for public "buildings" to the lowest bidder based on plans and specifications previously adopted, but are "furnishings," as to which there is no such requirement.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 187, 188; Dec. Dig. § 116.*]

For other definitions, see Words and Phrases, vol. 1, pp. 889–899; vol. 8, p. 7593; vol. 4, pp. 3013–3016.]

Department 2. Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by W. N. Sarver against the County of Los Angeles and others. Judgment for defendants, and plaintiff appeals. Reversed.

Geo. P. Adams and J. W. McKinley, for appellant. Scarborough & Bowen, for respondents.

HENSHAW, J. Plaintiff, a taxpayer of the county of Los Angeles, sought by his action an injunction to restrain the supervisors of the county from entering into a contract for the construction of certain steel cells within the county jail. The substance of his complaint is that the county advertised for bids for the work to be performed, as it was required to do under section 4041, subd. 8, of the Political Code (St. 1907, p. 368, c. 282). This section, in empowering boards of supervisors "to cause to be erected, or rebuilt, or furnished, a courthouse, jail, hospital, and such other public buildings as may be necessary," prescribes that in so doing they shall advertise for bids and let the contract to the lowest responsible bidder, and shall erect or construct "none of the aforesaid buildings * * * until the plans and specifications have been made therefor and adopted by the board." It is charged that bids were duly advertised for pursuant to the plans adopted, and that upon the opening of the bids the board of supervisors arbitrarily and in defiance of law refused to award the contract to the lowest responsible bidder, but announced its intention to award the contract to the Pauly Jail Building Company, whose bid was over $6,000 in excess of that of the lowest responsible bidder. The board of supervisors made answer: That, while they had adopted general plans and specifications for the proposed work, still from its nature it was impossible to formulate complete plans and specifications, and this because of the different kinds of material which could be employed, of the varying advantages or disadvantages in patented locking devices, and for many other like reasons not necessary here to set forth in detail; that the character of the work was therefore such as called for the exercise of discretion upon the part of the board in awarding the contract; and that in the exercise of this discretion and for the benefit of the county and its taxpayers it was decided to award the contract to the Pauly Jail Building Company. Upon the filing of this answer plaintiff moved for and obtained a judgment upon the pleadings, and defendants appeal.

The question presented upon appeal is whether the work for which bids were received was of a character which made it compulsory upon the board to award the contract, based upon plans and specifications previously adopted, to the lowest responsible bidder, or whether, as appellants contend, from the nature of the work, it was impossible so to do, and the board was at liberty therefore, and, indeed, that it became its duty, to exercise a judgment in the matter. There can be no doubt but that, depending upon their mode of construction, cells in a common jail may either be a part of the structure, or they may be, as here, steel tanks or cages erected within, but quite independent of, the jail building. When such is the case, these cells become a part of the modern jail furnishings. Pauly Jail Bldg. & Mfg. Co. v. Com'rs, etc., 68 Fed. 171, 15 C. C. A. 351. In the erection or reconstruction of a public building the statute contemplates very properly that the contract shall be let, and the work performed, under plans and specifications previously adopted; but there is no such requirement in the case of furnishing a public building. The law does not say that no furnishings shall be purchased except under adopted plans and specifications. It says "none of the aforesaid buildings shall be erected" except under such adopted plans, and the reason is quite apparent. In the matter of furnishings, something, from the necessities of the case, must be left to the sound judgment and honest discretion of the board of supervisors. Desks, chairs, book shelves, carpets, light fixtures, etc., are of different prices and quality. Many of such articles are manufactured under patents and could be procured but from one source. It would be practically impossible to call for the furnishing of a building under preadopted plans and specifications adequate to exclude the necessary play of discretion and judgment, and, as we have said, the law has not undertaken so to hamper the boards of supervisors in the performance of this important duty. In the case at bar it may well be, as the appellants plead, that, notwithstanding the Pauly Jail Building Company's bid was higher in terms of money, it was still the lowest and the best in consideration of the quality of work, of material to be used, and of patented devices to be employed. That such patented devices may be considered, and, indeed, called for by the board of supervisors, is well settled. Nicolson Pavement Co. v. Painter, 35 Cal. 699; Dunne v. Altschul, 57 Cal. 474.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

We have not been favored with a brief by respondent upon the matter; but from appellants' brief we gather that reliance was placed in the lower court upon the case of Ertle v. Leary, 114 Cal. 238, 46 Pac. 1. The case is not at all in point, as will be seen from the following quotations: "The jail in this case is a new edifice, and we agree with plaintiff that the cells are an integral part of the same—not 'furniture' merely, as said by appellants. In the contract the structures to be completed and delivered by Van Dorn are themselves called 'the jail,' and they probably are the most essential part of the prison. They are therefore within the statute prohibiting the board from causing the same to be constructed until plans, etc., have been made and adopted." Such is not the condition here presented. The Los Angeles jail is an existing building with a number of such cells erected therein, and the call in this contract is for the taking into the building steel and other proper material and therein constructing another tier of tanks or cages.

Still further it is said in Ertle v. Leary. "To permit each bidder to propose the plans and specifications according to which he will construct the building not only prevents competition in bidding for the work, but gives to the board an opportunity for the exercise of favoritism in awarding the contract, instead of being required to let it to the lowest responsible bidder, for, since neither of the bidders can know of the plans and specifications under which others are making their bids, there is no standard by which the board can determine which is the lowest bidder." This language, directed as it is and as it declares, to the construction of the "building," is manifestly just and proper; but it has no application to the case of "furnishings" concerning which, as has been shown, the law, from the nature of the thing to be done, requires no preadopted plan.

The judgment is reversed, with directions to the trial court to overrule the demurrer to defendants' answer and proceed with the trial upon the merits.

We concur: LORIGAN, J.; MELVIN, J.

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156 Cal. 201

PECK v. STASSFORTH et al. (L. A. 2,300.)

(Supreme Court of California. Aug. 24, 1909.)

1. MUNICIPAL CORPORATIONS (§ 651*)—STREETS —NAMES.

A map of a subdivision of a block was recorded, with a street thereon designated as O. street. The city council thereafter accepted as public streets all streets which had been dedicated as public streets. *Held*, O. street thus legally became the name of the street.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 651.*]

2. MUNICIPAL CORPORATIONS (§ 651*)—STREETS —CHANGE OF NAME.

After O. street became the legal name of a street to the extent of the map of a subdivision filed by S., a map was filed by D. adopting the subdivision into lots in the S. map, and continuing the subdivision on to adjoining lands not in the S. map; O. street, however, being named on the D. map D. street. *Held*, that such filing of the D. map could not legally change the name of O. street, whatever might be its effect as to the name of the street fronting on the lots actually owned by D., so that a subsequent ordinance changing the name of D. street to S. street did not change the name of O. street within the map of S.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 651.*]

3. MUNICIPAL CORPORATIONS (§ 444*)—STREET IMPROVEMENT—RESOLUTION OF INTENTION—NOTICE.

An ordinance, giving notice of intention to improve "S." street, could not give notice to owners of lots on "O." street, at least where they did not know of an attempt to change the name of "O." street to "S." street; and so because of such defect in the ordinance their lands could not be charged with a lien for the street work.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1064; Dec. Dig. § 444.*]

Department 2. Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by E. C. Peck against O. A. Stassforth and another. Judgment for defendants. Plaintiff appeals. Affirmed.

A. J. Sherer and Edward Winterer, for appellant. Shankland & Chandler, for respondents.

HENSHAW, J. This is an action to foreclose the lien of a street assessment. The complaint shows that the city council passed its ordinance of intention for the grading, graveling, curbing, etc., of "Savannah" street. All subsequent proceedings were directed to these improvements upon Savannah street between Fourth and Second streets. Defendants are the owners of certain lots fronting on Savannah street, if such be that street's true name. If such be not its true name, then the resolution of intention and all subsequent proceedings fail to charge the defendants with notice of the proposed work. The court found that Savannah street was not the legal name of the street fronting upon defendants' property, but that the true name was Otto street, and judgment properly passed for defendants accordingly. The facts upon which this finding is based are without conflict. In 1886 the defendants filed for record a map of their subdivision of a portion of Workman & Hellman's subdivision of block 73, Hancock's survey of the city of Los Angeles. That map showed lots from 4 to 11, inclusive, upon one side of a street designated as "Otto street." In 1890 the city council of Los Angeles adopted an omnibus ordinance accepting as public streets, alleys, and parks all such streets, alleys, and parks which had been dedicated or which had been offered for dedication. Thus legally Otto street became the name of the street upon which these lots fronted. Subsequently, in 1894, another map was filed, which was "Davin & Jullien's subdivision" of part of lots 6 and 7, block 73, Hancock's survey. This map also was duly recorded. It adopted the subdivisions into lots made in the earlier Stassforth & Hellman map, and continued the subdivisions on to adjoining lands not embraced in the Stassforth & Hellman map. Upon the Davin & Jullien map, Otto street was named "Davin street." In 1897 the city council adopted an ordinance changing the name of Davin street to Savannah street. The court held, and properly, that by the resolution of 1890 Otto street became the official name of the street in question, at least to the length and extent of the plat of Stassforth & Hellman, showing lots presumptively owned by them. The subsequent filing of the Davin & Jullien map, readopting the plat of the Stassforth & Hellman lots, but changing the name of Otto street to Davin street, could not legally operate to change that name, whatever may have been its effect as to the name of the street fronting upon the lands which Davin & Jullien actually owned. Notice of intention to improve Savannah street could not therefore carry notice to the property owners upon Otto street. Moreover, these defendants deny any actual knowledge of the attempted change in the name of the street upon which their lots fronted. The conclusion of the court, thus properly reached, necessarily rendered void the attempted lien upon defendants' property.

The defendants' answer did not deny the ownership of the land in the complaint described, but raised the issue above considered. The complaint described the land as being lots 4 and 5 of the Davin & Jullien subdivision. Lots 4 and 5 could be identified from the Davin & Jullien subdivision, and it was not incumbent therefore upon the defendants to deny ownership of this land. What they did deny, and what they sought to show, and conclusively did show, was that, by reason of the defect in the resolution of intention above pointed out, their lands could not be charged with a lien for the street work.

Under the views above expressed, no other points call for consideration, and the judgment and order appealed from are therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

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156 Cal. 203

PECK v. STASSFORTH et al. (L. A. 2,301.)

(Supreme Court of California. Aug. 24, 1909.)

Department 2. Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by E. C. Peck against O. A. Stassforth and another. Judgment for defendants. Plaintiff appeals. Affirmed.

A. J. Sherer and Edward Winterer, for appellant. Shankland & Chandler, for respondents.

PER CURIAM. For the reasons given in the opinion in E. C. Peck v. O. A. Stassforth et al. (L. A. No. 2,300, this day decided), 103 Pac. 918, the judgment and order appealed from are affirmed.

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156 Cal. 177

FULLER et al. v. SMITH. (L. A. 2,303.)

(Supreme Court of California. Aug. 21, 1909. Rehearing Denied Sept. 20, 1909.)

VENDOR AND PURCHASER (§ 56*)—CONTRACT—CONSTRUCTION.

Pending suit by third persons to enjoin irrigation, with waters of a river, of land of which plaintiffs were lessees, at a yearly rental of $800 less taxes, defendant, the owner, conveyed it to plaintiffs, taking notes payable annually, in from 2 to 10 years, and secured by mortgage on the land, for the entire consideration of $40,000, the full value of the land, even with the disputed water rights. At the same time they executed a contract, reciting execution of the deed and mortgage, pendency of the suit, desire of defendant to sell the land, and desire of plaintiffs to buy it, if right to use the water could be established, providing that the deed should be delivered absolutely, and defendants should receive the notes and mortgage, both subject to the further provisions of the contract: That payment of notes and interest should be suspended while any injunction against use of the water was in force, provided that such suspension should not extend more than 5 years, and that time for full payment of the notes should not be extended more than 10 years, beyond the date of the contract; that during such period of extension plaintiffs should pay an annual rental of $800, less taxes; that plaintiffs should at their own cost prosecute the defense of the suit to final judgment by the Supreme Court; that defendant would waive no rights in the suit; that, if plaintiffs made any compromise or waiver of rights therein, the notes and mortgage should be absolutely enforceable, and payable at the times therein provided; that, if it should be adjudged that the land was not entitled to water from the river, then plaintiffs "shall" reconvey the land to defendant, and defendant shall satisfy the mortgage and secured debt; that plaintiffs may "at any time" obtain releases of the mortgage as to lots of not less than 100 acres on payment of a certain amount per acre; and that, if it be adjudged that the land was entitled to the water rights, the notes and mortgage should be enforceable. *Held*, that the contract did not require, but merely allowed, plaintiffs to reconvey the land, and have the debt satisfied, if it was decreed that the land was not entitled to the water right.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 56.*]

Department 1. Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Action by C. H. Fuller and others against Fred J. Smith. Judgment for defendant. Plaintiffs appeal. Reversed and remanded.

E. W. Freeman and Freeman, Summerlin & Laughlin, for appellants. John G. North, for respondent.

ANGELLOTTI, J. This is an appeal by plaintiffs from a judgment entered on the pleadings on motion of and in favor of defendant. The action was one to obtain a decree declaring the amount due on certain notes executed by C. H. Fuller to defendant, the payment of which notes was secured by a mortgage on certain lands alleged to have been conveyed by defendant to him, and requiring defendant upon the payment of such amount within the time to be fixed by the decree to deliver up said notes and mortgage with a release of the mortgage executed and acknowledged so that it could be recorded. The plaintiffs other than C. H. Fuller were his partners and interested with him in the transaction; but the legal title was taken in the name of C. H. Fuller. In all the matters referred to herein, C. H. Fuller acted in his individual name, but for himself and his coplaintiffs, and they were at all times equally interested with him therein. On November 4, 1907, C. H. Fuller executed and delivered to his coplaintiffs a deed of conveyance, conveying to each an undivided one-third of the property. Defendant's claim is that, under the terms of the agreement between the parties, by reason of certain facts alleged in his cross-complaint, and either not denied or expressly shown by the allegations of plaintiffs' answer thereto, defendant is entitled to a reconveyance from plaintiffs of all the land described in his deed to C. H. Fuller, upon the delivery up by him of said notes and mortgage. No part of the principal sum evidenced and secured thereby has been paid. The trial court adopted this theory of defendant, and its judgment requiring such reconveyance was necessarily based thereon. If this theory be not supported by the admitted facts shown by the pleadings, it is manifest that the judgment in favor of defendant must be reversed, for admittedly plaintiffs' complaint states facts warranting the relief sought by them, unless they are without the right to retain the land, paying the amount due therefor. In view of our conclusion as to the true intent and meaning of the written agreement made by C. H. Fuller and Smith at the time of the execution of the deed, notes, and mortgage, it will be necessary to consider but one of the many propositions suggested in the briefs of counsel.

The land in question consisted of several parcels containing in the aggregate 800 acres, being a portion of the Jurupa ranch in Riverside county. On May 31, 1900, they were, and had been for a long time in the possession of plaintiffs under a lease from Smith, at a rental of $800 per annum less taxes. The fair and reasonable value of said land at such time did not exceed $40,000, and was alleged by plaintiffs to be only $25,000. At that time plaintiffs had already constructed a canal to convey water from the Santa Ana river to and upon these lands so leased by them from Smith, and also upon other lands in the same vicinity owned by them, claiming that all of such lands were riparian to such river. There had then been commenced and was pending in the superior court of Riverside county an action, being case No. 2,148 therein, in which the Anaheim Union Water Company and the Santa Ana Valley Irrigation Company were plaintiffs, and the plaintiffs herein and Smith were defendants, the object of which action was to obtain a decree perpetually restraining the defendants from diverting by means of said ditch, or by any other means, the waters of said Santa Ana river to or upon any portion of a 400-acre tract of the Smith land so leased to plaintiffs, or a 900-acre tract in which plaintiffs were interested as owners; the theory of the plaintiffs therein being that said lands were not riparian to the said Santa Ana river. On said May 31, 1900, Smith executed and delivered to C. H. Fuller a deed of conveyance of the land in question; the instrument being in the usual form of a grant, bargain, and sale deed, and the consideration expressed therein being the sum of $40,000. This deed was duly recorded. As a part of the same transaction, C. H. Fuller executed and delivered to Smith nine several promissory notes amounting in the aggregate to $40,000, the entire purchase price of said premises, and also a mortgage covering said property to secure the payment of said notes. The notes were four for $1,000 each, payable respectively two, three, four, and five years after date, and five for $7,200 each, payable respectively six, seven, eight, nine, and ten years after date, and each provided for interest at 6 per cent. per annum, payable semiannually. The mortgage was duly recorded.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

At the same time, and as a part of the same transaction, a written agreement was executed by C. H. Fuller and Smith. This agreement recited the contemporaneous execution of the deed and mortgage, the pendency of the action brought by the Anaheim Union Water Company et al. against the parties to the agreement and others, that Smith desires to sell said lands and their appurtenances, and that said Fuller desires to buy the same, "provided a riparian right to the use of the waters of the Santa Ana river through said canal for the irrigation of the said lands in whole can be established by decree of court in said suit, or suits, as hereinafter provided." It was then mutually agreed: That the deed shall "be delivered absolutely" to Fuller, "subject, however, to the mutual covenants and agreements hereinafter contained," and that Smith should receive the notes and mortgages, "subject, however, to the mutual covenants and agreements hereinafter contained." That said deed and mortgage should be recorded as soon as may be. That the time of payment of said principal and interest "shall be suspended" during the time any injunction may be in force in said action, enjoining any of said parties from using the waters of the Santa Ana river for irrigation on said lands through said canal, provided that such suspension shall not be extended beyond five years from May 31, 1900, and that nothing shall be so construed as to extend the time for the full payment of the notes beyond ten years from May 31, 1900. That during any such period of suspension, Fuller shall pay an annual rental for the land of $800 less taxes. That Fuller will, at his own cost and expense, but for both Smith and himself, diligently press to a judicial determination the matters involved in said action, take an appeal to the Supreme Court from any judgment or portion of a judgment favorable to plaintiffs therein and against defendants therein, and prosecute said appeal or appeals with due diligence to final decision, and "prosecute the defense of said suit" until a final judgment "is rendered and entered by the Supreme Court * * * settling all controversies involved in said cause." That Smith will not make any agreement with the plaintiffs in said action which would waive or have the effect of waiving any right of Fuller or his codefendants in said cause to so take such water. That no compromise is to be made by Fuller, of any of the matters involved in said action, without the written consent of Smith. That no order or judgment by stipulation or consent is to be made except one adjudicating in favor of the defendants in said action all of the matters contested therein. That, should Fuller make any such compromise or waiver of his rights or those of his codefendants, "then said promissory notes and mortgage * * * shall be absolutely valid and enforceable without defalcation or delay, and payable at the times in said notes and mortgage written." Then follows the provision upon which Smith mainly relies, and which is as follows: "It is further agreed between the parties hereto that in case said party of the second part shall fail to secure a judgment or decree of court, entitling said party of the second part or his assigns to use the waters of said Santa Ana river, through said canal, upon said lands described in said exhibits, then in that case the said party of the second part or his assigns shall reconvey by grant, bargain, and sale deed to the record holder of said mortgage all of said lands described in said exhibits and the said party of the first part or his assigns shall, upon the tender of said deed conveying said lands as aforesaid in the manner hereinafter provided, execute an instrument in such form and manner as to entitle it to be recorded in the office of the county recorder of Riverside county, Cal., satisfying the lien of said mortgage and the debt thereby secured, and at the same time deliver up to the said party of the second part, or his assigns, the notes and mortgage hereinbefore described and referred to as 'Exhibit B.' The said tender of said deed shall be made by leaving the same with the said county recorder of said Riverside county to be delivered to said mortgagee upon the delivering up of said satisfaction of mortgage and notes to said recorder to be by him delivered to said party of the second part hereof, or his assigns, as herein stipulated." Then follows a provision to the effect that Fuller may "at any time" obtain a release of said mortgage of portions of said land, of not less than 100 acres at any one time, by paying at the rate of $75 per acre for lands not in alfalfa and at the rate of $100 per acre for lands in alfalfa. This was followed by provisions as follows: "It is further agreed between the parties hereto that except it shall be adjudged in said suit and decreed by judgment of said court that all of the said lands described in said exhibits hereto attached are not riparian to said Santa Ana river and are not entitled to the use of the waters of said Santa Ana river, through said canal, the said promissory notes and mortgage described in said exhibits shall then and in that case be valid and collectible as though this agreement never existed, except as hereinbefore provided as to suspended payments of interest. * * * It is further understood and agreed between the parties hereto that the essence of this contract is that said notes referred to in this agreement shall not become collectible unless the said defendants shall succeed in securing the right to use at least one inch of water measured under a four-inch pressure upon said land, for each and every five acres of said land, through said Fuller ditch."

We have omitted to mention several other provisions which appear to us to throw no light on the question of the proper construction of this agreement. This agreement was signed and acknowledged by C. H. Fuller and Smith, but was not recorded. Fuller faithfully complied with all the provisions of this agreement as to the defense of said action. The action was tried in the superior court, with the result that on the 12th day of November, 1903, judgment was entered therein restraining each of the defendants therein from diverting by means of said Fuller ditch any of the usual and ordinary flow of the waters of the Santa Ana river upon any portion of said 400-acre tract, or of said 900-acre tract. A motion for a new trial was made by Fuller on behalf of the defendants, and this motion was denied by the trial court. Fuller thereupon appealed from such judgment and order to this court, and on January 19, 1907, said judgment and order were affirmed by this court. A petition for a rehearing was denied on February 18, 1907, and said judgment became final. We shall assume here that it was thus finally determined that Fuller had failed to secure the judgment or decree contemplated by the provision of the agreement relative to reconveyance which we have hereinbefore quoted, and that the event upon the happening of which a reconveyance should or might be made and the notes and mortgage be canceled had then occurred.

Plaintiffs have been in possession of said premises ever since May 31, 1900. They have made permanent improvements thereon in fencing, leveling, and preparing the same for husbandry, and buildings for the proper use and enjoyment thereof. They have prepared and planted to alfalfa 400 acres thereof. Since the prohibitory judgment was made by the superior court, November 12, 1903, they, at their own cost and at an expense of over $6,000, bored wells on the land and erected, in connection with said wells, a pumping plant which is capable of producing and which does produce 300 inches of water measured under a four-inch pressure, which water has been used for irrigation on said land in lieu of the waters of the Santa Ana river formerly used thereon. Up to November 30, 1903, they paid all interest which became due on said notes. Thereafter, and up to November 30, 1906, because of the judgment enjoining the use of the water from the Santa Ana river, they paid $800 per year, less the taxes. After the affirmance of such judgment by this court, plaintiffs notified defendant that they desired to pay in full the aforesaid notes and mortgage according to the tenor and effect thereof. On September 13, 1907, defendant gave to plaintiffs' attorney a written statement of the amount that he claimed to be due, saying therein that he had sent to England for the notes and that they would be obtained within a few days, and he expected "prompt payment" as soon as the notes were ready for delivery. In this statement he claimed that the interest from November 30, 1903, should be paid. Plaintiffs at once objected to this, claiming that, in view of the fact that they had been enjoined from the use of the waters of the Santa Ana river ever since that date, they were required by the agreement to pay, in addition to the principal, only $800 per annum, less taxes. Some discussion was had by the parties relative to submitting the matter to arbitration, and, while the further disposition of the matter was pending undetermined, Smith, on November 25, 1907, notified Fuller that the contingency had arisen upon which he was obligated to reconvey the property to him, and demanded such reconveyance, offering to deliver up the notes and mortgage upon receipt of the reconveyance. He concluded his notice as follows: "I have been willing heretofore to accept payment of the principal and interest on the said notes and mortgage in full and allow you to retain the property, but you have failed to make such payment. There seems to be no way left for me but to make the demand and offer which I hereby make and, in case of refusal, to proceed to enforce the reconveyance of the said property." On December 2, 1907, plaintiffs, by instrument in writing, dated November 30, 1907, notified Smith that they, as owners of the premises, declared each of said notes to be due and payable, and offered to pay $40,000, together with $800, less $458.08 taxes, in lieu of interest to November 30, 1907, upon delivery up of said notes and a proper satisfaction of the mortgage. In their complaint in this action, filed December 4, 1907, plaintiffs declare that they have elected and do now elect to pay said notes and mortgage in full according to the terms and effect thereof and of the agreements aforesaid, and that they have heretofore waived and do now waive all right to reconvey said land in lieu of payment of said notes and mortgage.

There would be much force in the contention of learned counsel for defendant as to the meaning and intent of the provision in the agreement relative to reconveyance, if that provision stood alone, and we had nothing else from which to determine its meaning. This, however, is not the situation. Under familiar rules, we are required to take the whole contract into consideration in determining the exact intent of the parties as to any particular provision, and, if we can reasonably do so, we must make of it all a consistent whole. When we consider the agreement of these parties in that way, it appears very clear to us that the provision as to a reconveyance, which constitutes the whole basis of defendant's claim, was a provision inserted solely for the benefit of the purchaser, which he, having complied with the other provisions, might enforce or not as he saw fit, and that it should be read just as though the word "may" had been written, instead of the word "shall," in the clause providing that, if the purchaser shall fail to secure a certain judgment, he "shall reconvey," etc. The provision itself indicates this very strongly in the stipulation that Smith shall be called upon to do anything in the matter of delivering up the notes and executing a release of the mortgage, only upon the tender of a deed of reconveyance by Fuller, to be made by him in the manner carefully prescribed. Taking the whole contract together, it seems very clear, as we have said, that the provision was one solely for the benefit of Fuller, which he had the absolute right to waive. The price agreed on, $40,000, was admittedly the full value of the land, even with the right to take water for irrigation purposes thereon from the Santa Ana river. The agreement shows that Smith desired to absolutely sell the land for that price, and to free himself from the burden and expense of any litigation in regard to the water rights thereon. It further shows that Fuller was not willing to be bound to take it if such water could not be had, but was willing to take it with the understanding that if, making all proper and diligent effort in that behalf at his own expense, he could not obtain a final judicial determination that he was entitled to such water for the land, he might rescind the contract of purchase. The written agreement between the parties, except as to the provisions relative to suspension of interest, annual rental during such suspension, the release of an existing mortgage, the conditions as to partial release from the lien of the mortgage given by Fuller to Smith, and the application of damages recovered on any injunction bond, was, practically, simply an agreement reserving to Fuller the right to rescind the contract of purchase upon a certain contingency on certain conditions. The conditions were that Fuller should diligently and at his own expense defend to the end, without compromise of any kind, the pending proceeding brought to obtain a decree depriving the land of such water, and any other suit instituted by either of the same plaintiffs for the same purpose within three years of the date of the agreement. The contingency was the failure of Fuller, notwithstanding his full compliance with the conditions, to obtain the right by judgment in said action or actions, to use said waters upon said land to the extent of "at least one inch of water measured under a four-inch pressure upon said land, for each and every five acres of said land, through said Fuller ditch," as stated in the last stipulation of the agreement. The provision as to the limitation of the period of suspension of interest, the maximum being 10 years, the provision against any compromise of the action by Fuller under penalty of being compelled to retain the land and pay the agreed purchase price according to the terms of the notes and mortgage, and the provision giving Fuller the right "at any time" to obtain releases of the mortgage as to lots of not less than 100 acres on payment of a specified rate per acre, show very clearly the intention of the parties that Fuller had the absolute right to hold the land for the consideration agreed on regardless of the result of the litigation concerning the water. There is no foundation for any theory that Smith could be advantaged by a favorable determination of the litigation to the extent stipulated, otherwise than that by reason of such determination Fuller would be precluded from rescinding and the sale would stand. His whole object appears to have been to most carefully limit the right of Fuller to rescind to the single contingency specified, and to guard against the bringing about of that contingency by any act or failure on the part of Fuller himself. The theory of learned counsel for defendant as to the effect of the provision regarding reconveyance would, in our judgment, make it inconsistent with the whole spirit of the contract. It is impossible to conceive of any good reason why Smith, desiring to absolutely sell the land for $40,000, should wish to reserve to himself the privilege of taking it back in the event of a decree depriving it of certain alleged water rights, and thus unfavorably affecting its value. We think that the contract manifestly shows that he was not stipulating for any such right, but that he was, in fact, simply conferring the right of rescission in a certain contingency on Fuller, and prescribing the manner in which that right was to be exercised.

The allegations of the pleadings show a practical construction of this agreement by the parties similar to the construction that we place upon it. As to Fuller and his associates, there can be no doubt in this regard. The development of water thereon by them at great expense, the cultivation and improvement of the land, and their acts following the final adjudication as to the water of the Santa Ana river, practically demonstrate their understanding of the contract. Smith appears to have regarded it in the same way and to have acknowledged the right of plaintiffs to hold the land notwithstanding the result of the litigation, until after he and the plaintiffs differed as to the amount due on the notes, in view of the provisions as to suspension of interest during the time that plaintiffs were deprived by injunction of the use of the water from the Santa Ana river; but we do not rest at all upon this in our conclusion, for we are satisfied that the written instruments upon their face, taken as a whole, clearly show the understanding and intention of the parties to be as we have stated it.

If we are correct in our conclusion as to the proper construction of the contract, the judgment given on the pleadings must be reversed. The order appointing a receiver is a part of the judgment and will fall with it.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with the views herein expressed.

We concur: SHAW, J.; SLOSS, J.

(156 Cal. 204)

McCALEB v. DREYFUS. (L. A. 2,215.)

(Supreme Court of California. Aug. 25, 1909. Rehearing Denied Sept. 23, 1909.)

1. MUNICIPAL CORPORATIONS (§ 284*)—PUBLIC IMPROVEMENTS — CONTRACTS — DELEGATION OF POWER BY MUNICIPALITY.

Where the nature of a public improvement permits a predetermination of its actual cost, it should be determined by the city council, but a provision in sewer specifications that if, in the judgment of the city engineer, it shall be necessary to form any part of the foundation of the sewer of concrete, it shall be paid for as extra work, was not void as giving the city engineer discretionary power to vary the cost of the work.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 756; Dec. Dig. § 284.*]

2. EVIDENCE (§ 83*) — PRESUMPTIONS — DISCHARGE OF OFFICIAL DUTY.

It is presumed that official duty will be properly performed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. § 83.*]

3. MUNICIPAL CORPORATIONS (§ 284*)—PUBLIC IMPROVEMENTS—CONTRACTS—VALIDITY.

Sewer specifications were not objectionable for providing that the city engineer, and not the superintendent of streets, should determine whether any concrete was necessary for the foundation, where the contract required the work to be done under the direction of the street superintendent, pursuant to the provisions of the Vrooman act (St. 1885, p. 147, c. 153), in view of Santa Barbara Charter, Amendment No. 7 (St. 1905, p. 937, § 123, subd. 1), requiring the city engineer to make all surveys, inspections, and estimates required by the council.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 284.*]

4. APPEAL AND ERROR (§ 1042*)—HARMLESS ERROR—STRIKING OUT PLEADING.

In an action by a contractor to foreclose sewer assessment liens, the contract not being invalid because the specifications provided that if, in the city engineer's judgment, it was necessary to use concrete in the foundation, it should be paid for as extra work, the refusal to strike an allegation of the complaint that no extra concrete was in fact used was immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4110-4114; Dec. Dig. § 1042.*]

5. MUNICIPAL CORPORATIONS (§ 339*)—PUBLIC IMPROVEMENTS — CONTRACTS—CONFORMITY TO SPECIFICATIONS.

That sewer specifications called for "a lamp hole to be placed at the point indicated on plans," when the plans, profile, and resolution called for six lamp holes which were constructed, was not misleading, so as to deprive the city council of jurisdiction to order the work.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 339.*]

6. MUNICIPAL CORPORATIONS (§ 293*)—PUBLIC IMPROVEMENTS—PRELIMINARY PROCEEDINGS—RESOLUTION OF INTENTION.

A property owner cannot complain because the resolution of intention to construct sewers was printed in full instead of being given in substance, and referring to the resolution for further particulars, as permitted by law.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 293.*]

7. MUNICIPAL CORPORATIONS (§ 572*) — SPECIFIC ASSESSMENTS—ENFORCEMENT—RELIEF —ATTORNEY'S FEE.

While, under section 12 of the Vrooman act (St. 1885, p. 157, c. 153), authorizing suit against the owner of land assessed for public improvements to enforce the assessment, and awarding plaintiff, if successful, an attorney's fee of $15 in addition to taxable costs, a contractor can enforce several liens on lots against the owner in a single action, he can only recover a single attorney's fee.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1286; Dec. Dig. § 572.*]

In Bank. Appeal from Superior Court, Santa Barbara County; Samuel E. Crow, Judge.

Action by W. H. McCaleb against Louis G. Dreyfus. From a judgment for plaintiff, defendant appeals. Affirmed as modified.

Canfield & Starbuck, for appellant. Henley C. Booth, for respondent.

HENSHAW, J. This is an action to foreclose liens upon an assessment for sewer work. Judgment passed for the plaintiff, and the defendant property owner appeals.

1. The specifications for the work provided that "if, in the judgment of the city engineer, it shall be necessary to form any portion of said foundation (of the sewer) of concrete, said concrete shall be paid for as extra work at the price per cubic yard mentioned in the contract." This language forms the foundation of the principal attack made by appellant. He insists that under the authority of Bolton v. Gilleran, 105 Cal. 244, 38 Pac. 881, 45 Am. St. Rep. 33, and Perine v. Pasadena, 116 Cal. 6, 47 Pac. 777, there is by these words conferred upon the city engineer the discretionary power at will to increase or decrease the cost of the work to the property owner, and that a contract which so permits is void. The underlying principle in Bolton v. Gilleran is indubitably

sound, and that is that, where the nature of the work permits a predetermination of its actual cost, such predetermination shall be made by the council in awarding the contract, and no improper discretionary power shall be left with the street superintendent or city engineer whereby such cost may either be increased to the injury of the property owner, or diminished to the benefit of the contractor. This is usually possible in that class of work known generally as street work. It is difficult, if not practically impossible, to enforce such a condition where the work is the construction of a sewer, or the driving of a tunnel. Bolton v. Gilleran has been seized upon by property owners and used in every possible way to defeat the just recovery of the contractor, until, finally, this court felt impelled to voice its protest against these efforts, in Haughawout v. Raymond, 148 Cal. 311, 312, 83 Pac. 53, where it is said: "Notwithstanding that the proceedings for street work and sewer work, like proceedings in taxation, are in invitum, and that, therefore, a fairly strict and accurate compliance with all the statutory requirements is necessary, this is the limit to which any court should be expected to go in disposing of the questions which are involved. The contractor who has honestly and substantially complied with his contract, of which the property owners have received and will continue to receive the benefit, is quite as much entitled to the protection of the law as are the property owners themselves, and, upon the other hand, an endeavor—even a successful endeavor—upon the part of the property owners to defeat the just claims of such a contractor, by a resort to the extreme technicalities of the law, can, upon the whole, operate only to the disadvantage of the property owners themselves, since it necessarily tends to increase the price at which any and all future contractors will be willing to engage in work, payment for which, after having been duly performed, is met by harassment and vexatious delay, with the prospect at the end of utter failure of recovery."

In awarding a contract for street work it is quite apparent, since the surface of the ground is exposed, that there may be an accurate predetermination of the amount and character of material to be used. It is unnecessary, therefore, to delegate any discretion in this matter to the street superintendent. Such was the condition in Perine v. City of Pasadena, supra (a street work case), where the specifications required that "the contractor shall put in such extra concrete as the superintendent of streets and the city engineer may require, and in such places and in such form as they may designate." It was easily susceptible of predetermination upon the part of the council whether any extra concrete was required at all, and, if so, the quantity and the place of use. This delegation, therefore, was held to be unreasonable. But where, as here, the work is the construction of a sewer, involving, first, the digging of the trench, and, second, the placing of the sewer upon a durable foundation, it is apparent that but one of three courses can be pursued in the letting of the contract. First, the course here pursued, where the possibility of uncovering soil unsuitable in its natural state for the foundation was anticipated and provision was made that where such soil was encountered, a concrete foundation should be constructed. Indisputably the determination as to whether or not a concrete foundation would be necessary must be vested in some one. Indisputably, also, the proper person to determine this was not the contractor, but the street superintendent or city engineer. For the concrete which should be so required the specifications provided that payment should be made at a given price per cubic yard. It could at once be determined whether this price was reasonable or unreasonable, and, while the quantity which might be used could not be predetermined, the cost was fixed with all of the exactness which the circumstances permitted. If such a method —a method which would unquestionably be adopted by any private individual contracting for the doing of such work—is not permitted to a city, it must result in the city adopting one or the other of the methods hereafter considered. Let us briefly state them, to see whether, under the most liberal view, it can be said that either of them presents any advantage to the property owner over the method here adopted. One of these methods is that which appellant here insists upon, whereby a bid for a lump sum would be called for, thus enabling the property owner to know the exact amount in dollars and cents which the work is to cost. By this method the discretionary power to say whether artificial foundations shall be constructed and where and to what extent is still vested in the street superintendent. Obviously, under such circumstances, the contractor will bid a sum amply sufficient to protect him, should concrete foundations be called for along the whole route. The immediate and direct effect of such a plan would be to increase the cost of the work to the property owner. Moreover, the door to fraud is not hereby closed, since it is equally open to the dishonest or incompetent street superintendent to refuse to call for foundations where foundations should be constructed, and thus materially enlarge the profits of the contractor. The only remaining method would be that whereby the contract for the work should be let in sections—a contract first let for the construction of the sewer trench, and then, with the land exposed, a subsequent contract let for the erection of the sewer, with proper foundations, where the disclosed undersoil showed that they were necessary. Can it for a moment be said that this method (even if permissible) would be to the benefit of the property owner? It would mean an interminable prolongation of the work and a serious detriment to the use of the property while the work was in progress, and it is not to be supposed that the letting of the two separate contracts would be had at so advantageous a figure as would be the letting of a single contract for the whole work. It seems to us plain that the first method—that actually adopted by the city—is not only the method which would be adopted by a prudent person in awarding such a contract, but is the one that best protects the property owner, and enables the work to be quickly and advantageously done at the lowest price. Official duty it is presumed will be performed, and we cannot perceive that, under this method, the property owner will suffer at the hands of an iniquitous street superintendent, when every foot of the work and every order which the street superintendent may give are carefully watched and open to public inspection. Thus we find in Haughawout v. Hubbard, 131 Cal. 675, 63 Pac. 1078 (a sewer case), a specification upheld valid, which declares that, "when the ground does not afford a sufficiently solid foundation, the contractor shall excavate the trench to such increased depth as the street superintendent may decide to be necessary, and shall then bring it up to the required level and form with such material and in such manner as the street superintendent may direct." So in Banaz v. Smith, 133 Cal. 102, 65 Pac. 309 (a sewer case), it is said, discussing the same subject: "For instance, when the ground is wet, the soft earth is to be removed and gravel filled in; but the specifications do not determine the amount of wet, soft ground to be removed, or the quantity of gravel required to fill the excavation. It is not left to the street superintendent to say how much shall be done in any case. The contractor must do the work as required by his contract, and the street superintendent cannot accept less or require more." In Belser v. Allman, 134 Cal. 399, 66 Pac. 492, likewise a sewer case, a specification was upheld which declared that "under so much of said sewer as is to be constructed of brick and concrete, wherever the natural foundation is soft, spongy, or springy, such natural foundation shall be removed down to a firm and solid natural foundation, and, instead of the removed material, there shall be placed and constructed a firm and durable foundation of broken rock and concrete," etc. Here, while in terms the discretion to say where such natural material should be removed and replaced by concrete is not expressly conferred upon the street superintendent, it is not to be doubted that the control of the matter was in fact and in law vested in him. And in Chase v. Scheerer, 136 Cal. 248, 68 Pac. 768, considering the nature of the work imposed by sewer construction, where the specifications declared that the contractor should excavate the trench to such increased depth as the street superintendent may decide to be necessary, it is said: "It would be practicably impossible for the city council to burrow into the ground all along the line of the contemplated sewer to see if the ground formed a sufficient foundation for the trench of the sewer." It is held, therefore, that the specification here under consideration, with its delegation of authority to the city engineer, is reasonable and valid, and, if it shall be considered that this view is in direct conflict with that expressed in Bolton v. Gilleran, it must suffice to say that to this extent Bolton v. Gilleran is overruled.

2. Objection is made that the specifications provided that the city engineer, and not the superintendent of streets, should determine whether any, and, if so, how much, concrete should be used for the artificial foundation. But the contract provides that the work shall be done under the direction and to the satisfaction of the street superintendent, thus following the provisions of the Vrooman act (St. 1885, p. 147, c. 153), and the city engineer, under charter amendment No. 7 of the charter of Santa Barbara (St. 1905, p. 937, § 123, subd. 1), is required "to make all surveys, inspections and estimates required by the council." It was therefore not improper to delegate this discretion to the city engineer. After the exercise of the city engineer's discretion in the matter, the work must still be inspected and approved and the assessment issued by the street superintendent.

3. Under the views above expressed it matters not that the court refused to strike out the allegation of the complaint to the effect that no extra concrete for foundation was in fact used.

4. The specifications called for "a lamp hole to be placed at the point indicated on plans and profile." The plans, profile, and resolution called for six lamp holes, and these lamp holes were in fact constructed. We cannot agree with counsel that this trifling imperfection in the use of the singular for the plural, by which, with the reference to the plans, no one could be misled, produces such an inconsistency as to deprive the council of jurisdiction to order the work.

5. It is complained that the posted notices of intention were not such as the law contemplates. Herein it is not contended that they did not contain all that the law required, but the somewhat singular contention is made that they contain more than the law required, in that the resolution of intention was printed in full, instead of being given in substance, with a reference to the resolution "for further particulars." Some-

thing also is urged as to the smallness of the type in which the body of the notice was printed. A copy of the notice is inserted in the transcript. It is sufficiently legible, and the property owner cannot be heard to complain with justness because the notice itself conveys to him more information than the law requires that it should.

Defendant was the owner of all of the lots against which the liens were sought to be enforced in a single action. While the method of procedure is permissible under section 12 of the Vrooman act (St. 1885, p. 157, c. 153), yet a single attorney's fee only can be recovered in such an action. Hughes v. Alsip, 112 Cal. 587, 44 Pac. 1027.

The judgment is modified by striking therefrom all but one award for attorney's fees and costs, and, as so modified, the judgment and the order appealed from will stand affirmed.

We concur: BEATTY, C. J.; SHAW, J.; LORIGAN, J.; ANGELLOTTI, J.; SLOSS, J.; MELVIN, J.

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156 Cal. 211

BROOKSHIRE OIL CO. v. CASMALIA RANCH OIL & DEVELOPMENT CO. et al. (L. A. 2,040.)

(Supreme Court of California. Aug. 25, 1909. Rehearing Denied Sept. 23, 1909.)

1. Mines and Minerals (§ 73*)—Oil Lease—Construction.

A lease provided that A. thereby granted to M. the sole right to produce oil and gas from certain land, specifically granting to M. for 10 years the exclusive right to drill and operate oil and gas wells, to lay and operate pipe lines, telegraph and telephone lines, the necessary right of way over the premises, the use of enough land on which to preserve the products, the use of water and wood on the premises, till oil is found, that, should M. find a paying production of oil or gas on the land during said term, then A. would extend the lease, from year to year, so long as such production continued, and that in consideration M. agreed to use and occupy only so much of the land as might be necessary for the purposes granted, to commence operations within a year, to pay a royalty on oil and gas produced, also agreeing to use no water necessary for A.'s stock. *Held*, in view of the general rules of interpretation of contracts, stated by Civ. Code, §§ 1648, 1650, 1653, and the main object and attendant provisions of the lease, that it gave no general or exclusive right to pay and operate pipe lines, but only sufficient rights in that respect to enable the lessee to carry out the main object of producing and removing the oil and gas, so that he could not interfere with a pipe line, subsequently laid by another with the lessor's permission, not affecting his operations.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 73.*]

2. Mines and Minerals (§ 49*)—Leases—Adverse Use.

A lease gave exclusive right to procure oil and gas from land, and prior rights to lay and operate necessary pipe lines. Thereafter, with the lessor's permission, a third person constructed a pipe line across the land to conduct his products from other land to the market. *Held*, that his use was not adverse to the lessee till the latter began to use the part of the land through which the pipe line ran in a way incompatible with the maintenance of such line.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 49.*]

3. Mines and Minerals (§ 51*)—Interruption of Pipe Lines—Damages.

That between the times a pipe line for conducting oil to market was torn up and reconstructed, the owner was prevented from marketing oil of a certain value, does not show damage from destruction of the line; but if during the interruption the market value of oil depreciated, or if because of the interruption oil was lost or destroyed, or oil which otherwise would have come through the owner's wells was, because of their being closed, drawn through the wells of another, and so lost to such owner, and this could be shown, such damages could be recovered.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 51.*]

In Bank. Appeal from Superior Court, Santa Barbara County; J. W. Taggart, Judge.

Action by the Brookshire Oil Company against the Casmalia Ranch Oil & Development Company and others. From parts of the judgment, and from an order denying a new trial, plaintiff appeals, and from part of the judgment defendant company appeals. Reversed in part, and remanded for new trial.

See, also, 151 Cal. 577, 91 Pac. 383.

Richards & Carrier and McD. R. Venable, for plaintiff. Wm. H. Chapman and H. C. Booth, for defendants.

SHAW, J. Three separate appeals are presented upon the same transcript: An appeal by the plaintiff from the parts of the judgment consisting of paragraphs numbered 2 and 3; an appeal by the plaintiff from an order denying its motion for a new trial; and an appeal by the defendant company, which for brevity we will call the Casmalia Oil Company, from the part of the judgment consisting of paragraph numbered one. The defendant's appeal was taken more than 60 days after the entry of the judgment, and it does not present the question of the sufficiency of the evidence to support the part appealed from. The nonappealing defendants are officers and agents of the defendant corporation, and, as the plaintiff urges nothing against the judgment in their favor, their rights need not be further considered.

The object of the action was to recover damages alleged to have been caused by the acts of the defendants in tearing up about 4,000 feet of pipe line maintained by the plaintiff over a tract of land owned by one Juan B. Arellanes and in destroying the pipe, and to enjoin the defendants from preventing the construction and maintenance of said pipe line by the plaintiff. The defendant company, under an oil lease executed by Arellanes in 1899, claims the exclusive right to maintain pipe lines over the land. The plaintiff claims the right to maintain its particular pipe line over the land by virtue of a parol license from Arellanes to lay and maintain such pipe line, given in January, 1905, and the subsequent construction thereof with his consent. The principal question involved is whether the lease, or contract, of Arellanes to the Casmalia Oil Company's assignors gave the exclusive right to maintain any pipe line over any part of the land and the right to prevent any other person or persons from laying or maintaining any such pipe line for any purpose, or whether it gave them only the right to lay and maintain such pipe lines as they might find necessary in the process of extracting and transporting the oil produced by them under the contract. The material parts of the lease of Arellanes to Morehouse and his associates, who transferred the same to the Casmalia Oil Company, are as follows: "The first party (Arellanes) hereby grants unto the second parties the sole right to produce petroleum, asphaltum and other hydrocarbon substances, and natural gas, from the following named tract of land (describing about 5,000 acres of land). Specifically granting to the second parties, for and during the term of ten years from this date (November 25, 1899), the exclusive right to drill and operate oil and gas wells; to lay and operate pipe lines; telegraph and telephone lines; the necessary right of way over the premises; the use of enough land on which to preserve the products and erect such buildings as they may desire; the free use of water and wood, if found on the premises, until oil is found; with the right at any time to annul this lease by failing to comply with its terms; and to remove all machinery and fixtures which they may have placed thereon; and should the second parties find a paying production of oil or gas on said land during said term, then first party agrees to extend this lease upon the same terms and conditions as herein provided for, from year to year, so long as said production continues. In consideration for which the second parties agree as follows: * * * Second. To use and occupy only so much of said land as may be necessary for purpose herein granted. Third. To commence operations on land herein leased, or other lands of the vicinity, within one year from this date. * * * Fifth. To pay to said party of the first part one tenth royalty of all oil and gas produced on said leased land. * * * Also agreeing to use no water that is necessary for his stock."

Under the authority of said instrument, the Casmalia Oil Company, within three months after its execution, entered upon the land and began drilling for oil thereon and has ever since continued the work of exploration for oil thereon, but has not discovered oil or any other substance in marketable quantities. It has not laid any pipe line over or upon the land, nor has it made any plans for that purpose. The plaintiff offered evidence tending to show that the pipe line constructed by it was laid in a part of the land where it would not interfere with any pipe line that the Casmalia Oil Company would have to lay to conduct oil from the land to any point of shipment or use, but upon the objection of the said defendant the evidence was excluded. This instrument does not vest in the so-called lessees any present title in the land. It grants only the right to do certain things thereon and to take certain mineral substances therefrom, and no title to such substances passes from the original owner until the same is severed from the realty. In regard to such agreements it is said: "The title is inchoate and for purposes of exploration only, until oil is found. If it is not found, no estate vests in the lessee, and his title, whatever it is, ends when the unsuccessful search is abandoned. If oil is found, then the right to produce becomes a vested right, and the lessee will be protected in exercising it in accordance with the terms and conditions of his contract." Venture Oil Co. v. Fretts, 152 Pa. 451, 460, 25 Atl. 732; Steelsmith v. Gartlan, 45 W. Va. 27, 34, 29 S. E. 978, 44 L. R. A. 107; Lowther Oil Co. v. Miller, etc., Co., 53 W. Va. 501, 44 S. E. 433, 97 Am. St. Rep. 1027; Huggins v. Daley, 99 Fed. 608, 40 C. C. A. 12, 48 L. R. A. 320; Gadbury v. Gas Co., 162 Ind. 14, 67 N. E. 261, 62 L. R. A. 895; Eaton v. Alleghany Gas Co., 122 N. Y. 417, 25 N. E. 981; Funk v. Haldeman, 53 Pa. 242; Union, etc., Co. v. Bliven, etc., Co., 72 Pa. 173; Grubb v. Grubb, 74 Pa. 33; Thornton on Oil, § 53.

With regard to possession of the land, the agreement gives it for special purposes only, and so far as may be necessary and convenient for such purposes and no farther. The right of possession is limited to the possession necessary to enable the lessees to search for the minerals they are allowed to take, until such minerals are found, and thereafter to the possession of only the part required for the convenient operation of the works they may construct and use for the extraction and removal of the minerals. Funk v. Haldeman, supra. The right to lay and operate pipe lines is stated in general terms and is not expressly limited to such pipe lines as should be found necessary for the production and removal of the oil and gas, and so, for that matter, is the right to erect and operate telephone and telegraph lines. These general words, however, do not necessarily confer a general right for all purposes. "However broad the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract." Civ. Code, § 1648. "Particular clauses of a contract are subordinate to its general intent." Civ. Code, § 1650. "Words in a contract which are wholly inconsistent with its nature, or with the main intention of the parties, are to be rejected." Civ. Code, § 1653. With these rules of interpretation in mind, and considering the main object of the agreement as well as the attendant provisions, it is plain that there was no intention to grant a general right to lay and operate pipe lines, or to erect and maintain telephone or telegraph lines for general purposes over the entire tract, and that the design was to give only sufficient rights of that character to enable the lessees to carry out the main object of producing the oil and gas that might be found, and to make explorations to find these substances. The "necessary right of way over the premises" is given, and the lessees are bound to "use and occupy only so much of said land as may be necessary for purposes herein granted." Their right to operate telegraph or telephone lines over the land, and their right to lay and use pipe lines as well, would, no doubt, be paramount to that of the lessor, or of any person claiming under him by subsequent grant or license, to the extent that, if such subsequent line came in conflict with any line which the lessees found it necessary or convenient to lay and operate for the purposes stated, the lessor, or those claiming under him, must yield supremacy to the lessees and avoid any interference with the operations under the lease; but the lessees' right goes no further than this, and when it is found that any pipe line laid across the land with the permission of Arellanes by a third person does not in any way affect the lessees in their explorations for oil or other minerals, or in their operations in producing and removing the same, the lessees have no right to complain of such pipe line and no right to interfere with its maintenance and operation.

The Casmalia Oil Company does not claim that the pipe line of the plaintiff interferes at all with its operations for the discovery of oil on the premises. The defense is founded wholly upon the theory that by the agreement with Arellanes the Casmalia Oil Company has the sole right to lay pipe lines in the land, for any or all purposes and in all parts of it, and that any pipe line laid in the land is a trespass on its right. The theory is that the agreement creates some sort of an estate in the land for pipe line purposes, that it severs from the fee all right to use the land for that purpose and vests that use in the lessees and their successors, and that it cannot be used for that purpose by any other person without invading that estate. The theory is untenable. The right given is limited to the use of the land for the purpose of producing the minerals. Any use by the owner, or others operating under him, which does not affect the search for and production of the minerals, is lawful, and the defendants have no right to interfere with such use, except when in the actual exercise of the lessees' rights under the lease, the other occupation or use shall be found adverse, injurious, or conflicting.

So far as the pipe lines are concerned, the agreement grants an easement only, and this is done in general terms. The case is similar to that of Winslow v. Vallejo, 148 Cal. 723, 84 Pac. 191, 5 L. R. A. (N. S.) 851, 113 Am. St. Rep. 349. There the grant was of a right of way "for any water pipes or mains which may be laid by the city of Vallejo." The court quoted from Jennsion v. Walker, 11 Gray (Mass.) 423, the statement that: "Where an easement in land is granted in general terms, without giving definite location and description to it, so that the part of the land over which the right is to be exercised cannot be definitely ascertained, the grantee does not thereby acquire a right to use the servient tenement without limitation as to the place or mode in which the easement is to be enjoyed." A similar principle applies here. The Casmalia Oil Company has not the right to take and hold possession of all the land in virtue of the grant of the right to lay and operate pipe lines over all of it. Its right of possession for that purpose is limited to the part of the land which may be required as a right of way for such pipe lines as it does actually lay, and it has no right of possession at all for that purpose until it actually begins the laying of such line. In the meantime the lessor has the right of possession and dominion over the land and may use it for any purpose not inconsistent with the rights granted by the agreement. The lessor's grantee or licensee has the same right. In view of the nature of the operations to be carried on by the lessees, the grant would not be exhausted by the location of one pipe line, as is generally the case in grants of an unlocated easement for a single purpose; but the company may lay as many lines as it may need from time to time in its operations. With that qualification, its rights are no greater than in grants similar to that considered in Winslow v. Vallejo.

The court finds that the line laid by the plaintiff was over a part of the land which was not occupied, used, or operated upon by the Casmalia Company under the lease. The evidence excluded would have shown that it was situated in a part of the land which, in all probability, the Casmalia Company would never have occasion to use for a pipe line, or for any other purpose. The part of the judgment from which the plaintiff appeals enjoins the plaintiff from maintaining any pipe line over any part of the land and commanded it to remove the pipe already laid therein. There is a finding that the maintenance of the pipe line over the land by the plaintiff would in time ripen into a prescriptive right to keep it there. There is, however, no finding that the plaintiff claimed adversely to the defendants' actual rights under the lease, nor is there any allegation to that effect, and there is no evidence of any such claim. The fact is that the plaintiff was operating oil wells on premises about a mile east of the Arellanes tract, and that, in order to market its oil, it laid a pipe line from its wells westerly over the northerly corner of that tract, to a railroad station some five miles away, solely to transport its own oil, and not for any purpose connected with the Arellanes tract of land. Under these circumstances, the use by the plaintiff was not adverse, and would not become adverse, until the Casmalia Company, in the course of its operations, began to use the part of the land through which the pipe line ran, in a manner incompatible with the maintenance of the pipe line. The judgment enjoining the plaintiff cannot be justified on the theory that it was necessary in order to prevent the use by the plaintiff from creating a prescriptive right. It cannot be sustained on the theory that the lease gave the lessees the right to maintain exclusive possession prior to the laying of any pipe line, nor on the ground that the plaintiff's pipe line was an obstruction to the free use by the Casmalia Company of its rights under the lease. There is no theory upon which it can be supported. The plaintiff has the right to lay and maintain the pipe line by permission of Arellanes, so long as it does not interfere with the actual operations of the defendant under the lease. The injunction was granted upon the cross-complaint of the Casmalia Oil Company. It does not show that the plaintiff was invading its rights, nor that the pipe line had caused it any legal damage. The demurrer to the cross-complaint should have been sustained.

The complaint alleged that the damage caused by the destruction of the pipe taken up was $2,500. The court found this damage to be $1,232, and that it was not necessary for the defendants to destroy the pipe in order to preserve the rights which the court concluded the Casmalia Company had under the lease, and it gave judgment for the above sum against the Casmalia Company, but in favor of the other defendants, who, it seems, did not participate in the wrong. The complaint also alleged that by reason of the destruction of the pipe line the plaintiff was damaged in the sum of $5,000 by "the loss incident to the conduct of oil from the property of plaintiff to said railway station." The plaintiff rebuilt its pipe line after its destruction by the defendant company; but it was delayed in the use thereof for the period of 47 days by reason of said destruction. In the meantime it was prevented from transporting its oil from its wells to its customers, except by other means than the pipe line, and it was thereby prevented from marketing, during that period, oil of the value of $3,151.24. A special issue was submitted to a jury and an advisory verdict rendered fixing this amount, which, however, the court refused to adopt, and it made no finding on the subject. We do not think it would necessarily follow that the plaintiff would be damaged to the extent of the value of the oil which it was thus prevented, for a short time, from delivering. It was not deprived of the oil, and there is nothing to show that the oil was not as valuable afterwards as before, nor that any of it was lost or destroyed by reason of the interruption. There was an offer of evidence tending to show that a flowing well on adjacent land, and near to the oil wells of the plaintiff, was, during that time, spouting large quantities of oil from the same stratum, and that the effect of this flow was to take oil from the part of the stratum which belonged to plaintiff, and that by reason of the delay aforesaid, during which the plaintiff was compelled to cap its wells, some of the plaintiff's oil was drawn off to the adjoining land and lost to the plaintiff. This evidence was excluded by the court. We are by no means certain that any reliable proof of such a loss could be made. It must be to a great extent a matter of conjecture. We can only say in regard to it that, if it should appear that loss actually occurred from that cause, it would be a legitimate element of damage. It may also be observed that if there was a change in the market value, of such a character that the plaintiff, when it became able, by the rebuilding of its pipe line, to market the oil which it was prevented from marketing during the interruption caused by the destruction of the pipe, could not and did not obtain as high a price for it as it would have obtained had it been marketed during the period of interruption, the difference in the price would be a loss which the plaintiff could recover as damages for the unlawful act of the defendant company.

This disposes of all the points presented by the plaintiff in support of its appeals. It follows from what we have said that the judgment granting the injunction against plaintiff, and the order denying a new trial, were erroneous.

The appeal of the defendant company is from the part of the judgment giving damages to the plaintiff. The only point made in support of that appeal is that the defendant was justified in destroying the pipe as the only means of preventing the rebuilding of the pipe line. From what we have heretofore said in discussing the plaintiff's appeals, it is clear that the point is without merit.

There does not seem to be any necessity for a new trial of the case so far as the damages from the destruction of the pipe are concerned. The plaintiff is satisfied with the award, and the objections of the defendant thereto are unfounded. That part of the judgment may be allowed to stand. The new trial will be confined to the other issues. We presume the views we have stated will dispose of the defendants' claim to an injunction. The evidence given in support of the plaintiff's additional claim for damages would not sustain a judgment. Other evidence may be adduced upon a new trial, however, and we cannot say that the errors in excluding evidence were without substantial prejudice to plaintiff's rights.

The parts of the judgment in favor of plaintiff against the Casmalia Ranch Oil & Development Company for $1,232 and costs and in favor of the defendants other than the said company are affirmed. In all other particulars the judgment is reversed. The order denying a new trial is reversed, except as to the issue of damages for the destruction of the pipe of plaintiff and the issue as to the liability of the natural persons defendant, and the cause is remanded for a new trial upon all the other issues; but the judgment for damages is to remain unaffected by the subsequent proceedings upon the new trial.

We concur: ANGELLOTTI, J.; MELVIN, J.; LORIGAN, J.; HENSHAW, J.

156 Cal. 195

SWAN v. WALDEN et al. (L. A. 2,293.)

(Supreme Court of California. Aug. 23, 1909. Rehearing Denied Sept. 22, 1909.)

1. HUSBAND AND WIFE (§ 14*)—CONVEYANCES TO HUSBAND AND WIFE—TENANCY BY ENTIRETY.

The common law of tenancy by entirety is not recognized by Civ. Code, § 164, declaring that, in case of a conveyance to husband and wife, the presumption is that she takes as tenant in common, and section 682, providing that ownership of property by several persons is either a joint interest, partnership interest, interest in common, or community interest of husband and wife.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 71–89; Dec. Dig. § 14.*]

2. HUSBAND AND WIFE (§ 14*)—CONVEYANCES TO HUSBAND AND WIFE—JOINT TENANCY.

A deed to a husband and wife "as joint tenants with fee to the survivor," or to husband and wife for their joint lives "as joint tenants and afterwards to the survivor in fee simple absolute," creates a simple joint tenancy, and not a common-law tenancy by entirety.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 71–89; Dec. Dig. § 14.*]

3. HOMESTEAD (§§ 84, 118*)—ESTABLISHMENT—RIGHT OF WIFE.

Under St. 1867–68, p. 116, c. 138, authorizing the selection of a homestead, though the land is held in joint tenancy, land held in joint tenancy by husband and wife may at her instance be impressed with a homestead, without segregation or partition or delimitation of boundaries, for she may do so as to her own interest which is her separate property, and may do so as to her husband's interest, and a deed of the husband alone made after the wife's declaration is inoperative.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 121, 203; Dec. Dig. §§ 84, 118.*]

Department 2. Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Action by W. H. Swan against Edward Walden and another. From a judgment for plaintiff, defendant Louella Walden appeals. Reversed.

Halsey W. Allen and Henry W. Nisbet, for appellant. Leonard & Surr, for respondent.

HENSHAW, J. This is an appeal from the judgment and from an order denying a motion for new trial. The action was for the partition of lots 3, 4, and 5 in block L in the city of Redlands. While defendants Edward Walden and Louella, his wife, appellant herein, were the admitted owners of these lots under deeds hereinafter to be considered, Louella made a declaration of homestead on lots 3 and 4, where she and her husband resided. Subsequently, the homestead never having been abandoned, the husband executed a deed of grant of all of his interest in the lots to plaintiff Swan. Judgment passed for plaintiff, and Louella Walden appeals, urging (1) that the estate held by herself and her husband in the lots was a tenancy by the entirety, that consequently the husband was without power to convey, and his deed was therefore void; (2) that by reason of the valid homestead upon lots 3 and 4 the husband was unable to convey any interest or estate affecting those lots.

1. On the first proposition appellant contends for the existence of the common-law tenancy by entirety. This tenancy was a modification of the joint tenancy, and arose where an estate was conveyed to a husband and wife under circumstances which would have created simply a joint tenancy if the conveyance had been made to any two people other than a husband and a wife. The estate was still at common law a joint tenancy, but, because of the disabilities of the wife, the common law regarding the husband and wife as one, by construction the courts erected a modification of the tenancy. The modification was that while such estates had, like a joint tenancy, the quality of survivorship, they differed in the essential respect that neither spouse could convey his or her interest so as to affect the right of survivorship in the other. In the eye of the law the spouses were not seized of moieties, but of entireties. 1 Wash. Real Prop. (6th Ed.) p. 562. Thus, while in the case of a joint tenancy a severance of any of the unities, as a conveyance by one of the joint tenants to a third person, terminated the joint tenancy and transformed the new estate into a tenancy in common, this could not be done in a tenancy by entirety, owing to the fiction of the law that in the latter tenancy each held an undivided right to the whole, and not, as in a joint tenancy, a right to an undivided half. Of course, it was well settled, and is well settled, where a tenancy by entirety is recognized, that neither spouse can so destroy the character of the estate as to prevent the survivor becoming sole owner. Frost v. Frost, 200 Mo. 474, 98 S. W. 527, 118 Am. St. Rep. 689; Thornburg v. Wiggins,

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

135 Ind. 178, 34 N. E. 909, 22 L. R. A. 42, 41 Am. St. Rep. 422.

In this state, however, the reason which obtained at common law, and which forced the courts into the declaration of a tenancy by entirety, has no existence whatsoever. The right of the wife to hold property and to contract is fully recognized and upheld. With the ending of the reason for the rule the rule itself should cease. The spirit of our laws makes against the recognition of such an estate. Besides the compulsion of the common-law theory, there was an added protection to the wife when property was conveyed to the spouses under these circumstances. It was her clumsy equivalent to the modern homestead. She could not be disturbed in her possession, in her title, nor in her enjoyment, and, if she survived, the fee vested absolutely in her. But in this state the Code declares (section 682, Civ. Code) that the ownership of property by several persons is either (1) of joint interest; (2) of partnership interest; (3) of interests in common; and (4) of community interest of husband and wife. And it further declares (section 164, Civ. Code) that in case of a conveyance to a married woman and to her husband the presumption is that the married woman takes the part conveyed to her as tenant in common, unless a different intention is expressed in the instrument. In effect, then, this is a refusal upon the part of our law to recognize estates other than those named in section 682 of the Civil Code. Moreover, in those states where tenancy by entirety is recognized, the trend of decision is to treat such estates as a simple joint tenancy, unless the language of the instrument forbids such interpretation. Stewart, Husband & Wife, § 310; Tiedeman on Real Prop. § 244; Thornburg v. Wiggins, supra. An inspection of the deeds by which the Waldens took discloses clearly that the estates conveyed were designed to be estates in joint tenancy. Thus the grant of lots 3 and 4 was "to Edward Walden and Louella Walden, husband and wife, as joint tenants with fee to the survivor." Lot 5 was granted "to Edward Walden and Louella Walden, husband and wife, during their joint lives, as joint tenants, and afterwards to the survivor in fee simple absolute. * * * The intention of this grant being to constitute a joint tenancy in said land in the said Edward Walden and Louella Walden." In Indiana, where tenancies by entirety are recognized, it is said: "Husband and wife, notwithstanding tenancies by entirety exist as they did under the common law, may take and hold lands for life, in joint tenancy or in common, if appropriate language be expressed in the deed or will creating it; and we know of no more apt term to create a joint tenancy in the grantees in this estate than the expression 'convey and warrant to Daniel S. Wiggins and Laura Belle Wiggins in joint tenancy.'" Thornburgh v. Wiggins, supra. It is held, therefore, upon this proposition, first, by the laws of this state, tenancy by entirety is not recognized, and, second, if it were, the deeds in question do not create such a tenancy, but a simple joint tenancy.

2. The second question to be answered may be thus stated: May land, held in joint tenancy by husband and wife, be impressed with a homestead at the instance of the wife; the sole objection to the validity of the homestead being the nature of the tenancy in which the land is held? As early as 1855 this court decided in Davis v. Fleischacker, 5 Cal. 244, 63 Am. Dec. 121, that under the homestead act as it then existed a homestead could not be carved out of land held in joint tenancy or by tenancy in common; the reason given being that "it required the title of all the tenants to constitute an ownership in the land, and that there was therefore no part of it which he (the homesteader) had the power to set apart as his own so as to constitute the homestead," and no mode had been provided under the homestead act for the ascertainment and separation of the particular estate sought to be impressed by the homestead. In that case the homestead was attempted to be declared by the husband who held in joint tenancy with two strangers to his family. Immediately following this was decided the case of Giblin v. Jordan, 6 Cal. 416, where the tenancy in common was that of the husband, the wife, and a daughter. Here also the husband had attempted to impress the land, or his estate therein, with a homestead, and a distinction was sought to be drawn between the situation thus presented and that of the Fleischacker Case. But this court declared that it was at a loss to find a distinction, saying: "The defendants are as much tenants in common as though they were entire strangers to each other, and the estate of the wife and child cannot be impressed with the character of a homestead simply because they have resided upon the premises." These decisions were adopted and followed in a long line of cases, unnecessary here to cite, until in Seaton v. Son, 32 Cal. 483, where the father, being in the exclusive possession of property, and believing that he was the sole owner thereof, declared a homestead, and it proved that he held legal title, not to all, but to an undivided seventeen-eighteenths, and that the title to the remaining eighteenth was in another person, notwithstanding the fact that the father was in the exclusive possession of all the property, the court felt compelled to hold the homestead invalid. This harsh rule led to the adoption by the Legislature in 1868 (St. 1867-68, p. 116, c. 138) of a statute declaring that "whenever any party entitled to a homestead under the laws of this state shall be in exclusive occupation of any parcel or tract of land, having the same enclosed, and shall select and record and reside upon the same as a homestead, such

party so selecting and claiming shall be entitled to such homestead, and to all rights and exemptions provided by the general law, * * * although such land be held in joint tenancy, or tenancy in common, or such claimant own only an undivided interest therein," and the validity of homesteads declared under the indicated circumstances has been established. Cameto v. Depuy, 47 Cal. 79; Rousset v. Green, 54 Cal. 136. Moreover, by force of this statute it was held in case of co-tenancy that the husband's interest, if he was residing upon the property under conditions fulfilling the requirements of the statute, could be impressed with a homestead at the instance of the wife. Higgins v. Higgins, 46 Cal. 259. Saving, however, in the cases mentioned, this court, which was the first to declare that a homestead could not be impressed upon land held in co-tenancy, has, though somewhat reluctantly, felt impelled to adhere to its decisions as a rule of property under the doctrine of stare decisis, and such uniformly have been its decisions, to the last recorded case of Schoonover v. Birnbaum, 148 Cal. 550, 83 Pac. 999. But in all the cases that have been adjudicated the precise question presented by this case has never before arisen. Generally speaking, the cases have been like that of the Fleischacker Case in 5 Cal. and 63 Am. Dec., where the husband had sought to declare the homestead and where his inability to do so has been based upon the fact, first, that the metes and bounds of his holding could not be delimited because of the nature of the tenancy, and, therefore, it could not be said that the whole land or any specific parcel was impressed by the homestead, since it was legally impossible to impress his cotenants' interests with this characteristic. The same reasoning, as we have noted, was applied in Giblin v. Jordan in 6 Cal., where, of course, by his own declaration the husband could not impress the homestead character upon his wife's separate property or upon his daughter's property, in which sense they stood in the position of strangers. But the case which is here presented is different in this respect. Here the wife seeks to impress the whole land with the homestead characteristic. This she may do as to her own interest, which is her separate property, and this she may do as to her husband's interest, since she has the power to declare a homestead upon the husband's separate property, though he has no such power over hers. The homestead thus attempted to be declared is upon land, all of which is susceptible at the instance of the wife of having the homestead characteristics impressed upon it. There is no occasion for segregation or partition or delimitation of boundaries, since the homestead attaches to all of the estate and all of the land. The reasons which, in the view of this court, made it legally impossible for the husband to declare such a homestead when there was a co-tenancy between himself, his wife, or third persons, do not exist in the peculiar instance of the case at bar. We have seen in Higgins v. Higgins, supra, that, where the wife has no interest in the property, she may, if her husband, a co-tenant, be in the exclusive possession of it, declare a homestead upon his estate. How much more readily should the rule apply in this case, where the whole estate and all of the land may, at the instance of the wife, be made subservient to the homestead rights? In this respect the finding of the court that the wife was not in the exclusive possession of the land within the contemplation of the statute of 1868 is meaningless. Her husband certainly was in such possession precisely as in the Higgins Case.

For which reasons we hold that the homestead declared by the wife was valid, and, as a necessary consequence, the deed of the husband alone, made after the declaration, was inoperative and void.

The judgment is therefore reversed, with directions to the trial court to enter a new judgment in conformity with the above.

We concur: LORIGAN, J.; MELVIN, J.

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11 Cal. App. 15

HARRISON et al. v. WOODWARD et al.

(Civ. 559.)

(Court of Appeal, Third District, California. July 12, 1909.)

1. Corporations (§ 610*)—Voluntary Liquidation—Agreement of Stockholders.

Plaintiffs and defendants, who together owned practically all the stock of an insolvent corporation, agreed that plaintiffs should pay the debts, liquidate the business, and on payment of plaintiffs' advances, $40,000 by a certain date, time being made essential, and other sums later on, should surrender to defendants all their interest in the concern, the agreement providing that all reasonable and proper expenses of liquidation should be taken from the cash proceeds of liquidation before the application thereof to the payment of plaintiffs' advances. *Held* that, though plaintiffs had credited on the $40,000 certain cash proceeds of the liquidation, they were entitled to reduce such credits by the amount of expenses subsequently paid by them, and were not required to postpone any credits to themselves for payments on the ground that they would later take in more money.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 610.*]

2. Payment (§ 39*)—Application—Conclusiveness.

Defendants being under no obligation to make any payments, but having simply the option of reimbursing plaintiffs, the relation of debtor and creditor did not exist between them, and hence Civ. Code, § 1479, subdiv. 2, providing that an application once made by the creditor cannot be rescinded without the debtor's consent, did not govern, such statute applying only to debtors and creditors.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 114; Dec. Dig. § 39.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3. ESCROWS (§ 15*)—CONDITION—FAILURE OF PERFORMANCE—REDELIVERY TO DEPOSITOR.

Plaintiffs and defendants, who together owned practically all the stock of an insolvent corporation, agreed that plaintiffs should pay all the debts, provided that defendants would contribute to the assets a mortgage on their property; plaintiffs agreeing to surrender all their interest in the corporation to defendants on being repaid a certain sum. A satisfaction of the mortgage and also all the stock were deposited in escrow to be delivered to defendants on their performing the agreement, and, on their failure so to do, to be returned to plaintiffs. *Held*, that defendants being under no obligation to make any payment, but simply having an option so to do, plaintiffs were entitled on defendants' failing to pay to the stock and satisfaction of the mortgage, the rule that equity will not lend itself actively to enforce a penalty or forfeiture not applying, a forfeiture under such rule implying a breach of duty on the part of one losing his interest in the property.

[Ed. Note.—For other cases, see Escrows, Cent. Dig. § 21; Dec. Dig. § 15.*]

4. ESCROWS (§ 15*)—REDELIVERY TO DEPOSITOR.

Civ. Code, § 3380, providing that any person having the possession or control of a particular article of personal property of which he is not the owner may be compelled specifically to deliver it to the person entitled to its immediate possession, authorized an action by plaintiffs against the depositary to recover the papers.

[Ed. Note.—For other cases, see Escrows, Cent. Dig. § 21; Dec. Dig. § 15.*]

5. ESCROWS (§ 15*)—REDELIVERY TO DEPOSITOR — ACTION AGAINST DEPOSITARY — DEFENSES.

The depositary claiming no interest in the property beyond the right to hold possession until the happening of the contingency provided for, he could not defend on the ground that plaintiffs were seeking to enforce a forfeiture.

[Ed. Note.—For other cases, see Escrows, Cent. Dig. § 21; Dec. Dig. § 15.*]

6. ESCROWS (§ 15*) — ACTION AGAINST DEPOSITARY—PLEADING.

Plaintiffs were not required in such action to allege the value of the property.

[Ed. Note.—For other cases, see Escrows, Cent. Dig. § 21; Dec. Dig. § 15.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by A. Dalton Harrison and others against O. J. Woodward and others. From a judgment for plaintiffs and from an order denying a motion for new trial, defendants appeal. Affirmed.

Franklin P. Nutting and Henry Brickley, for appellants. Wright & Wright, for respondents.

BURNETT, J. The determination of the controversy really turns upon the construction of a certain agreement between James E. Bell and A. Dalton Harrison, the parties of the first part, and John M. Seropian and George M. Seropian, the parties of the second part, executed on the 23d day of January, 1904. These parties were the owners of all but two shares of the capital stock of a corporation engaged in the fruit business. It is not disputed that the corporation was indebted to various persons in a sum exceeding $135,000, and it appears that it was insolvent. The affairs of the concern were involved in litigation, and there was great dissension and bitterness between Bell and Harrison on the one hand and the Seropians on the other. To prevent a sacrifice of the property in a court of bankruptcy and to effect a permanent settlement of their joint affairs, the said agreement was entered into by the terms of which the said Bell and Harrison were to pay all the debts of the corporation, provided the Seropians would contribute to its assets a $15,000 mortgage on their Fresno ranch, and the former further covenanted to surrender to the latter all their interest in said corporation upon repayment to them of the sum of $110,000. An escrow arrangement was devised to accomplish the desired result. A satisfaction of said mortgage and also all of the capital stock of the corporation owned by the parties, properly indorsed so as to entitle it to be transferred on the books of the corporation, were deposited with O. J. Woodward, subject to the following conditions, to wit: "Said satisfaction of mortgage and all of said stock to be delivered to second parties, they having performed all of the terms and stipulations of this agreement by them to be performed, whenever within two years from the date thereof said first parties shall have been repaid, on account of their advances made and those to be made to said corporation as herein before specified, the sum of one hundred and ten thousand dollars U. S. gold coin. * * * It being a still further condition of such payment that said $40,000.00 and interest thereon be fully paid within six months from date hereof * * * time being expressly made of the essence of this agreement and particularly of the escrow. * * * In the event, however, such payments have not been made to said parties of the first part in the amount and at the times hereinbefore specified, and also, in the event that parties of the second part have failed or neglected to perform any of the covenants, terms, conditions or stipulations on their part to be performed by this agreement, then all of said capital stock so deposited in escrow, and said satisfaction of mortgage shall be delivered to parties of the first part, and said escrow shall thereupon be terminated." The method contemplated for the repayment to the said parties of the first part is shown in the following provision of the agreement: "It is further agreed that the parties of the first part shall have full charge of the liquidation of the affairs of said corporation of Seropian Bros. The parties of the first part shall proceed at once to sell in the name of said corporation, and shall sell as speedily as possible, at prevailing market prices, all fruits of said corporation; * * * it being understood that the cash proceeds of the liquidation of the assets of said corporation, including therein proceeds of sales of any assets of said corporation which shall be made during such liquidation shall be applied on account of said sum of $110,000." It was further provided "that all reasonable and proper expenses connected with the liquidation of the affairs of said corporation, including the packing, seeding and stemming required by agreements with the California Raisin Growers' Association are to be taken from cash proceeds of liquidation before the application thereof to the payment of indebtedness of the corporation to the parties of the first part," and that the parties of the first part "shall advance the sum of three thousand five hundred dollars to enable said corporation to complete its confirmation or purchase of raisins from the California Raisin Growers' Association, which said advance shall be considered one of the expenses of the liquidation of the affairs of the corporation, to be paid together with interest thereon from the date thereof, at the rate of six per cent. per annum to said parties of the first part, independent of said sum of one hundred and ten thousand dollars."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

On the ground that they had not been repaid the sum of $40,000 as prescribed, plaintiffs, after the expiration of the six months and the days of grace allowed, brought the action to recover a judgment directing the said O. J. Woodward to deliver to plaintiffs said documents held by him in escrow as aforesaid. Defendants denied "that all money received by plaintiffs from the sale of the assets of said corporation or from any proceeds of said liquidation was credited by plaintiffs on the said sum of $40,000 and interest thereon that was to be paid to them in accordance with the terms of said agreement, but allege that large sums of money far exceeding the said sum of $40,000 and said interest thereon were received by said plaintiffs and not credited on said sum of $40,000 or on their accounts with defendants." Defendants also filed a cross-complaint charging plaintiffs with inefficiency, want of dilligence, and criminal conspiracy in conjunction with their employés in their method of caring for the fruit and in selling the same and making collections therefor, whereby defendants were damaged in a sum exceeding $200,000.

The conclusion of the court was in favor of plaintiffs upon all the material issues. The amount including the interest to be paid within the six months was the sum of $41,200, and the court found that to this account no more than $31,000 could be credited as payment. This finding is the subject of the principal controversy between the parties.

Appellants insist that error was committed by the trial court in charging against this sum of $41,200 as expenses of liquidation, two items of $3,500 and $9,694.27. It seems that plaintiffs about a week after the execution of said contract of January 23d advanced the sum of $3,500 to "complete the confirmation" of the purchase of certain raisins pursuant to said contract, and on the same date they caused the corporation to execute and deliver a promissory note for $9,694.27 in favor of the First National Bank of Fresno. This note was also signed by the plaintiffs, and was paid by them prior to the expiration of the term for the payment of the said sum of $41,200. Prior to the execution of the contract of January 23d, the corporation, by George M. Seropian, acting president, entered into a contract for the purchase of a large quantity of raisins from the California Raisin Growers' Association, agreeing to pay therefor $19,614, paying on account 10 per cent. of the purchase price. Certain lots of these were sold and paid for prior to said January 23d, and at that time $13,194.27 was the balance due on the purchase price. As before stated, it was a part of the contract of liquidation that plaintiffs should advance the said sum of $3,500 to close the transaction of purchase; it being understood by the plaintiffs and the Seropians that Woodward would advance on the security of the raisins taken over the balance of the purchase price. The association was in need of funds, and was insisting upon the payment by the corporation of its indebtedness. The association owed the corporation $6,075 for rent of the latter's packing house, and it had also agreed to pay the corporation a bonus of $3,375 on condition that the corporation keep its agreement as to the purchase of the raisins. Both these sums were likely to be lost if the purchase was not completed. Woodward refused to loan the $9,694 on the corporation's note to be secured by the raisins, but insisted upon the signatures, as joint makers, of Bell and Harrison. The note was thereupon executed upon the agreement of the association to waive all claim to the forfeiture of the said bonus of $3,375, and to pay at once the said rent of $6,075 then past due. This rent was applied to the payment of one of the obligations of the corporation which plaintiffs had assumed under the said contract of January 23d. As stated by respondents: "In purchasing these raisins the corporation not only saved the 10 per cent. which it had already paid, but made an immediate collection of $6,075 and a few months later of the bonus of $3,375 and in addition realized later the full value of the raisins purchased. Not to have completed this transaction would have been most detrimental to the interests of the corporation, and, had Bell and Harrison failed to do so in the face of their stipulation to make the $3,500 advance, the Seropians would certainly and properly so have been most severe in their denunciation of them." Indeed, there can be no valid objection to the action of the plaintiffs in completing the purchase of the raisins. It was not only authorized by said contract of January 23d, but it was clearly within the principles of ordinary prudence and fair dealing. Nor does it seem a matter of just complaint that the payment was made a short time before plaintiffs could be compelled by Woodward to do so. They had a right to use their own judgment as to such details of the liquidation, and the trial court was justified in holding that they acted wisely and in the utmost good faith.

The appellants, however, contend that the respondents having rendered a statement to the Seropians under date of July 12, 1904, showing at that date $29,171.60 to have been paid on the said $40,000 and interest, leaving a balance of $10,870.49 to be paid on or before August 8th, the said respondents could not by a subsequent application of expenses of liquidation reduce this balance. Appellants declare: "There can be no question as to when or how the changes in the application of payments took place. The first occurred on July 14, 1904, and consisted in taking the sum of $3,500 and interest from the $29,171.60 already credited on the $40,000 account and with it paying the account entitled 'Catton, Bell & Co. a/c C. R. G. Assoc.' This amount was then charged to the debit side of the account with the Seropians. The next change was made on July 21, 1904, when the further sum of $8,241.77 was deducted from the $29,171.60 already credited on the $40,000 account to pay the remainder of the account entitled 'Bills Payable a/c C. R. G. A.' This change of application was noted in the statement sent to the Seropians on July 21, 1904. These two changes in the application of payments already credited on another account aggregated $11,747.77. Adding to $31,000—the amount found by the court to have been paid on the $40,000 account—the said sum of $11,747.77 and the amount paid by the Seropians was $42,741.77, $1,541.77 in excess of the amount required." The point is that the law does not permit such a change of the application of payments already made on account. Wendt v. Ross, 33 Cal. 650; Cardinell v. O'Dowd, 43 Cal. 586; White v. Costigan, 138 Cal. 564, 72 Pac. 178; Civ. Code, § 1479, subd. 2.

The trial judge, in disposing of this contention, used the following language: "There is some claim as to the way in which the various charges and credits are made in reference to settlements with the raisin association. I do not understand the claim to be made now that the plaintiffs are not entitled to credit the amount they paid in confirming that sale. * * * In determining how these credits and charges should be made, the defendants must consider the matter as simply between plaintiffs and the corporation without regard to the question whether the $40,000 was to be raised by a certain time. The charges should be made and the credits given just as they occurred. When the plaintiffs paid out money, they paid it. Of course, that should be credited to them at that time. If they afterwards got any money, they would charge themselves with it, but only as of the time when they received it. The theory of the defendants seems to be that they should postpone any credits to themselves for payments because afterwards they would be getting in more money. That is not the proper theory of the case at all. They should be charged and credited just as the transaction occurred." The foregoing is the reasonable view, and is in accordance with the method contemplated by the parties. The stipulation to which we have already referred in relation to "all reasonable and proper expenses" of the liquidation cannot be construed as claimed by appellants. The parties themselves by their contract having established a rule of appropriation, effect, of course, must be given to it to the exclusion of any other. Again, the rule as to application of payments invoked by appellants is in force only between debtors and creditors. The parties here do not sustain that relation to each other. It is clear that no obligation was imposed upon the Seropians to make any payments whatever. They had the option to make sales, and also from their own funds to supply any deficiency in the reimbursement of plaintiffs, but they were under no legal nor moral compulsion to do either. Under some circumstances, after reporting $29,000 as paid on the $40,000 account, plaintiffs would be estopped from reducing it by reason of expenditures subsequently entered, but estoppel is not pleaded nor does it appear that appellants were misled to their prejudice. It cannot be said that at any time within the six months was there in the hands of the liquidators the sum of $40,000 after deducting the just and reasonable expenses of liquidation, and therefore under the provisions of the escrow agreement plaintiffs were entitled to the documents held by Woodward. Indeed, the evidence shows that on August 16, 1906, five months prior to January 23, 1907, the date of the final payment under the contract, the liquidators had received only the sum of $32,871.03, with the packing houses as the only remaining asset—which it is stated by respondents and not disputed by appellants was sold in the summer of 1907 for $14,000. Thus it is seen how barren ultimately would be the victory of appellants if they should be upheld in their technical view of the application of payments on the $40,000 account. Appellants are equally at fault in their contention that this is a proceeding to which the rule applies that equity will not lend itself actively to enforce a penalty or forfeiture or a loss in the nature of a forfeiture. The principle upon which appellants rely is stated in 1 Pomeroy, Eq. Juris. § 459, as follows: "When will a court of equity by its decree actively enforce or carry into effect a forfeiture? The general answer to this question is easy and clear. It is a well-settled and familiar doctrine that equity will not interfere on behalf of the party entitled thereto and enforce a forfeiture but will leave him to his legal remedies, if any, even if the case be one in which no equitable relief would be given to the defaulting party against the forfeiture." But the forfeiture which equity hesitates to enforce is what Blackstone defines as "a punishment annexed by law to some illegal act or negligence in the owner of lands, tenements or hereditaments, whereby he loses all his interest therein, and they become vested in the party injured as a recompense for the wrong which he alone or the public together with himself hath sustained." 2 Bl. Com. 269. It implies a breach of duty on the part of the one losing his interest in the property. In the case here no obligation was imposed upon defendants to make any payment. They had simply an option to do so which they failed to exercise.

The action itself, while involving equitable principles, as it relates to the termination of a trust, has particular features that carry it beyond the ordinary range of equitable cognizance. Indeed, it is authorized by a special provision of the statute contained in section 3380 of the Civil Code that "any person having the possession or control of a particular article of personal property of which he is not the owner may be compelled specifically to deliver it to the person entitled to its immediate possession." There is no apparent reason why effect should not be given to this remedial measure, and since the evidence is clear that Woodward had in his possession these articles of personal property of which he was not the owner, and furthermore that under the terms of the agreement of January 23d, plaintiffs had become entitled to the same, and, it further appearing that there was nothing immoral, illegal, or inequitable in the original transaction of January 23d, we have a proper case for the the relief provided in said section 3380. In fact, Woodward was the only necessary party defendant, and he obviously could not refuse to deliver the papers to plaintiffs on the ground that the latter were seeking to enforce a forfeiture, as that is no concern of his. He is indifferent as between the other parties, and he claims no interest in the property beyond the right to hold the possession until the happening of a certain contingency. The Seropians were made defendants that a judgment concluding the trust and directing the delivery of the said documents to plaintiffs might bind all and protect Woodward from further litigation of the question of fact as to whether said contingency had occurred. It must be clear, therefore, that, if we concede an element of forfeiture to be involved in the suit it is not available as a defense to Woodward, it would not excuse him from delivering the papers to plaintiffs as he agreed, nor does it entitle the defendants to any affirmative relief as that would be in violation of their contract with plaintiffs and opposed to the well-established principle that equity will not aid those who do not regard their covenants. The theory of appellants, therefore, leads to the conclusion that neither are they nor is Woodward entitled to the possession of the papers, but that he should deliver them to plaintiffs.

What has been said is perhaps a sufficient answer to appellants' contention that there should have been an allegation of the value of the property as is required in an action in claim and delivery. Technically this is neither such an action nor is it a proceeding for specific performance, but it is an action for specific delivery of personal property under a title of the Code providing for "Specific and Preventive Relief," and the measure of the relief granted is found in the provisions of chapter 1 of said title. Section 3380, as originally adopted, reads as follows: "Any person having the possession or control of a particular article of personal property of which he is not the owner may be compelled specifically to deliver it to the person entitled to its immediate possession in either of the following cases: (1) When the thing claimed is held subject to an express trust in favor of the claimant. (2) When pecuniary compensation would not afford adequate relief for the loss of the thing claimed and (3) When it would be extremely difficult to ascertain the actual damage caused by the loss." It was amended by eliminating the specification of the cases in which it was allowed. The purpose of the amendment undoubtedly was to enlarge its scope, although as it formerly stood it would have authorized this action, since the documents were held by Woodward "subject to an express trust." The tendency, however, of legislation as well as of its construction by the courts is to enlarge the operation of remedial principles to promote justice and prevent wrongdoing. The boundaries of equity are being constantly extended to meet the demands of our complex civilization. As said by Chief Justice Fuller in the case of Union Pac. Ry. Co. v. Chicago, etc., Ry. Co., 163 U. S. 564, 16 Sup. Ct. 1173, 41 L. Ed. 265: "The jurisdiction of courts of equity to decree the specific performance of agreements is of very ancient date and rests on the ground of the inadequacy and unfitness of the remedy at law. Its exercise prevents the intolerable travesty of justice involved in permitting parties to refuse performance of a contract at pleasure by electing to pay damages for the breach. It must not be forgotten that in the increasing complexities of modern business relations all equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them. As has been well said, equity has contrived its remedies 'so that they shall correspond both to the primary right of the injured party and to the wrong by which that right has been violated,' and 'has always preserved the elements of flexibility and expansiveness so that new ones may be invented or old ones modified in order to meet the requirements of every case and to satisfy the needs of a progressive social condition in which new primary rights and duties are constantly arising and new kinds of wrongs are constantly committed.' Pomeroy's Eq. Jur. § 111."

There is nothing in the statute nor can any good reason be advanced requiring the plaintiff in an action of this kind to allege the value of the property. It would be a strange defense for Woodward to urge that he was not required to execute his trust because the property was of no pecuniary value to plaintiffs, and the only purpose to be subserved by an allegation of value would be to recover it instead of the property itself if possession of the latter could not be obtained. But plaintiff is not required to allege anything more than to show that he is entitled to recover what the statute specifically authorizes; that is, the possession of the identical thing detained. The position taken here by appellants is as destitute of merit as would be the contention that a plaintiff in an action of ejectment must allege the value of the real property in order to state a cause of action.

The judgment and order denying the motion for a new trial are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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10 Cal. App. 746

STANDARD BOX CO. v. MUTUAL BISCUIT CO. (Civ. 588.)

(Court of Appeal, Third District, California. July 10, 1909. Rehearing Denied by Supreme Court Sept. 7, 1909.)

1. Sales (§ 24*)—Option Contracts—Acceptance—Time.

Where an option to purchase goods limited no time of acceptance, it was revoked by the lapse of a reasonable time without acceptance.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 49; Dec. Dig. § 24.*]

2. Sales (§ 88*) — Construction of Contracts—Question of Law.

What is a reasonable time to accept an option to purchase goods is a question of law.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 248; Dec. Dig. § 88.*]

3. Sales (§ 24*) — Options — Acceptance — Time of Acceptance.

Notice of acceptance of an option to purchase boxes 10 months after the option was given, and after a disastrous earthquake and fire had greatly increased the market value of the goods, was not given within a reasonable time.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 49; Dec. Dig. § 24.*]

4. Evidence (§ 442*) — Parol Evidence — Varying Contracts—Extending Time of Acceptance.

That which is implied by law becomes as much a part of a written contract as its written terms, and if, aided by such implication, it is clear and complete, the part implied cannot be contradicted by parol, so that the reasonable time within which the law required an option to be accepted where no time was stated could not be extended by a prior or contemporaneous executory parol agreement.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1887; Dec. Dig. § 442.*]

5. Sales (§ 89*)—Modification of Contract—"Executed Contracts."

An oral agreement between the buyer and seller to extend the time of acceptance of an option to purchase to a certain date, made when the option was given, was not an executed contract within Civ. Code, § 1698, providing that a written contract may only be altered by a contract in writing or an executed parol agreement, where the written option was not accepted within a reasonable time, and the seller at the time of the acceptance refused to recognize the existence of the option.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 251; Dec. Dig. § 89.*

For other definitions, see Words and Phrases, vol. 3, p. 2562.]

6. Sales (§ 35*) — Validity — "Duress" — "Menace."

Civ. Code, § 1569, defines "duress" as (1) the unlawful confinement of a person; (2) unlawful detention of the property of any such person; (3) confinement of such person, lawful in form, but fraudulently obtained. Section 1570 defines "menace" as consisting of the duress specified in subdivisions 1 and 2, and unlawful and violent injury to the person and property of such person, or injury to his character. Defendant demanded the right to purchase boxes from plaintiff at an alleged contract price, which contract, in fact, did not exist, but plaintiff refused to sell at less than practically the market price, which was higher than the alleged contract price. It was practically impossible to then buy the boxes elsewhere, and they were essential to the continuance of defendant's business, and defendant claimed it was coerced into paying the price charged therefor. *Held*, that some element of compulsion or threatened exercise of power over the person or property to compel payment must be present to constitute duress, and defendant was not compelled by duress to purchase and pay the price charged for the boxes.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 62; Dec. Dig. § 35.*

For other definitions, see Words and Phrases, vol. 3, pp. 2268–2276; vol. 8, p. 7645; vol. 5, p. 4474.]

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by the Standard Box Company against the Mutual Biscuit Company. From an order denying defendant's motion for a new trial, it appeals. Affirmed.

Sullivan & Sullivan and Theo. J. Roche, for appellant. P. L. Benjamin, for respondent.

CHIPMAN, P. J. Action for goods, wares, and merchandise sold and delivered to defendant by plaintiff. The cause was tried by a jury, and plaintiff had the verdict for $1,444.83, the amount claimed in the complaint. Defendant appeals from the order denying its motion for a new trial.

It appeared that defendant had been purchasing certain boxes, cases, and trays from plaintiff for defendant's use in its business during the year 1905 under a written agreement dated July 25, 1905. While this contract was in force, to wit, September 1, 1905, plaintiff addressed the following letter to defendant (Defendant's Exhibit No.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2): "Gentlemen: We hereby agree to give you an option from one year from July 25, 1906, to furnish boxes at the same price as agreed upon in contract entered into between the Mutual Biscuit Co. and Standard Box Company. We furthermore agree to allow discount of 19½% off said prices, as present in said contract." On the same day defendant wrote plaintiff as follows (marked Defendant's Exhibit No. 3): "Gentlemen: We are in receipt of your communication of this inst., containing option for the continuation of contract for one year from July 25, 1906, with same conditions, prices and discounts as at present." It is not pretended that this last above letter was anything more than an acknowledgment of the receipt of plaintiff's letter. It is in no sense an acceptance of the option given defendant, and may be dismissed from further consideration. By the earthquake and fire of April 18, 1906, the plant of defendant was destroyed and was not rebuilt until the latter part of August of that year. On July 25th defendant mailed the following letter to plaintiff bearing that date: "Temporary Office Mutual Biscuit Co., 72 Central Ave., San Francisco, July 25, 1906. Standard Box Co., Beale & Bryant Sts., City. Gentlemen: In accordance with your contract letter of Sept. 1, 1905, we hereby accept the option therein, agreeing to purchase all of our boxes of you upon same terms and prices as in previous contract, 19½% discount off. This to be in effect for one year from July 25, 1906, pursuant to contents of said letter. In a previous letter we stated that we would change our stamp, but this we have decided not to do for a while at least. You will please have delivered at factory anywhere from Aug. 20th to Sept. 1st, the following: 1000 of our ⅛ boxes. 1000 of our ¼ boxes. 500 of our ½ cases. 500 of our full cases. To be delivered at our new factory at Stevenson, Crocker and Colton streets." Coincidently with offering this letter in evidence defendant endeavored to prove that prior to and at the time the option (Exhibit 2) was given the plaintiff verbally agreed with defendant that defendant should have and was given to and including July 25, 1906, within which to accept said proposal or offer contained in said option, if defendant so desired. Objection was made by plaintiff to all such evidence and to the letter offered in evidence as incompetent, immaterial, and irrelevant and also upon the ground that "the conversation sought to be proved was merged into the subsequently executed papers whatever those papers may have been; and upon the further ground that it is an attempt to vary a contract, which, if it exists, is in writing, and is required to be in writing by the statute of frauds." The court sustained the objection, and neither the oral evidence nor the letter of July 25, 1906, was admitted.

It appeared that payment for the goods, the subject of the action, became due between October 13, 1906, and November 26, 1906; that the price to be paid was the usual market price prevailing at the time of delivery. Defendant claimed that if he had not been compelled to purchase the goods from plaintiff at the going prices, and had not also been compelled to purchase from other box factories at advanced rates, the difference between the prices so paid by it and the prices mentioned in said option would be considerably in excess of the amount now claimed by plaintiff, and for this excess defendant asks judgment in its several counterclaims pleaded. Defendant does not claim that a contract arose by virtue alone of its written acceptance sent to plaintiff after the option was given, but it is claimed that, having been verbally told at the time that it would be allowed one year within which to inform plaintiff of its acceptance, it should have been permitted to make this proof, and that the court erred in refusing evidence of that fact. The question then is: Was it competent to prove by parol that defendant had one year within which to accept plaintiff's offer? The option is silent as to the time of acceptance. It was but a proposal which is revoked by "the lapse of a reasonable time without communication of the acceptance." Civ. Code, subd. 2, § 1587. See, also, 9 Cyc. 291; Chicago & G. E. R. R. Co. v. Dane, 43 N. Y. 240; 1 Page on Contracts, § 38. What is a reasonable time is a question of law for the court. Roberts v. Evans, 43 Cal. 380, was the case of an offer to sell personal property, and it was said: "An offer to sell, where no time is given, must be accepted at once, or within a reasonable time thereafter. A year, or even six months, must be held, as a matter of law, to be an unreasonable time." In Crossmore v. Page, 73 Cal. 213, 14 Pac. 787, 2 Am. St. Rep. 789, a promissory note provided that default in payment of interest should work the immediate maturity of the note, at the option of the holder. A delay of seven months was held to be a waiver of the right to exercise the option, and that the holder must wait until another installment of interest became due. In the case, Chicago, etc., R. R. Co., supra, four months was held not to be a reasonable time within which to accept the offer there involved. The notice of acceptance here was given 10 months after the offer and, if that would matter, after conditions in San Francisco had so changed as to greatly increase the market value of the goods. We think the acceptance was not given within a reasonable time.

Nor do we think it was competent to show by parol testimony that at the time the option was given plaintiff agreed that defendant should have one year within which to accept it. It is a well-settled principle that that which is implied by law becomes as much a part of the contract as that which is therein written, and, if the contract is clear and complete when aided by that which is imported into it by legal implication, it cannot be contradicted by parol in respect of that which is implied any more than in respect of that which is written. In the present case the law required that the acceptance should be communicated to plaintiff within a reasonable time, and this reasonable time could not be extended by parol. The principle was stated by us in Peterson v. Chaix, 5 Cal. App. 525, 90 Pac. 948: "Where the contract appears to be merely an incomplete memorandum, or to be partly in writing or partly in parol, extrinsic evidence is admissible to show what the mutual stipulations were. But this is true only as to such matters concerning which the written memorandum is silent or as to which terms are used which import ambiguity or uncertainty—i. e., which on their face admit of doubt as to what the parties meant by their use. There is another principle to be observed, namely, that whatever the law implies from a contract in writing is as much a part of the contract as that which is therein expressed; and to the extent that the contract, with that which the law implies, is clear, definite, and complete, it cannot be added to, varied, or contradicted by extrinsic evidence"—citing Fawkner v. Smith Wall Paper Co., 88 Iowa, 169, 55 N. W. 200, 45 Am. St. Rep. 230. In Gardiner v. McDonogh, 147 Cal. 313, 81 Pac. 964, the memorandum of sale of the goods did not state the time and place of delivery, and it was hence argued that the memorandum was incomplete. But the court held otherwise and that the provisions of the Civil Code (sections 1753 and 1754) are deemed to be a part of the contract and supplied the missing provisions. The rule that prior or contemporaneous negotiations cannot be used to contradict, add to, or vary a written contract applies not only to the letter of the written document, but also to its legal effect, as for example, where no time of performance is fixed, the law implies that a reasonable time is given, and evidence that a specific time had been agreed upon is inadmissible. 17 Cyc. 570; 2 Page on Contracts, § 1195, citing Fisk v. Casey, 119 Cal. 643, 51 Pac. 1077. The principle was applied in the following among many other cases which I have examined: Stone v. Harmon, 31 Minn. 512, 19 N. W. 88; Liljengren F. & L. Co. v. Mead, 42 Minn. 420, 44 N. W. 306; Irish v. Dean, 39 Wis. 562; Warren v. Wheeler, 8 Metc. (Mass.) 99; Driver v. Ford, 90 Ill. 598; Smith v. Caro, 9 Or. 284; Boehm v. Lies (Super. N. Y.) 18 N. Y. Supp. 577; Rodney v. Wilson, 67 Mo. 123, 29 Am. Rep. 499; Doolittle v. Ferry, 20 Kan. 230, 27 Am. Rep. 166; Charles v. Denis, 42 Wis. 56, 24 Am. Rep. 383; Stack v. Beach, 74 Ind. 571, 39 Am. Rep. 113; Bryan v. Duff, 12 Wash. 233, 40 Pac. 936, 50 Am. St. Rep. 889; Skelton v. Dustin, 92 Ill. 52; Martin v. Cole, 104 U. S. 38, 26 L. Ed. 647; Allen v. Chambers, 13 Wash. 333, 43 Pac. 57. Certain decisions of our Supreme Court are cited as establishing a contrary rule to that we have given. In Wangenheim v. Graham, 39 Cal. 169, it was held that the time for the performance of a simple contract in writing may be waived, or extended, by subsequent oral agreement. But it was pointed out in Henehan v. Hart, 127 Cal. 656, 60 Pac. 426, that the Wangenheim Case was decided prior to the amendment of section 1698 of the Civil Code, and that the rule laid down in that case is not now the law. Henehan v. Hart, supra, was followed in Harloe v. Lambie, 132 Cal. 136, 64 Pac. 88. See, also, Muller v. Swanton, 140 Cal. 249, 73 Pac. 994. Appellant relies with much confidence upon Sivers v. Sivers, 97 Cal. 518, 32 Pac. 571, and subsequent cases in which it is cited. In the Sivers Case the written agreement was to pay $300 loaned "or any further sum of money which he may loan us at such time as circumstances may occur," and, if not paid within a certain time (five years), the signers agreed to give a mortgage as security upon certain described land. As conclusion of law the court found that no time of payment being specified the obligation became due on demand. It was alleged in the complaint and found by the court that at the time the agreement was entered into it was orally agreed that defendants should pay the sum named in the instrument "whenever they should sell the real estate described, and that such sale had been made prior to the plaintiff's demand and the commencement of the action." It was objected that oral proof of this written agreement was incompetent, as the written agreement must be held to embrace all the terms of the agreement between the parties. It was said on appeal: "The instrument, therefore, being silent in respect of the time for the payment of the money, it was competent for the plaintiff to show that a period or event had been agreed upon between the parties thereto at which payment should be made, and such agreement could be shown by oral testimony. This evidence did not contradict or vary any of the terms in the instrument. The rule which excludes evidence affecting the terms of a written instrument does not apply * * * when the evidence is not inconsistent with the terms embodied in the instrument"—citing Guidery v. Green, 95 Cal. 630, 30 Pac. 786. "Inasmuch, therefore, as the instrument does not specify any time for its performance, the finding of the court that the money therein named became payable immediately upon the demand therefor was correct (Civ. Code, § 1657); and the further findings respecting the foregoing oral agreement did not prejudice the appellant. If the money was payable immediately on demand, they were not prejudiced by the fact that the demand was not made until after they had sold the property, or by the fact that it had been agreed that a demand should not be made until after such sale." It must be admitted that some expressions in the opinion would seem to be at variance with what may safely be said to be the universal rule as we have given it. We do not think the writer of the opinion, or the court in adopting it, intended to establish a rule so greatly different from that prevailing generally in this country and in England. We think the rule there laid down was with reference to what was regarded as a collateral agreement upon which the instrument was silent and all the authorities hold that such an agreement does not vary the written instrument and may be shown by parol. The writer of the opinion in the Sivers Case also wrote the opinion in Savings Bank v. Asbury, 117 Cal. 96, 48 Pac. 1081, and he cited the Sivers Case as applying to a collateral agreement. The Sivers Case was cited in Bradford Investment Co. v. Joost, 117 Cal. 204, 48 Pac. 1083, but was distinguished and was not followed because not applicable. In Board of Education v. Grant, 118 Cal. 39, 50 Pac. 5, the Sivers Case is referred to, and it was pretty broadly hinted that so much of the opinion as held that, where the written agreement mentioned no time of payment, evidence of a contemporaneous oral agreement was admissible, must be considered as dictum. In Wolters v. King, 119 Cal. 172, 51 Pac. 35, the defendants were to be paid in lumber for certain land which they sold, as plaintiff's agents, to the Red Cross Lumber Company. Defendants were to receive all the lumber in payment for the land and were to be paid their commissions also out of the lumber. They claimed the right, under section 1657, Civ. Code, to appropriate the first lumber delivered as commissions, but evidence was admitted that at the time the contracts were entered into it was orally agreed that the commissions were not to be paid until all the lumber was delivered. This evidence was held admissible. In Richter v. Union Land Co., 129 Cal. 367, 62 Pac. 39, the circumstances were peculiar to that case and the oral agreements were held admissible under section 1856, Code Civ. Proc. In Williams v. Ashurst Oil Co., 144 Cal. 619, 78 Pac. 28, all that was there held on the point was that, as the writing did not show on its face what shares of stock were meant by the writing, "parol evidence is admissible to show other conditions or explain latent ambiguities." But we have seen that, where the law fixes the time of performance, parol evidence of some other definite time is inadmissible as varying the written instrument. In Pierce v. Edwards, 150 Cal. 650, 89 Pac. 600, the Sivers Case is again cited but to the point that oral stipulations sought to be proved are not inconsistent with the terms embraced in the writing. But the law in the present case completed the agreement by clearly implied terms which could not under the settled rule be changed by parol. The last case, in which reference is made to the Sivers Case, is Germain Fruit Co. v. Armsby Co., 153 Cal. 585, 96 Pac. 319. The contract there was in writing by which defendant sold to plaintiff certain "five hundred boxes apricots, more or less," designated by lots A, B, etc. The question was whether evidence was admissible to show a sale by samples and hence a warranty of quality. It was held inadmissible. It was said: "If it (the writing) imports on its face to be a complete expression of the whole agreement—that is, contains such language as imports a complete legal obligation—it is to be presumed that the parties have introduced into it every material item and term; and parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular [matter] to which parol evidence is directed. The rule forbids to add by parol when the writing is silent, as well as to vary where it speaks"—citing Harrison v. McCormick, 89 Cal. 327, 26 Pac. 830, 23 Am. St. Rep. 469, from which the quotation is taken. The court said further: "To hold parties to diligence and care in reducing their negotiations to writing, and to hold the writing to be subject to attack only by specific allegations of fraud or mistake, appears to be the better rule, and is now supported by the weight of authority. Like the statute of frauds, this rule is founded upon the long and convincing experience that written evidence is more certain and accurate than 'slippery memory.' So long as the rule is applied, the actual contract made can be preserved without fear of its being affected in its terms by the frailties of an interested human recollection. That sometimes the written contract does not include all the terms intended by reason of neglect or oversight, and injustice thereby done in particular cases, does not justify the abandonment of the rule. To construe it away is to destroy one of the greatest barriers against fraud and perjury."

Appellant cites numerous cases from other jurisdictions holding that evidence of a subsequent parol agreement may be given extending the time of performance, but obviously they have no application here for the Civil Code (section 1698) provides that "a contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise." The claim that the alleged oral agreement was an executed agreement within the meaning of section 1698, Civ. Code, is without merit. Platt v. Butcher, 112 Cal. 634, 44 Pac. 1060; Mackinzie v. Hodgkin, 126 Cal. 598, 59 Pac. 36, 77 Am. St. Rep. 209; Henehan v. Hart, 127 Cal. 656, 60 Pac. 426; Harloe v. Lambie, 132 Cal. 133, 64 Pac. 88.

In its reply brief defendant devotes much attention to its counterclaims which it seeks to support because, as is alleged, its purchases and payments were "at prices higher than the contract rates," and "were compulsory, involuntary, and under protest." After alleging the prices as provided for in the alleged contract, the first two counterclaims rest substantially upon the following averments: That defendant was engaged in the business of manufacturing and selling bread stuffs, crackers, and biscuits; that by reason of the earthquake and fire of April 18, 1906, its plant was destroyed as were also "a large number of plants located in San Francisco wherein were manufactured boxes, cases," etc., in which defendant packed its articles of manufacture; that by reason thereof "it was practically impossible for said defendant to procure or purchase from any person, firm or corporation, other than plaintiff, the boxes, * * * required by it in its said business, or any large portion of the same, and without such boxes * * * it would have been impossible for defendant to have continued in its said business, all of which was known to said plaintiff," which, as is alleged, would have resulted in defendant's great financial loss and the loss of its business; that on various occasions between September 19, 1906, and December 21, 1906, plaintiff, "taking advantage of the distressed condition of defendant and its necessities, wrongfully demanded amounts of money aggregating $2,843.39 in payment of said boxes * * * so furnished to defendant, although the agreed price * * * was and is the sum of $1,628.27 and threatened defendant that if it refused to pay said sums, aggregating $2,843.39, said plaintiff would refuse to furnish said defendant any further boxes," etc.

A second counterclaim of $905.18 consists of a discount of 19½ per cent. upon certain boxes, trays, etc., and in addition to those mentioned as constituting the first counterclaim, being the same boxes, etc., as are referred to in plaintiff's complaint, and it is claimed that this amount should be allowed defendant under the terms of the alleged contract.

As a third counterclaim, it is alleged that between December 2, 1906, and January 27, 1907, "plaintiff wrongfully refused to furnish said boxes, trays, and extra tops or any portion thereof, pursuant to the terms of said contract, * * * denied that it was any longer in force or effect, and denied that it was under any obligation or liability whatever to comply with the terms, or any term of said contract, or to furnish defendant with any of said boxes, cases, trays, or extra tops," by reason whereof "defendant was compelled to and did purchase the same from other plants in the city and county of San Francisco, paying therefor the sum of $1,959.84, being $873.30 in excess of the price which plaintiff agreed to furnish to defendant said boxes * * * pursuant to the terms of said contract," and that said sum of $1,959.84 "was the least amount for which said boxes * * * could be purchased by defendant."

A fourth counterclaim is set forth based upon like averments and averring that between January 25, 1907, and July 25, 1907, by reason of plaintiff's refusal to comply with said alleged contract, defendant was compelled to purchase elsewhere in San Francisco, articles which cost defendant $6,573.22, being $3,369.42 in excess of the prices at which plaintiff agreed to furnish the same.

It will be observed that the counterclaims, except the two arising out of purchases made from plaintiff prior to December 2, 1906, are for articles purchased from factories in San Francisco, other than plaintiff's. It is nowhere alleged in the answer that defendant was at any time compelled to pay either to plaintiff or any other factory more than the market rates existing at that time, or that the prices charged were exorbitant or oppressive, and a comparison of the prices paid to outside parties by defendant, as appears by the answer, will show them to have been quite as high as, if not higher, than those paid to plaintiff. The evidence was that upon being told by plaintiff that it would have to pay the current market rates, paid by all others, defendant objected, and claimed that it should be supplied at the contract rates contemplated in the option; that plaintiff denied that any contract existed, and refused to furnish any boxes to defendant except at market rates, whereupon defendant accepted the goods upon plaintiff's terms, and paid the earlier bills as rendered by plaintiff without objection or protest. Later in their dealings, when there became due certain bills, about November 26, 1906, amounting to the sum named in the complaint, defendant refused payment, and this suit was brought on December 8, 1906. The third and fourth counterclaims are based wholly upon plaintiff's refusal to comply with the alleged contract whereby defendant was compelled to purchase its supplies elsewhere, and both of these counterclaims accrued after this suit was brought. As plaintiff was under no obligation to provide boxes to defendant under the alleged contract, its proposal never, in fact, having ripened into a contract, it is obvious that these particular claims are groundless. Plaintiff had a right to refuse to deliver boxes when demanded by defendant at times and at prices to which plaintiff had never agreed. No issue of duress or compulsion is involved in these items of the counterclaims, and they may be dismissed from further consideration. They rest entirely upon breach of an alleged contract having no existence.

Defendant offered to prove all the allegations contained in its first and second counterclaims. Plaintiff's counsel consented that the offer might be made in that way but objected to the evidence as incompetent, irrelevant, and immaterial. The objection was sustained and defendant took an exception. It is not claimed by defendant that it offered to or could prove any facts showing duress other than as alleged in the answer. Is sufficient there set forth to constitute what the law regards as duress? Reduced to its essence, the answer shows that defendant was in great need of certain boxes, cases, and trays with which to conduct its business of making and marketing biscuits; that it was "practically impossible" for defendant to purchase them elsewhere than of plaintiff; that defendant demanded of plaintiff that it furnish the articles under the alleged contract set out in the answer; that plaintiff denied the existence of any contract between the parties, and refused to sell defendant any of said articles at the alleged contract prices, and, taking advantage of defendant's "distressed condition," exacted a sum for said articles in excess of the prices fixed for the same in said alleged contract, and informed defendant that, unless such sum was paid, plaintiff "would refuse to furnish defendant any further boxes"; that these articles were essential to defendant if it was to continue business, without which "its business would have suffered irreparable loss by reason of defendant's inability to supply its customers with said breadstuffs," all of which "was well known to plaintiff."

As there were no contract relations between plaintiff and defendant by which defendant had any right to demand the merchandise, all considerations of contract obligations on the part of plaintiff must be eliminated from the case. When, therefore, defendant solicited the goods, it stood to plaintiff as a stranger seeking to make purchases. It was told the prices it must pay, and the evidence was, and it is not alleged otherwise, that these prices were the market rates charged to other customers. However pressing defendant's need and whatever consequences to its trade should it fail to get the articles, plaintiff had a clear right to make its own prices and having made them, and defendant having accepted the goods under the agreement then made, its action, it seems to us, was voluntary as was its subsequent payment for the goods. Defendant, in fact, when its averments are reduced to their last analysis, alleged no more than that plaintiff refused to recognize the existence of any contract, demanded the current market prices, and that in order to secure the much needed articles defendant paid to plaintiff the higher price demanded. We fail to discover in the transaction the elements of duress. Section 1569 of the Civil Code defines "duress" as (1) the unlawful confinement of a person; (2) unlawful detention of the property of any such person; (3) confinement of such person, lawful in form but fraudulently obtained, etc. "Menace" is defined by section 1570, Civ. Code, and consists of such duress as is specified in section 1569, subds. 1, 2; of unlawful and violent injury to the person and property of any such person or injury to his character. It is not possible to find any constituent of duress or menace as thus defined in any of the averments of the answer.

In the early case of Brumagim v. Tillinghast, 18 Cal. 265, 272, 79 Am. Dec. 176, the court considered quite fully what in law would constitute compulsion or coercion sufficient to render payments involuntary. Among other principles it was there affirmed that where a person, with full knowledge of all the circumstances, pays money voluntarily under claim of right, he shall not afterwards recover back the money so paid, and, to avoid the application of this rule, it must appear that the party was compelled by duress of his person or goods to pay the same. This case was cited in the following cases: Bucknall v. Story, 46 Cal. 589, 598, 13 Am. Rep. 220; Wills v. Austin, 53 Cal. 152; Dear v. Varnum, 80 Cal. 86, 89, 22 Pac. 76. In Holt v. Thomas, 105 Cal. 273, 38 Pac. 891, it was held not legal duress to threaten to bring suit for the enforcement of a debt. The Brumagim Case, supra, was approved in Rooney v. Snow, 131 Cal. 51, 54, 63 Pac. 155. See, also, Huddleston v. Washington, 136 Cal. 515, 519, 69 Pac. 146. In Dear v. Varnum, supra, the court said: "In the absence of acts amounting to duress or coercion, the payment of the tax was voluntary; and the mere protest, made at the time of payment, does not divest it of its voluntary character." As was said in Phelan v. San Francisco, 120 Cal. 5, 52 Pac. 39: "There must be some compulsion or coercion which controls the conduct of the party making the payment, * * * some threatened exercise of power or authority over his person or property which can be avoided only by making the payment." In Huddleston v. Washington, supra, the court said: "A payment is not to be regarded as compulsory unless made to emancipate the person or property from an actual and existing duress imposed upon it by the party to whom the money is paid." A threat to refuse performance of a contract cannot be made the predicate of legal duress. 9 Cyc. 448; Taylor v. Ford, 131 Cal. 440, 63 Pac. 770. In Silliman v. United States, 101 U. S. 465, 25 L. Ed. 987, an oft-cited case, the question arose out of alleged compulsion in entering into new charter parties. The court said: "There was no threat of injury to their persons or to their property, to avoid which it became necessary to execute new charter parties. Nor were those charter parties executed for the purpose nor as a means of obtaining possession of their property. They yielded to the threat or demand of the department solely because they required, or supposed they required, money for the conduct of their business or to meet their pecuniary obligations to others. Their duty, if they expected to rely upon the law for protection, was to disregard the threat of the department and apply to the courts for redress against its repudiation of a valid contract." In Cable v. Foley, 45 Minn. 421, 47 N. W. 1135, certain contracts were sought to be avoided as having been executed under duress. The evidence offered for that purpose, said the court, "amounted to no more than that, the plaintiff being without means to pay his men, the defendants refused to pay what was then due him, unless he executed the contracts. The mere threat to withhold from a party a legal right, which he has an adequate remedy to enforce, is not, in the eyes of the law, duress; certainly not such as will avoid the execution of a contract." Defendant's duty here was to seek aid of the courts to enforce his rights under the contract. He could not receive the goods under the terms upon which they were delivered, afterwards pay for them, and then claim that the payment was compulsory, and recover the difference between the price thus paid and the prices mentioned in the contract. The payment must be regarded as voluntary. Regan v. Baldwin, 126 Mass. 485, 30 Am. Rep. 689.

Appellant says that it seeks relief "on the line of the complaint" in Rowland v. Watson, 4 Cal. App. 476, 88 Pac. 495. The circumstances there were very different from the facts here, and that case furnishes no guide for us here. Burke v. Gould, 105 Cal. 277, 38 Pac. 733, is cited. Without stating the facts in that case, suffice it to quote from the opinion: "The unvarying principle of them all [the cited cases] is that by the performance or threat to perform some unlawful act whereby plaintiff will suffer loss the defendant has induced the plaintiff, under circumstances sufficient to control the action of a reasonable man, to pay money which he otherwise would not have paid." The court then proceeds to show that all that defendant threatened was to foreclose the mortgage which plaintiff had executed, and that this was not an unlawful act; that it was the exercise of a right which the law conferred upon him, and was neither in law nor in morals reprehensible. We fail to see how this case can avail defendant. Here there were no contractual relations, as we have held, and plaintiff did no more than to require defendant to pay for the merchandise its market value. Refusing to sell more goods unless defendant would pay for what it had bought was but an act of common business prudence. There was absolutely nothing unlawful in plaintiff's action in the matter. Robertson v. Frank Brothers Company, 132 U. S. 17, 10 Sup. Ct. 5, 33 L. Ed. 236, relied upon, was the case of a United States collector of revenue imposing certain illegal charges which the importer paid under protest in order to get possession of his goods and the question was whether "the settlements made in pursuance of that demand of necessity were voluntary in such sense as to preclude the appellant from subsequently insisting on his statutory right." Said the court: "The parties were not on equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction, or discontinue its business." It was held that the payment was not "a voluntary act within the meaning of the maxim volenti non fit injuria." It will be observed that the exaction was illegal, and for this reason and to get possession of his property the law permitted the importer to save his business by paying the illegal dues without being penalized by the enforcement of the rule as to voluntary payments. It is not necessary to further pursue the examination of the cases relied upon by defendant. Conceding that the courts recognize what may be termed moral duress under some circumstances, there is always some element of illegality in the demand complained of, some denial of a right, some unfounded claim, some extortion, as was said by Justice Cooley in Hackley v. Headley, 45 Mich. 569, 8 N. W. 511, "as a condition to the exercise by the party of a legal right." Here defendant had no legal right to demand the goods at his own prices or at all for that matter. On the contrary, plaintiff had the legal right to fix the price upon his own goods. It was no concern of plaintiff that defendant could not get the goods elsewhere. Plaintiff was under no obligation to see that defendant's business was safeguarded. It is not pretended that defendant was treated differently from other customers of plaintiff's or that more than market rates were charged for the goods or that those rates were excessive or burdensome.

We do not deem it necessary to notice other points raised by defendant.

The order is affirmed.

We concur: HART, J.; BURNETT, J.

11 Cal. App. 79

FENN v. CLARK. (Civ. 676.)

(Court of Appeal, Second District, California. July 21, 1909. Rehearing Denied Aug. 20, 1909; Denied by Supreme Court Sept. 16, 1909.)

1. NEGLIGENCE (§ 6*)—ACTS CONSTITUTING—VIOLATION OF STATUTE.

Failure to perform a duty imposed by statute or ordinance is negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 8; Dec. Dig. § 6.*

For other definitions, see Words and Phrases, vol. 5, pp. 4743–4763; vol. 8, pp. 7729–7731.]

2. NEGLIGENCE (§ 56*)—PROXIMATE CAUSE—"ACTIONABLE NEGLIGENCE."

Failure to perform a statutory duty, to be actionable negligence, must have contributed directly to the injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 69, 70; Dec. Dig. § 56.*

For other definitions, see Words and Phrases, vol. 1, pp. 148, 149; vol. 8, p. 7563.]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3. MUNICIPAL CORPORATIONS (§ 706*)—USE OF STREETS—NEGLIGENCE—ACTIONS — MISLEADING INSTRUCTONS.

In an action for injuries by being struck by defendant's automobile at night, an instruction that if defendant was operating his machine without lights, contrary to ordinance, he was negligent, and plaintiff was not required to make further proof of negligence, construed in connection with further instructions that, if the accident was caused through defendant's negligence without negligence by plaintiff contributing thereto, the jury must find for plaintiff, and with other instructions given for defendant that, notwithstanding his negligence, plaintiff could not recover if she was herself negligent, or could by ordinary diligence have avoided the accident, and the violation of the ordinance would not in itself justify a verdict for plaintiff, were not objectionable as authorizing a verdict for plaintiff merely because defendant violated the ordinance, irrespective of whether such violation contributed to the injury.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 706.*]

4. MUNICIPAL CORPORATIONS (§ 706*)—USE OF STREETS—NEGLIGENCE—PRESUMPTIONS.

It must be assumed, in the absence of contrary evidence, that plaintiff could see, so that, had defendant's automobile displayed lights as required by ordinance, plaintiff might have seen the car approaching, and have avoided collision therewith.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 706.*]

Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by Addie E. Fenn against Ion L. Clark. From an order setting aside a verdict for plaintiff, and granting a motion for new trial, plaintiff appeals. Reversed.

Earl Rogers, Paul W. Schenck, and W. H. Dehm, for appellant. T. M. Stewart and Jones & Weller, for respondent.

SHAW, J. Action for damages for personal injuries. A trial was had before a jury, which brought in a verdict in favor of plaintiff. Thereafter the court made an order setting aside the verdict and granting defendant's motion for a new trial, from which order plaintiff prosecutes this appeal.

Plaintiff alleges that while attempting to cross Main street at its intersection with Sixth street, in the city of Los Angeles, at the usual and regular crossing thereof for pedestrians, she was knocked down, permanently injured, and disabled by an automobile which defendant was then and there carelessly and negligently running and operating upon said street. It further appears from the allegations of the complaint that the collision occurred about 6 o'clock p. m. on December 24, 1906, at which hour darkness prevailed, and defendant was running the automobile at the time without any lights displayed thereon, and gave no warning or signal of his approach while running at a dangerous and reckless rate of speed. The answer denies that defendant was guilty of negligence in operating the automobile, denies that plaintiff was damaged, and alleges that such injuries as she may have sustained were due to her own negligence. The evidence tended to prove that at about 6 o'clock p. m., December 24, 1906, while plaintiff was crossing said Main street at its intersection with Sixth street, she was struck and knocked down by an automobile operated by defendant, which she did not see until it was upon her, as a result of which she sustained serious injuries; that it was dark at the time, and before attempting to cross the street she looked up and down the street and saw no vehicles approaching. Defendant admitted he had no lights displayed on the machine. Plaintiff introduced in evidence an ordinance of the city of Los Angeles making it unlawful for any person to run or operate an automobile upon the streets of the city between one-half hour after sunset and one-half hour before sunrise unless such automobile has displayed a lamp or lantern, throwing a white light toward the front and a red light toward the rear of the machine. There was proof that on the day of the collision the sun set at 4:50 p. m. Defendant testified that as the machine reached her plaintiff stepped back in front thereof. This was denied by plaintiff. At the hearing of defendant's motion for a new trial it was stipulated that the motion was made and urged upon the sole ground that the court had erred in giving to the jury, at plaintiff's request, among other instructions, the following: "You are instructed that failure to comply with a municipal ordinance, or to perform a duty which is imposed by a municipal ordinance, is negligence in itself; therefore, if you find that defendant, at the time of the alleged accident, was operating his automobile in the city of Los Angeles in violation of any ordinance of said city, that in itself establishes negligence on the part of the defendant, and it is not necessary that the plaintiff make any further showing of negligence in defendant in order to recover." The only question presented on this appeal is whether or not the giving of this instruction constituted error.

It has been repeatedly declared by the Supreme Court of this state that the failure to perform a duty imposed by statute or municipal ordinance constitutes negligence. Siemers v. Eisen, 54 Cal. 418; Driscoll v. Market Street, etc., Ry. Co., 97 Cal. 553, 32 Pac. 591, 33 Am. St. Rep. 203; Bresee v. L. A. Traction Co., 149 Cal. 131, 85 Pac. 152, 5 L. R. A. (N. S.) 1059. But the omission to perform such duty must contribute directly to the injury; otherwise, however illegal the act or omission thereof, in the abstract, no action for damages can be maintained thereon. McKune v. Santa Clara V. M. & L. Co., 110 Cal. 480, 42 Pac. 980. The instruction complained of is one of a series, and respondent concedes that it should not be separated from its context, but contends that by the instructions, considered as a whole, the jury was precluded from determining the question whether or not the omission to display lights as required by the ordinance was the direct cause of the collision, as a result of which plaintiff was injured; but, on the contrary, he insists "the whole body of instructions given left the jury to understand that the violation of the ordinance alone made the defendant liable for any injury that the plaintiff had sustained, wholly irrespective of the question whether or not the act or omission contributed directly to the injury." Regarding the instructions as a whole and in the light of the issues tried, they do not admit of such interpretation. In order to recover, it devolved upon plaintiff to prove certain facts, among which was defendant's negligence, and by this instruction they were told, in effect, that, if they found defendant was operating his machine contrary to the provisions of the ordinance, such fact sufficiently established defendant's negligence, and in order to recover plaintiff was not required to make other proof upon this point. But they were further instructed that: "If you believe from the evidence that the said accident was caused by and through the negligence of the defendant, and that there was no negligence on the part of plaintiff which contributed thereto, then you must find for the plaintiff." Having found the existence of facts which constituted negligence on the part of defendant, they were compelled, under this last instruction just quoted, to further find that the collision, as a result of which plaintiff was damaged, was "caused by and through the negligence of the defendant, and that there was no negligence on the part of plaintiff which contributed thereto." The jury was further and fully instructed on behalf of defendant that, notwithstanding defendant's negligence, plaintiff was not entitled to recover if she was guilty of contributory negligence, or could by ordinary diligence have avoided the accident, and that the violation of the city ordinance would not in itself justify a verdict for plaintiff.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The giving of an instruction almost identical with the one under consideration was sustained in McKune v. Santa Clara V. M. & L. Co., supra. As said in that case, there may be exceptional cases when the omission to comply with the provisions of an ordinance would not, as to one falling within the exception, constitute negligence. We must assume, however, in the absence of anything to the contrary in the record, that plaintiff was in possession of the sense of seeing, and hence, had the car displayed the lights required by the ordinance, she might have seen the car approaching and avoided the collision. Such evidently was the view entertained by the jury, and they were justified in such conclusion.

The instructions taken as a whole constitute a correct declaration of the law applicable to the issue in question, and the court erred in setting aside the verdict and granting the motion for a new trial.

The order appealed from is therefore reversed.

We concur: ALLEN, P. J.; TAGGART, J.

10 Cal. App. 762

FORD & SANBORN CO. v. BRASLAN SEED GROWERS' CO. et al. (Civ. 562.)

(Court of Appeal, Third District, California. July 10, 1909. Rehearing Denied by Supreme Court Sept. 7, 1909.)

1. New Trial (§ 138*)—Notice of Intention to Apply—"Adverse Parties."

Where judgment was rendered against several defendants, one of whom contended that its codefendants were alone liable, which contention, if sustained, would relieve it of all liability, and cast the burden of the judgment wholly on such codefendants without right of contribution, the latter were "adverse parties" within the meaning of Code Civ. Proc. § 659, requiring notice of motion for new trial to be served on the adverse party.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 138.*

For other definitions, see Words and Phrases, vol. 1, pp. 224–227; vol. 8, pp. 7567, 7568.]

2. Appeal and Error (§ 414*)—Notice of Appeal—"Adverse Parties."

Such codefendants were also "adverse parties" within the meaning of Code Civ. Proc. § 940, requiring notice of appeal to be served on the adverse party, and of sections 941a, 941b, and 941c (added by St. 1907, p. 753, c. 410), prescribing a new method of appeal, and providing that notice of an appeal taken under such sections need not be served on any of the parties to the action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2137, 2138; Dec. Dig. § 414.*]

3. Appeal and Error (§ 414*)—Notice of Appeal.

Code Civ. Proc. §§ 941a, 941b, 941c (added by St. 1907, p. 753, c. 410), providing a new method of appeal, provide that the notice of appeal therein mentioned need not be served on any of the parties to the action, but when filed shall, without further action on the part of the appellant, transfer the cause to the higher court, and that, when taken under these sections, the appeal shall have the same force and effect as appeals taken pursuant to the provisions of sections 939, 940, and 941, "provided, however, that any question may be reviewed therein which question could be reviewed on an appeal taken pursuant to the provisions of section 939." *Held* that, where notice of appeal by a defendant was duly filed as required by section 941a, the appeal was so far perfected as to give the appellate court jurisdiction, though the appeal was apparently taken under the old law, and codefendants, who were adverse parties, were not served with notice as required thereby.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 414.*]

4. Exceptions, Bill of (§ 46*) — Notice to Adverse Party.

Code Civ. Proc. § 659, as amended by St. 1907, p. 717, c. 380, provides that the party intending to move for a new trial must within 10 days after receiving notice of the entry of the judgment file with the clerk and serve on the adverse party a notice of his intention, designating the grounds of the motion, and whether it will be made on affidavits, bill of exceptions, or statement of the case. Paragraph 2 provides that the bill of exceptions shall be prepared as provided in section 650. Section 650 provides that a party desiring to have exceptions taken at a trial settled in a bill of exceptions may prepare a draft of the bill and serve the same by copy on the adverse party, etc. *Held*, that such directions are not directory in so far as they relate to service of notice of proceedings to settle the bill, and that, where such notice is not given, the bill cannot be considered on appeal from an order denying the motion for a new trial, but the order will be affirmed, notwithstanding notice of appeal was filed.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Exceptions, Bill of, Dec. Dig. § 46.*]

Appeal from Superior Court, Monterey County; B. V. Sargent, Judge.

Action by the Ford & Sanborn Company (a corporation) against the Braslan Seed Growers' Company (a corporation) and others. From a judgment for plaintiff, and from an order denying a motion for a new trial, the Braslan Seed Growers' Company appeals. Affirmed.

Campbell, Metson, Drew, Oatman & McKenzie, C. D. Wright, and Alexander & Alexander, for appellant. Dougherty & Lacey, for respondent.

CHIPMAN, P. J. This is an action in assumpsit for goods, wares, and merchandise sold to defendants by plaintiff. The complaint is verified. Defendants Braslan Seed Growers' Company and Charles P. Braslan filed their verified answer specifically denying the averments of the complaint so far as they related to the alleged sale of the goods. Defendants G. T. and W. F. Duncan answered in their own proper persons as follows: "The defendants G. T. Duncan and W. F. Duncan hereby enter this their appearance in the above-entitled case, and deny each and every allegation of the complaint." The cause was tried by a jury and plaintiff had judgment upon the verdict against W. F. Duncan and G. T. Duncan and Braslan Seed Growers' Company for the sum of $2,087.34 and costs of suit, and defendant Charles P. Braslan had judgment against plaintiff for his costs of suit. Defendant Braslan Seed Growers' Company appeals from the judgment, and from the order denying its motion for a new trial. It is claimed by respondent that the bill of exceptions cannot be considered, and that the appeals must be dismissed or the judgment and order affirmed. This contention arises out of the following condition of the record: Judgment was entered September 23, 1907. Notice of intention to move for a new trial was served upon plaintiff's attorneys "in due time," date not given. Notice of appeal from the judgment was served upon plaintiff's attorneys and filed November 19, 1907. Bill of exceptions was presented to attorneys for plaintiff, date not given, who "stipulated that the foregoing may be settled and allowed by the court," and on March 16, 1908, it was indorsed by the court "approved and allowed." It bears no filing mark or date by the clerk. Motion for new trial was denied June 26, 1908, and notice of appeal from the order served on plaintiff's attorneys July 8, 1908. It is conceded that no service of the notice of intention to move for a new trial or of any other steps in perfecting the bill of exceptions or taking the appeal, was made upon either of defendants, W. F. and G. T. Duncan. They seem to have been ignored as negligible quantities in the preparation of the papers on appeal.

In the trial of the case certain relations were shown to have existed between defendants the Duncans and defendant Braslan Seed Growers' Company in the purchase of the goods, subject of the action, which, as claimed by respondent, fixed a liability upon the defendants, the Duncans, and also upon the company both as guarantors of and either as partners or as engaged in a joint enterprise with the defendants, the Duncans, and the judgment was against the Duncans and the Seed Growers' Company. The contention of the appellant at the trial was and is here that the Duncans were alone liable. That the Duncans are adverse parties, within the meaning of sections 659, 940, Code Civ. Proc., and sections 941a, 941b, and 941c, as added by St. 1907, p. 753, c. 410, would seem not to admit of a doubt. Johnson v. Phenix Ins. Co., 146 Cal. 571, 80 Pac. 719; Id., 152 Cal. 196, 92 Pac. 182. See, also, Niles v. Gonzalez (Cal.) 100 Pac. 1080. The contention of appellant, if sustained, would relieve it from all liability, and cast the burden of the judgment wholly upon the Duncans without the right of contribution. They are therefore directly interested in and would be affected by the reversal or modification of the judgment or order from which the appeal has been taken, in which case, as was said in Senter v. De Bernal, 38 Cal. 637–640, they would be adverse parties, "within the meaning of the provisions of the Code, irrespective of the question whether they appear upon the face of the record in the attitude of plaintiffs or defendants or interveners." They are adverse parties because, as was said in Terry v. Superior Court, 110 Cal. 85, 42 Pac. 464, "by the record they appear to be interested in the judgment so that they will be affected by its reversal or modification."

By the provisions of the newly added sections of the Code of Civil Procedure, approved March 20, 1907 (St. 1907, p. 753, c. 410), namely, sections 941a, 941b, and 941c, a "new and alternative method by which appeals may be taken from judgments, orders or decrees of the superior court" is provided, and it is provided, that the notice of appeal therein mentioned "need not be served upon any of the parties to the action * * * but when filed * * * shall, without further action on the part of the appellant, transfer the cause for decision and determination to the higher court." When taken under these sections, the appeal "shall have the same force and effect as appeals taken pursuant to the provisions of sections 939, 940, and 941 of this Code; provided, however, that any question may be reviewed therein which question could be reviewed upon an appeal taken pursuant to the provisions of section 939 of this Code." In the light of Mitchell v. California & Oregon S. Co. (Cal.) 99 Pac. 202, we think it apparent that the appeal was so far perfected as to give this court jurisdiction of it, whether appellant proceeded under the old or the new law. The notice of appeal was duly filed, and, though not served on the Duncans, the filing complied with section 941b. To all appearances the appeal was in fact perfected in accordance with the old law, still, as we understand the opinion in the Mitchell Case, supra, the filing of the notice of appeal was equally effective under whichever method was pursued by appellant. We conclude, therefore, that the appeal from the judgment had the effect to bring up for review the judgment and whatever properly became part of the judgment roll. The appeal from the order also brought up the order, for the amended Code provision refers to orders as well as to judgments. And here arises the question: Can the bill of exceptions be considered in view of the fact that the defendants, the Duncans, as adverse parties were not served with any notice of any of the proceedings leading up to the order denying motion for a new trial? Can it be held that, by the mere filing of the notice of appeal from the order, the appellant is relieved from the necessity of complying with statutory provisions relating to the preparation of its bill of exceptions? Does the filing of a notice of appeal have such retroactive operation as to obviate all noncompliance with the statute, or render inoperative its plain provisions relating to the preparation of the bill? Are adverse parties to be deprived of the right to service of the notice of intention to move for a new trial or to participate in preparing the bill by the mere filing of notice of appeal from the order after the bill is settled? If one adverse party may be ignored, may not all, and, if so, may not the appellant proceed ex parte and have his bill settled? It seems to us that there can be but one answer to these questions and that answer is that the appealing party must comply with the statute which gives the right to have a bill of exceptions reviewed or it cannot be considered.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Section 659, Code Civ. Proc., as amended in 1907 (St. 1907, p. 717, c. 380), provides as follows: "The party intending to move for a new trial must, within ten days after receiving notice of the entry of the judgment, file with the clerk and serve upon the adverse party a notice of his intention," designating the grounds of the motion and whether it will be made upon affidavits, minutes of the court, bill of exceptions, or statement of the case. The notice in the present case declared that the intention was to move for a new trial, as to certain grounds, "upon evidence to be thereafter prepared, served and filed," and as to certain other grounds, upon a bill of exceptions to be thereafter prepared, proposed, served, and settled in accordance with the provisions of law." Paragraph 2 of this section provides that the bill of exceptions shall be prepared as provided in section 650, Code Civ. Proc. This section provides that: "When a party desires to have exceptions taken at a trial settled in a bill of exceptions, he may (within the time specified and upon the conditions prescribed) prepare the draft of a bill, and serve the same by copy thereof upon the adverse party." It then prescribes certain steps to be taken to complete the bill by amendments proposed, if any, "after such service upon the adverse party." "The proposed bill and amendments must" be presented by the party seeking its settlement to the judge "upon five days' notice to the adverse party," etc. It is not necessary to pursue the provisions of this section further. There may be some confusion or contradiction in the terms of the section, but upon the point that the adverse party is to have notice of the proceedings to settle the bill there is no confusion or doubt. At the time section 659 was amended a new section, 663a, was adopted which provides, that "the party intending to make the motion mentioned in the last section (663) must * * * serve upon the adverse party and file with the clerk of the court a notice of his intention," etc. There is nothing in the new sections or in the amendments of the old sections that would warrant the court in holding that service of notice of intention and of the other steps in the preparation of the bill are dispensed with. In this respect there is no change in the law.

It was held in Herriman v. Menzies, 115 Cal. 16, 44 Pac. 660, 46 Pac. 730, 35 L. R. A. 318, 56 Am. St. Rep. 82, that "section 659 of the Code of Civil Procedure, however, requires that the party intending to move for a new trial shall 'serve upon the adverse party a notice of his intention.' The 'adverse party' upon whom this notice is to be served is determined by the same rules as is the 'adverse party' upon whom a notice of appeal is to be served, viz., every party whose interest in the subject-matter of the motion is adverse or will be affected by the granting of the motion or changing the former decision of the court. * * * The superior court can have no jurisdiction to re-examine an issue of fact that it has tried, and change its decision thereon, unless all the parties to the issue and former decision are properly before it." The same question came before the court in U. S. v. Crooks, 116 Cal. 43, 47 Pac. 870, and was similarly decided. These cases hold that the appeal will not be dismissed, but that the order will be affirmed. We can see no reason why service of notice of the statutory steps should not be required as directed by the statute, for we cannot believe the Code contemplates that the appealing party may proceed ex parte and prepare and have approved his bill of exceptions without notice to the adverse parties. There is no more reason for requiring service of the notice of intention than of the subsequent proceedings. Estate of Scott, 128 Cal. 578, 61 Pac. 98. Our conclusion is that the bill of exceptions cannot be considered and that the order must be affirmed. Appellant's reply, as to want of service of the bill, is, first, that the provisions of section 650 as amended "are so absurdly confused that no one can follow it"; second, that the provisions are directory only; third, that "counsel by participating in all the proceedings waived want of service"—citing Hicks v. Masten, 101 Cal. 651, 36 Pac. 130. The reply to want of service of notice of intention, is, first, by citing Johnson v. Phenix Ins. Co., 146 Cal. 571, 80 Pac. 719; second, that the Duncans are not complaining and that they were not adverse parties, being satisfied with the judgment.

We find no confusion in section 650 sufficient to render it absurd or inoperative. We do not think its provisions directory in so far as they relate to service of notice. Counsel for respondent may have waived want of service as to respondent by assisting in the settlement of the bill, but Hicks v. Masten, supra, decides nothing beyond waiver as to the party who without notice takes part in settling the bill. The case does not hold that this excuses notice to other adverse parties for whom no one appeared in the settlement of the bill. Johnson v. Phenix Ins. Co., supra, furnishes no support to appellant's contention. In that case the judgment was dismissed, but the motion to dismiss the appeal from the order was denied. The question as to whether service upon the nonappealing San Mateo bank was necessary was not decided. But in the same case, when the question arose on its merits, the court decided that the order must be affirmed because the notice of motion for a new trial, as required by section 659, Code Civ. Proc., was not served upon an adverse party. It is immaterial that the Duncans are not complaining. They had no opportunity to complain for they had no notice of an intention to appeal or to move for a new trial. They might well be satisfied with a judgment that made the company jointly liable with them, but might seriously object to having the judgment reversed or so modified as to make them solely liable. We have thus for review the appeal from the judgment on the judgment roll alone; i. e., the pleadings, copy of the verdict of the jury, copy of any order made on demurrer (there was no demurrer), or relating to the change of parties (of which there was none), and a copy of the judgment. The bill of exceptions cannot be treated as part of the judgment roll for the reasons already stated.

The only conflict between the general verdict and the special findings related to the individual liability of defendant Charles P. Braslan. The general verdict ran against him personally with the other defendants. Special findings were to the effect that he was not individually liable. On motion of his attorneys the court gave judgment for Braslan against plaintiff. We discover no inconsistency or conflict between the other special findings and the general verdict. Neither the general verdict nor the special findings are open to attack as unsupported by the evidence.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

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11 Cal. App. 74

PROUD v. STRAIN. (Civ. 674.)

(Court of Appeal, Second District, California. July 21, 1909. Rehearing Denied Aug. 20, 1909; Denied by Supreme Court Sept. 16, 1909.)

1. PLEADING (§ 381*)—ISSUES AND PROOF.
A complaint alleging the sale and delivery by plaintiff to defendant of a quantity of cabbage at an agreed price, and nonpayment of a part thereof, was based upon a different contract than that alleged in the answer, which was a written agreement by plaintiff to sell the cabbage for the year through defendant, who should receive a certain commission, and did not rest upon the written agreement or vary it, so that it was unnecessary to amend the complaint by alleging the abandonment of the written agreement.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 381.*]

2. CONTRACTS (§ 245*)—ABANDONMENT—NEW AGREEMENT.
A new oral contract to sell to defendant absolutely the cabbage raised by plaintiff abrogated a prior written contract to sell the same cabbage through defendant on commission; Civ. Code, § 1698, providing that a written contract may only be altered by one in writing or by an executed oral agreement not applying to the new contract.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 245.*]

3. CONTRACTS (§ 245*)—EVIDENCE—WAIVER.
Waiver by defendant of all rights acquired under a written contract to sell plaintiff's cabbages on commission need not be by an express agreement, and a subsequent oral contract by which defendant was to buy the cabbage absolutely was evidence of a waiver of all of defendant's rights under the commission agreement.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 245.*]

4. SALES (§ 52*) — ACTION — SUFFICIENCY OF EVIDENCE—NATURE OF CONTRACT.
In an action for part of the price of cabbage claimed to have been sold to defendant, in which defendant alleged a written contract by which the cabbages were to be sold through him on commission, evidence *held* to support a find-

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ing of an absolute sale to defendant, and not a delivery for sale on commission.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 52.*]

5. Appeal and Error (§ 979*)—Discretion of Trial Court—New Trial.

Where the trial court has passed upon the question whether the verdict is against the weight of the evidence, it will not be considered on appeal to determine where the preponderance of the evidence lies; the trial court's conclusion being final.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3871–3873; Dec. Dig. § 979.*]

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by F. E. Proud against Thomas Strain. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

G. E. Harpham, for appellant. E. J. Marks, H. C. Head, and R. Y. Williams, for respondent.

TAGGART, J. Action for goods sold and delivered. Judgment for plaintiff, and defendant appeals from the order of the trial court denying his motion for a new trial.

From the bill of exceptions in the record it appears that plaintiff went to trial on a complaint which alleged the sale and delivery by plaintiff to defendant at the latter's request between March 22 and May 11, 1906, of a certain quantity of cabbage at an agreed price, the payment of a part of said price and the nonpayment of a balance of $667.09. The same matter was stated as a second cause of action for the same sum upon a quantum valebat count. The complaint also alleged seven other causes of action, doubly stated in the same manner, based upon sales of cabbage made to defendant by seven different persons who had assigned their respective claims therefor to plaintiff. All of said sales took place between March 19 and June 27, 1906, the aggregate of unpaid balances in the several causes of action being stated at $2,141.41, for which a judgment was asked. Defendant answered, denying that any sales of cabbage had been made to him by plaintiff or any of his assignors, and alleged that all the cabbage mentioned in the several causes of action was received by him under and by virtue of several and distinct agreements in writing made by defendant with the plaintiff and each of his said assignors, each of which writings was in substance as follows: "I agree to sell my cabbage for the season of 1906 through Thomas Strain, he to receive 10% (ten per cent.) and cost of crating and loading as compensation for marketing same." These writings were each set out in full in the answer, showing the signature of plaintiff and his assignors thereto, and the dates thereof, respectively, range from February 13, 1906, to March, 1906. When plaintiff attempted to introduce evidence of the terms of the sale of the cabbage to defendant, at the trial, the defendant objected on the ground that the answer would be incompetent if it attempted to vary the terms of the written agreement set out in the answer, and on the further ground that it was not the best evidence, because the written contract set up in the answer was the best evidence of this. Plaintiff then offered to prove a sale of the cabbage, as alleged in his complaint, to Thomas Strain entirely separate and distinct from the agreement set out in defendant's answer. Whereupon defendant objected to the introduction of any evidence as to the terms of any agreement to sell or sale other than the written agreements set out in defendant's said answer, and the court sustained this objection and required plaintiff to amend his complaint by alleging the abandonment or setting aside of the contract set out in defendant's answer before he could offer any evidence as to any other sales. This allegation was inserted under the ruling of the court, and it is contended by appellant that there is no evidence to support the special finding in plaintiff's favor on this issue, or the finding in plaintiff's favor on this element of his case, implied by the general verdict for plaintiff.

Plaintiff's cause of action did not rest upon the writing, or the cancellation of the writing, which the court required him to allege was set aside and abandoned, but upon a sale of the cabbage to defendant. The contract sued on by plaintiff was not an alteration of the writing pleaded in defendant's answer, but an entirely new and distinct contract. The pleadings as originally framed raised the issue whether the contract pleaded by plaintiff or that pleaded by defendant should determine the rights of the parties. It was not necessary that there should be an express destruction, cancellation, or setting aside of the first contract in order that plaintiff might state a cause of action under the new. We do not regard the allegation thus thrust into the plaintiff's pleading, or a finding thereon in his favor, as necessary to sustain the verdict in his behalf. Taking the complaint, however, as amended by order of the court, the allegation that a new obligation has been substituted for the old finds support in the evidence. The new oral obligation created by the absolute sale of the cabbage to the defendant abrogated the commission contract, and evidence of the creation of the new contract is evidence of the waiver of all rights under the commission contract by defendant. He could not while making an absolute purchase of the cabbage say that the old contract was still in force as to the very cabbage which he was buying. To such a new agreement substituted for an existing written agreement section 1698 of the Civil Code has no application. Pearsall v. Henry, 153 Cal. 314, 325, 95 Pac. 154, 159.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appellant's three points made, to wit, that there was no evidence to sustain a finding that the commission contract was set aside, that there was no evidence of any sales made by plaintiff and his assignors to defendant, and that there was no evidence to show that other agreements of sale were substituted for the commission agreements are all included in the one question: "Was there a sale of the cabbage to defendant?" The evidence as to the waiver of all rights of defendant under the commission contracts (if he acquired any rights thereby) need not be in the nature of an express agreement. While the instructions given by the court at the request of the defendant and the requirement of the court that the plaintiff amend his complaint so as to allege formally that the commission agreement was set aside and abandoned by the agreement of the parties gives some color to appellant's contention that the trial court intended by its instruction to require the proof of a formal agreement to abrogate or abandon, yet we do not think this is the necessary construction of the language of the instruction. There is nothing in the instruction inconsistent with the construction placed thereon by the jury by their special finding, to wit, that the intention to abandon the old agreement and substitute a new one might be implied from the acts of the parties, even in the absence of any express statements of such an intention by the parties. Under this view there is abundant evidence to sustain a finding that there was a sale of the cabbage to defendant as distinguished from a delivery to him to be sold on commission, and from this the inference might well be drawn that the commission agreement was abandoned.

Plaintiff and each and every of his assignors testified that he sold the cabbage to the defendant. While the testimony may be in the form of a conclusion, the form of it was not objected to when given. Each of the parties to the respective writings testified, in substance, that nothing was ever done under the original agreement. Again, none of the written statements of account made by defendant to the parties delivering the cabbage, which were rendered before this action was brought, showed any charge either for commission, crating or loading, while on the day following the service of the summons regular account sales on a commission basis, with deductions for commissions, crating, and loading, were forwarded to those to whom the ordinary statement of account, such as might have been made in case of a straight sale, had been previously rendered. That defendant explained why the first statements were so made out, and expressly denied that he had purchased any of the cabbage or accepted it in any manner, except under the writings pleaded in his answer, does not affect the question as this court must consider it. His testimony only raised a conflict in the evidence and the jury decided this in favor of plaintiff.

The rule invoked by appellant, that the trial judge should set aside the verdict if satisfied that it is against the weight of the evidence, is one that can be urged only in the trial court. The conclusion of the trial judge on the application of that rule is final. There is no review here for an abuse of discretion in that respect. This court will not inquire into the question of fact for the purpose of ascertaining where the preponderance of evidence lies.

No prejudicial error being presented by appellant, the order is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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11 Cal. App. 42

PEOPLE v. MAR GIN SUIE. (Cr. 85.)

(Court of Appeal, Third District, California. July 19, 1909. Rehearing Denied by Supreme Court Sept. 16, 1909.)

1. Criminal Law (§ 1159*)—Review—Findings on Conflicting Evidence—Conclusiveness.

Verdicts or findings cannot be set aside by appellate courts where they rest upon evidence in which there appears to exist, or does in fact exist, a substantial conflict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074–3083; Dec. Dig. § 1159.*]

2. Homicide (§ 253*)—Murder—Sufficiency of Evidence.

Circumstantial evidence *held* to sustain a conviction of murder in the first degree.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 253.*]

3. Criminal Law (§ 552*)—Murder—Circumstantial Evidence—Flight.

Flight of an accused is but a circumstance tending to establish a consciousness of guilt; but whether it is a strong or weak circumstance depends largely upon the circumstances, and its significance in a case made up entirely of circumstantial evidence must be determined by the jury in the light of other attending circumstances.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1257; Dec. Dig. § 552.*]

4. Homicide (§ 228*) — Murder — Evidence—Corpus Delicti.

In a murder case, evidence *held* sufficient to establish the corpus delicti.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 471–476; Dec. Dig. § 228.*]

5. Homicide (§ 228*)—Murder—Evidence—Corpus Delicti.

The corpus delicti may be proved by circumstantial, as well as by direct, evidence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 472; Dec. Dig. § 228.*]

6. Criminal Law (§ 404*)—Homicide (§ 174*)—Murder—Admissibility of Evidence.

In a murder case, as a part of the original case for the people, testimony of the officer who arrested accused a few days after the homicide, as to the finding of pistols lying on the bed in the room in which the arrest was made, was admissible, together with every other circumstance occurring at the time of the arrest having any bearing on the crime or upon accused's conduct when arrested, and the pistols were properly admitted as exhibits.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 891; Dec. Dig. § 404;* Homicide, Cent. Dig. § 364; Dec. Dig. § 174.*]

7. WITNESSES (§ 268*)—CROSS-EXAMINATION.

In a murder case, where a police officer had testified that he had been detailed to watch certain outgoing trains and search any Chinese thereon, that he searched accused on one of the cars, and found no weapons upon him, it was error on cross-examination to exclude the question whether witness' object in searching accused was to find whether he had any weapons.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931–948; Dec. Dig. § 268.*]

8. CRIMINAL LAW (§ 1170½*) — APPEAL — HARMLESS ERROR—CROSS-EXAMINATION OF WITNESS.

The witness having testified that he had found no weapons upon accused, the exclusion of the question on cross-examination, as to whether his object in searching accused was to find whether he had any weapons, was not prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1170½.*]

9. CRIMINAL LAW (§ 361*)—EVIDENCE—ALIBI —EXPLANATION OF CONDUCT.

Where an alibi is relied upon by accused, much latitude is generally allowed him in explaining his conduct which might otherwise be interpreted as indicating a consciousness of guilt, and hence, where a Chinaman accused of murder had testified that he came to town the day after the homicide to procure medicine from a Chinese doctor whose office was not in the Chinese quarter, and that while looking for the office he was stopped by a policeman, it was error to refuse to permit him to answer a question as to what the officer did to him, the purpose of the question being to show that the officer searched him, which might explain why he remained away from "Chinatown," which Chinese usually visit upon arriving in a town.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 361.*]

10. CRIMINAL LAW (§ 1170*)—APPEAL—HARMLESS ERROR—EXCLUSION OF QUESTION ASKED WITNESS.

Accused having just previously stated that, before meeting the policeman, a Chinaman had apprised him of the killing of a "Bing Kong Tong man" on the preceding day by a member of the Tong of which accused was a member, and that the "Bing Kong Tongs" were "after" all the members of accused's Tong, thus putting accused on his guard, the testimony being received to explain why accused did not visit the Chinese quarters on the day following the homicide, the exclusion of the question was not prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1170.*]

11. CRIMINAL LAW (§ 358*)—MURDER—ALIBI —EVIDENCE.

In a murder case, accused having testified that he reached the city where the crime occurred from M. at about noon on the day after the killing, the people could introduce testimony of a telephone operator in the city that accused came to the telephone office between 11 o'clock and 11:30 o'clock in the forenoon of that day and telephoned to some one in M.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3136; Dec. Dig. § 358.*]

12. CRIMINAL LAW (§ 1168*)—APPEAL—HARMLESS ERROR — ORDER OF RECEIVING EVIDENCE.

Though such evidence could appropriately have been a part of the people's original case, and being relevant and material even if it was not proper rebuttal testimony, the fact that it was introduced out of the regular order would not be ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1168.*]

13. WITNESSES (§ 290*)—EXAMINATION—REPETITION.

Where accused on cross-examination in presenting his original case was asked by the district attorney if he was not in a telephone office in the city where the homicide was committed at the time designated by a witness, and whether he did not telephone to a person at another town, and he declared that he was not in the telephone office at the time designated and was permitted on surrebuttal to say that he had never seen the witness until she came into court as a witness, the exclusion of a question asked accused on surrebuttal, as to whether he was in the telephone office at the time mentioned and under the circumstances detailed by the witness, was not error, since the answer would have amounted only to a repetition of what accused had previously testified to.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1005; Dec. Dig. § 290.*]

14. WITNESSES (§ 379*) — IMPEACHMENT — INCONSISTENT STATEMENTS.

In a murder case, where the foundation for impeachment of a witness had been laid, it was error to exclude testimony of a newspaper reporter that the witness, who had identified accused as a man who immediately after the killing had run with a pistol in his hand and disappeared in a cellar, had shortly after the homicide stated to the reporter that he did not believe he could identify any of the Chinamen who ran from the scene of the homicide.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1220–1256; Dec. Dig. § 379.*]

15. CRIMINAL LAW (§ 1170*)—APPEAL—HARMLESS ERROR—EVIDENCE.

The prosecuting attorney having himself asked the impeaching witness the same question on cross-examination, and he having replied that the identifying witness had made the statement imputed to him, the error was cured.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3147, 3148; Dec. Dig. § 1170.*]

16. WITNESSES (§ 389*)—IMPEACHMENT—PREDICATE.

Accused is not precluded from showing that a witness had before the trial made a statement inconsistent with his testimony, merely because the witness, upon being asked on cross-examination whether he had made the statement, answered that he did not remember whether he had made it or not.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1243–1245; Dec. Dig. § 389.*]

17. CRIMINAL LAW (§ 1156*) — APPEAL — REVIEW — MOTION FOR NEW TRIAL — NEWLY DISCOVERED EVIDENCE—CONFLICTING AFFIDAVITS.

A motion for new trial for newly discovered evidence being regarded with suspicion and disfavor, a wide discretion is committed to the trial court in ruling upon such a motion, and, where the showing made by the affidavits on both sides involves sharply conflicting evidence, the ruling thereon will not be disturbed on appeal.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3067-3071; Dec. Dig. § 1156.*]

18. CRIMINAL LAW (§ 761*) — MURDER — INSTRUCTIONS—"HOMICIDE"—"CRIME."

In a murder case, the court charged that it was contended by accused that he was elsewhere at the time of the commission of the homicide, and consequently that it was impossible for him to have committed it, that the contention constituted an alibi, which if established was a perfect refutation of any crime charged, and, being interposed by accused as proof that he was not guilty, it became the duty of the jury to pass upon the question whether accused was present at the scene of the homicide at the time of the commission thereof. *Held*, that the charge was not objectionable as assuming the proof of the crime charged against accused, on the hypothesis that "homicide" is synonymous with "crime," since the killing of a human being under any circumstances constitutes homicide, but whether a homicide is a crime depends on the circumstances under which it is committed.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 761.*]

19. CRIMINAL LAW (§ 572*)—EVIDENCE—ALIBI.

If accused introduces sufficient proof upon the contention of an alibi to raise a reasonable doubt as to his guilt, he is entitled to an acquittal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1290; Dec. Dig. § 572.*]

20. CRIMINAL LAW (§ 351*) — EVIDENCE — FLIGHT.

Flight, unexplained by other circumstances, may become a circumstance in the chain of evidence of guilt, depending upon its connection with all the other circumstances shown.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 779; Dec. Dig. § 351.*]

21. HOMICIDE (§ 340*) — APPEAL — HARMLESS ERROR—INSTRUCTIONS.

In a murder case, a charge that it is only necessary that the act of killing be preceded by a concurrence of will, deliberation, and premeditation of the slayer, to constitute the killing murder in the first degree, etc., was not so erroneous as to require reversal because of the omission of the words "and the result of" following the words "preceded by," where the evidence showed that accused just prior to the shooting was seen walking back and forth on the street near where decedent was killed, and that two men were engaged in the shooting, and that immediately upon the cessation thereof they fled with unusual celerity in different directions from the spot at which the homicide took place, thus strongly tending to show that the shooting and the killing, by whomsoever done, was deliberate, premeditated, and willful, and no element of self-defense appeared from the proved circumstances, since the jury must have understood from the charge that if accused had deliberately and premeditatedly formed the will to slay decedent, and did thereupon slay him, such slaying must have been the result of the will or intention so formed, and that under such circumstances only could they find him guilty of first-degree murder.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 340.*]

Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

Mar Gin Suie was convicted of murder, and appeals from the judgment and an order refusing a new trial. Affirmed.

C. T. Jones and J. E. Alexander, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

HART, J. The indictment upon which he was tried and convicted charged the defendant with the murder of one Lee Tong in the city of Sacramento on the 25th day of April, 1908. The jury found the defendant guilty of murder of the first degree, fixing the penalty at imprisonment for life (section 190, Pen. Code), and the court thereupon rendered judgment in accordance with said verdict. This appeal is from said judgment and the order refusing the defendant a new trial.

The judgment and order are attacked on the grounds that the evidence does not warrant the verdict, alleged errors in the rulings of the court upon questions of the admissibility of certain evidence, and alleged errors in giving and refusing to give to the jury certain instructions. There appears to be no question but that two Chinamen, each having a revolver, fired upon and shot the deceased, inflicting wounds which produced almost instant death; but there is a sharp conflict in the evidence as to the identity of the defendant as being one of the perpetrators of the homicide. Upon this point therefore, under the well-known rule as to the conflict of evidence, the judgment is beyond disturbance by a reviewing court. The contention of the defendant at the trial was that he was not in the city of Sacramento on the day of the homicide, and consequently could have taken no part in the slaying of Lee Tong.

1. The homicide occurred on I street, near the southwest corner of Third and I streets, in said city of Sacramento, at about 8 o'clock p. m., on the day alleged in the indictment. The facts may be gathered by a reference to some extent to the testimony. The witness Gayne heard the shooting from the corner of Third and I streets, where he was standing at the time. He heard, he said, about five shots. After the first shot, he looked in the direction of the point where the shooting was going on and saw two Chinamen engaged in shooting at some one; that, just after the shooting, he saw the two men who were engaged in it running away, one going across Third street to the east side thereof, carrying a revolver in his hand, and disappearing in a cellar from the sidewalk. He testified that the defendant resembled the man he saw crossing Third street. Immediately after the shooting this witness went to the spot where Lee Tong fell, and, on examination, found that he was dead, and observed some wounds in his body. The witnesses Guernsey and Myers were near the corner of Third and I streets when

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the shooting took place. Guernsey testified: That he had been sitting upon a railing surrounding the entrance to the basement of a building on Third street, within a few feet of I street, for about 10 minutes prior to the shooting; that, a few minutes before the firing began, the defendant came to a point near and just back of him; that defendant walked "up to the corner twice and back." The witness said that he "asked the defendant the time of day"; that he noticed with the defendant another Chinaman, whom he described as "a dark, heavy-set Chinaman, very badly pock-marked." The witness further testified that, upon hearing the shots, he left the railing and stepped to the corner, and that, just as he reached the corner, the defendant, with a pistol in his hand, ran past him, colliding, in his haste, with the witness Myers, and running "direct across the street to the east side of Third street and disappeared in a cellar." The other Chinaman ran north in the direction of and to the "sand lots." After the arrest of the defendant, a few days subsequently to the killing of Lee Tong, the witness went to the district attorney's office, to which place the defendant and another Chinaman had previously been taken, and there picked out the former as the man who, immediately after the shooting, with a pistol, ran to the east side of Third street and disappeared in a cellar. This witness was positive that the defendant was the man he saw under the circumstances just indicated. The witness Myers, who was at Third and I streets when the shooting occurred, corroborated Guernsey on all the important points to which the latter testified. He, too, pointed out the defendant and identified him in the district attorney's office as the man he saw, immediately following the shooting, running with a pistol in hand, across and to the east side of Third street and descend from the sidewalk into a cellar. A number of white witnesses—two of them boys, each claiming to be 15 years of age—testified that they were near the scene of the shooting when it occurred, and saw two Chinamen running from Third and I streets in different directions as soon as the shooting ceased. They each appeared to be positively of the opinion that the defendant was not one of the fleeing Chinamen. The witness Ong Get said he heard the shooting, and saw and knew the man who ran across Third street and entered a basement, and that he was not the defendant, but that "he knew him as Ah Gee Ung." The defendant, in support of his claim of an alibi, testified that he was in San Francisco on the day that the shooting resulting in the death of Lee Tong occurred, and left that city on that evening, about 8 o'clock, on the "Oregon Express," for Marysville; he having received a letter that day from a friend in the last-mentioned place asking him to go there. The defendant was corroborated on the point of having been in San Francisco and leaving there for Marysville at about 8 o'clock on the evening of April 25th by two other Chinamen.

Briefly, and in a general way, we have thus referred to the principal evidence received at the trial, and it is at once plainly apparent therefrom that, as stated, it is conflicting in a marked degree. Some of the witnesses for the prosecution were shown to have deviated in a slight degree in their testimony at the trial from statements previously made concerning the facts to which they testified; but whatever differences were made to appear between their testimony at the trial and statements made at some other time were for the jury to consider and settle by the aid of legal rules which, obviously, could be of little or no avail to appellate courts, were they at liberty generally to pass upon questions involving the credibility of witnesses, or the weight which should be attached to their testimony. Counsel for the appellant argue, however, that there is no conflict in the evidence, basing such contention on the fact that no witness produced by the prosecution saw or claimed to have seen the shooting, and that all that the people were able to and did prove was the death of Lee Tong from gunshot wounds and the immediate flight of two Chinamen, one carrying a pistol, from the scene of the homicide; that, on the other hand, the testimony for the defense was not only emphatic and direct that the defendant was not one of the fleeing men, but that at the time of the killing he was on his way to Marysville, only a short distance out of San Francisco, and therefore could not possibly have been concerned actually in the commission of the crime. But the circumstances established by the prosecution are sufficient, as stated, to sustain the verdict of the jury. It must be remembered that one of the white witnesses testified that he saw the defendant, just prior to the shooting, on Third street, near I street, and that the latter walked to the corner and back several times. This is a circumstance from which the jury were warranted in inferring that the defendant was looking or watching for some one, and adding it to the fact of the killing of Lee Tong by means of pistols, and the circumstance of the flight of the defendant, with a pistol still in his hand, from the scene of the homicide, immediately after it occurred, there is made out what we deem to be a good case of circumstantial evidence. Then there are always certain features developed in the trial of cases which cannot be made to clearly appear in the record on appeal, and by which a jury may properly be more or less influenced in reaching a verdict. In addition to considering the facts and circumstances proved by the people in a criminal case, the jury may, and, presumably, invariably do, consider the nature and character of the defense or the contention which the defendant sets up in opposition to the charge. They may consider whether the witnesses introduced by the defendant to support his defense or contention tell a likely story or relate it in such manner as to entitle it to credence. It is true the burden of proving the guilt of a party charged with crime beyond a reasonable doubt is always upon the people; but the jury, after the cause is submitted to them, are, of course, at liberty to review and consider the whole record, and where circumstances are proven which, with sufficient clearness, show, as is the fact here, that the accused must have been concerned in the actual commission of the crime charged, the rejection of his defense or contention against the charge for the reason that it is in the judgment of the jury fabricated or untrue adds just so much more force to the persuasive power of the evidence presented by the people; and the rejection of a defense or contention interposed by one accused of crime is generally for the reason that the manner of the witnesses in giving their testimony in support of such defense or contention is such as to inspire distrust or a belief that such testimony is not to be credited. Hence the rule in this state that verdicts or findings cannot be set aside by appellate courts where they rest upon evidence in which there appears to exist or does in fact exist a substantial conflict.

We are not unmindful, in the discussion of this feature of the case, of the rule as to the flight of one accused of crime as laid down in the text-books and decisions. Roscoe on Criminal Evidence, 18; People v. Stanley, 47 Cal. 118, 17 Am. Rep. 401; People v. Wong Ah Ngow, 54 Cal. 151, 35 Am. Rep. 69. It is quite true, as these authorities hold, that flight is but a circumstance tending to establish a consciousness of guilt in the person fleeing; but whether it is a strong or a weak circumstance must depend largely upon the circumstances under which the flight is prosecuted and accomplished. If a party kills another and, not having been seen near the scene of the homicide, flees to some distant locality, the fact that he was found in such other place after the killing would perhaps amount to a mere circumstance tending only to prove a consciousness of guilt; but if, after another has been shot and killed in a room or a building by means of a revolver, and immediately after the shots are heard, a party is seen running from such room or building, with a revolver in his hand, then the circumstance of flight under those circumstances becomes one of which, considered in connection with the circumstance of the shooting and killing of the deceased, a jury would be justified in predicating a verdict of guilty, in the absence of an explanation satisfactorily showing it to be an innocent circumstance. In other words, the significance of the circumstance of flight, in the extent of its persuasive power, in a case made up entirely of circumstantial evidence, must be determined by the jury in the light of other attending circumstances. In the case at bar, the flight of the defendant from the scene of the homicide, immediately following the firing of the shots and the killing of Lee Tong, carrying, exposed to view, a revolver, constituted an incriminatory circumstance of the most potent significance and importance.

2. The appellant insists that the corpus delicti was not established; that the man who was found dead upon the sidewalk upon the cessation of the shooting was not shown to be Lee Tong, who is alleged in the indictment as the man murdered by the defendant. There is no merit in this contention. The witness Gayne testified that he witnessed the shooting, saw the deceased immediately after he fell to the sidewalk, and then examined his body sufficiently to find that he was dead. The coroner testified that an autoptical examination of the body of the deceased, made at the inquest, disclosed six gunshot wounds in the body, one of which was on the left side and at the base of the neck, another in the jaw, the bullet passing through the jaw and cutting it in two; one in the right shoulder, one between the fourth and fifth ribs, one between the ninth and tenth ribs, and another in the left leg, ranging downwards. Lee You Ding saw the deceased at the coroner's office and recognized him as Lee Tong, an uncle of the witness. This witness also saw the wound in the jaw of the deceased. The circumstances thus referred to, considered with the other circumstances in the case, amply established the corpus delicti. That the testimony proves that the deceased was shot by another person, and that he died from the effect of the wounds thus inflicted upon him, and that said wounds were unlawfully inflicted, there is, it seems to us, no room for a reasonable doubt, or even cavil. Of course, it will not be denied that the corpus delicti may be proved by circumstantial, as well as by direct, evidence.

3. It is contended by appellant that the court erred to his prejudice in allowing the witness Lamphrey, the officer who arrested the defendant at Marysville a few days after the homicide, to testify that he found a couple of pistols lying on the bed in the room in which the arrest was made, and in receiving said pistols in evidence as exhibits in the case. It was not clearly shown by the people that these pistols were the property of the defendant. They were claimed by a woman who occupied the room and who testified for the defendant. At the time of the arrest and the finding of the pistols there were another Chinaman and the woman in the room. The claim is that there was no connection disclosed between the weapons and the crime charged, and that therefore no testimony should have been received concerning them, nor should they have been exhibited in the case. As a part of the original case of the people, we think the testimony with regard to the finding of the pistols was proper as furnish-

ing a circumstance bearing upon the charge, whether directly or remotely, was for the jury to decide in view of all the other facts and circumstances. Lamphrey said that when he first stepped into the room and looked about he saw the weapons on the bed, and asked to whom they belonged, whereupon the defendant started to walk behind him, when he shoved the Chinaman backward and against the wall and then took possession of the pistols. The woman declared at that time that she was the owner of the pistols, it is true, and in fact claimed ownership of everything in the room; but the people not only had the right to the testimony complained of, but to prove every other circumstance occurring at the time of the arrest of the defendant having any bearing on the crime for which the defendant was arrested or upon his conduct when arrested. His actions when the detective inquired as to the ownership of the pistols were proper to be described to the jury, and in that connection it was proper enough to receive the testimony relative to the finding of the pistols. In any event, it being undisputed that the deceased was killed by means of a revolver, and the identification of the defendant as one of the parties who left the scene of the homicide with great haste having been sufficiently established, the ruling could not have prejudiced the accused.

It is next urged that the court committed a prejudicially erroneous ruling in refusing to permit the witness Desmond to answer the following question propounded by counsel for the defendant on cross-examination: "Your object in searching him was to find out whether he had any weapons or not upon him, was it not?" This witness, who is a police officer of Sacramento, had testified on direct that he had been detailed to watch the outgoing trains of the Northern Electric Company leaving its depot at Eighth and J streets, in said city, for the purpose of watching for and searching any Chinese who might take any of the cars of said company. On the 27th of April, he testified, he saw the defendant on one of these cars, and searched him. The officer declared that he found no weapons upon him. The question was a proper one on cross-examination, and the court should have allowed an answer thereto; but we cannot see, in view of the witness' direct testimony, how the refusal to allow it could have been in the least harmful to the accused. Undoubtedly the point which it was important that the defendant should desire to appear clear to the jury was that the officer, having searched him, found no weapons upon his person, and this does appear clearly to have been the fact from the officer's direct testimony. Therefore whether the officer's object in making the search was to learn whether the defendant had any weapons upon him at that time became altogether unimportant and immaterial.

The defendant testified that he came to Sacramento from Marysville the next day after the homicide for the purpose of procuring medicine from a Chinese doctor for one Chin See, a Chinese woman, who was ill. After his arrival at Sacramento, and while looking for the doctor's office, which was not located in the Chinese quarters of said city, a policeman stopped and questioned him as to where he came from, where he had slept the night before, and where he was going. He was then asked by his attorney "what the officer did to him"; the purpose of the question being to show that the officer searched him. Upon objection by the district attorney, the court refused to permit an answer to this question. Counsel for defendant declare that the question was proper for the purpose of showing the effect the conduct of the officer had upon the defendant. Where an alibi is introduced and relied upon by a defendant in a criminal case, very large latitude is generally allowed the accused in explanation of conduct which might otherwise be interpreted as indicating a consciousness of guilt. For illustration, where flight is one of the circumstances upon which the prosecution rely to establish guilt, the defendant may testify that certain persons had communicated to him the fact of the commission of the crime and had advised him, for reasons perfectly consistent with his innocence, to keep "under cover" or to go to some other locality. It is a fact within the compass of common knowledge that, when a Chinese visits a city or town, the first place he seeks is that part of such city or town inhabited by his countrymen. It therefore becomes of peculiar importance to a Chinese, on trial for the murder of one of his countrymen, to explain why, if it be a fact, he remained away from "Chinatown" where and after the homicide was committed, when seen in the city or town in which it occurred; and in such case he should be allowed, as in fact any defendant should, to state any fact which would reasonably tend to explain either flight or why he remained away from those places which, in the very nature of things, under ordinary circumstances, he would be expected first to visit. The question to which objection was sustained by the trial court should have been allowed to be answered; but the ruling could not have operated prejudicially against the accused, in view of the fact that the defendant had just previously stated that, before meeting the policeman, a Chinaman had apprised him of the killing of a "Bing Kong Tong man" on the preceding day by a member of the "Chee Kong Tong," of which the defendant is a member, and that the "Bing Kong Tongs" were "after" all the "Chee Kong Tongs," thus putting the accused on his guard. This testimony was offered and received for the purpose of explaining why the defendant did not visit the Chinese quarters in Sacramento on the day following the homicide, and we cannot perceive how the circumstance of the search of the person of the defendant by the policeman could have added anything to the explanation of his conduct in that respect. The ruling was therefore without prejudice.

The defendant having testified that he reached Sacramento from Marysville on Sunday at about the hour of 12 o'clock in the daytime, the people were allowed, in rebuttal of that statement, to prove by a Miss Maybelle Springfield, who was then employed as an operator in the telephone office at Sacramento, that the defendant came into said office between 11 o'clock and 11:30 o'clock in the forenoon of that day and had telephonic communication with some one in Marysville. It is now claimed that this testimony was not in rebuttal of any new material fact brought out by the defense, and that the ruling admitting it involved prejudicial error. Counsel declare that such evidence is immaterial, because it could have no tendency to prove that the defendant was in Sacramento the night before. We do not assent to this contention. It was a circumstance bearing upon the question of the defendant's presence in Sacramento the preceding evening, of more or less importance, according to the weight which the jury, considering it in connection with the other proven circumstances, might feel justified in giving it. The testimony could appropriately have been made a part of the people's original case, and even if, strictly speaking, it was not proper rebuttal testimony, it being relevant and material, the fact that it was introduced out of the regular order would not justify a reversal of the case. People v. Arrighini, 122 Cal. 121, 54 Pac. 591; People v. Grimes, 132 Cal. 34, 64 Pac. 101; People v. Maughs (Cal. App.) 96 Pac. 407. It is, however, claimed that the fact that the defendant telephoned to some one in Marysville was clearly not rebuttal, nor material for any purpose, and that its admission was injurious to the defendant. If such fact were the only and principal one sought to be proved by the witness, and the circumstance not shown to have had any connection with the crime charged, it would doubtless be an immaterial fact; but we cannot say that even then it would be prejudicial. But the important point which the people designed to bring out through Miss Springfield's testimony was the fact that the defendant was in Sacramento on the day following that upon which Lee Tong was killed at an earlier hour than that at which he claimed to have arrived there from Marysville, and the fact that he communicated with some one at Marysville over the telephone was doubtless referred to by the witness merely as a circumstance explanatory of her recollection of his presence in the telephone office at the time mentioned by her.

The defendant was recalled to the witness stand after the prosecution had concluded their rebuttal testimony and asked if he was in the telephone office at the time mentioned and under the circumstances as detailed by Miss Springfield. The court sustained an objection by the district attorney to the question on the ground that it was not surrebuttal, and said ruling is assigned as error prejudicial to the defendant. The ruling was not erroneous. When under cross-examination, in the presentation of his original case, the defendant was asked by the district attorney if he was not in the telephone office at Sacramento at the time designated by Miss Springfield and communicated with a party at Marysville, and emphatically declared that he was not in said telephone office at any time in the forenoon of Sunday, the 26th of April, 1908. The defendant was permitted in surrebuttal to say that he had never seen the witness Springfield, until she came into court as a witness, and having already denied, during his cross-examination, that he was in said telephone office on the day and at the hour mentioned by Miss Springfield, the testimony of the latter brought out nothing new, and, obviously, the answer to the question to which the people's objection was sustained would have amounted only to a repetition of what the defendant had previously testified to.

It was error for the court to decline to permit the witness Davis, called by the defendant for the purpose of impeaching the testimony of the witness Myers, to testify to a certain inconsistent statement which it was claimed that the latter had made. Myers, it will be recalled, identified the defendant as the man who, immediately after the shooting, ran from the west to the east side of Third street, disappearing in a cellar. Davis, then a reporter on a Sacramento newspaper, interviewed Myers, shortly after the homicide, with regard to the shooting, and the latter said to Davis: "Now, I don't believe I could identify any of them"—referring to the Chinese who ran from the scene of the homicide. The foundation for the impeachment having been properly laid when Myers was under cross-examination, Davis was called as a witness for the defendant and asked if Myers had made the statement referred to. The district attorney's objection to this question was sustained, and we doubt not that the ruling would have been prejudicially erroneous but for the fact that the district attorney himself asked Davis the same question on cross-examination, and the witness replied that Myers did make the statement imputed to him, thereby curing the error involved in the ruling disallowing an answer to the question on the direct examination of the witness. The court's ruling appears to have proceeded on the theory that Myers' reply to the question whether he had made the statement attributed to him did not involve a denial that he made such statement, and that there was therefore nothing to contradict. Myers' reply to the question was, "I don't remember." But we think the defendant was entitled as a matter of fairness to have it clearly appear whether the witness did or did not make the inconsistent statement, and that he was not precluded under the rule from showing that the witness did make such inconsistent statement merely because he answered that he did not remember whether he made it or not. Greenleaf on Evidence (16th Ed.) § 462.

4. One of the grounds upon which the motion for a new trial was urged was that of newly discovered evidence, and in support thereof the defendant presented several affidavits. The facts set out in said affidavits were refuted by affidavits filed by the people, and the showing upon that ground involves evidence in which there is a sharp conflict. For this reason the ruling of the trial court thereon cannot be disturbed by this court. A motion for a new trial upon the ground of newly discovered evidence has always been regarded by the courts with a great deal of suspicion and disfavor, for which reason a wide discretion is committed to the trial court in ruling upon the motion when made on that ground. It has been said "that the temptations are so strong to make a favorable showing after a defeat in an angry and bitter controversy, and the circumstance that the testimony had just been discovered when it is too late to introduce it is so suspicious, that courts require the very strictest showing of diligence." People v. Freeman, 92 Cal. 360, 28 Cal. 261.

5. The appellant complains of the following instruction; his criticism thereof being that it assumes the proof of the crime charged against him: "It is contended by the defendant here that, at the time of the commission of the homicide, he was at a place other than the scene thereof, and, consequently, that it was impossible that he should have committed the same. This particular contention constitutes and is termed in law an alibi, and, if established, is a perfect refutation of any crime charged. Such contention being interposed by the defendant as proof that he is not guilty, it then becomes the duty of the jury to pass upon the question as to whether or no said defendant was present at the scene of the homicide at the time of the commission thereof. * * *" The objection to the foregoing instruction for the reason stated is based upon the hypothesis that the word "homicide" is synonymous in meaning with the word "crime," and that therefore the court in the instruction necessarily assumed the commission of the crime. The contention is untenable. The killing of a human being by another under any circumstances constitutes a homicide, as an etymological analysis of the word itself will plainly show; but whether a homicide is murder or any other like crime depends, necessarily, on the circumstances under which it is committed. Our Penal Code expressly sets forth the circumstances and conditions which would make a homicide a murder, and, furthermore, it prescribes the conditions upon which it would be either excusable or justifiable. There could be no such thing as an excusable or justifiable murder; but counsel's argument, carried to its logical end, would inevitably lead to such an absurd result. The authorities cited by counsel on this point need not be specifically noticed, for they do not, of course, uphold their contention; but it is further contended that the instruction is erroneous in that it declared to the jury that an alibi, "if established is a perfect refutation of any crime." The argument is that, by the use of the words "if established," the court in effect told the jury that it rested with the defendant to prove that contention by a preponderance of the evidence. We do not think that the instruction, when considered with the several instructions upon the burden of proof and reasonable doubt, should be so construed. The rule is that, if the defendant introduces sufficient proof upon the contention of an alibi to raise a reasonable doubt as to his guilt, he is entitled to an acquittal, and the court in effect so instructed the jury. The words "if established" should therefore be construed to mean, as it was, manifestly, when read by the light of the other instructions, so intended, that if the proof in favor of the contention of alibi was of that degree that it would create a reasonable doubt of the defendant's guilt, then such alibi would be "established," and the accused entitled to an acquittal. It is to be assumed that the jury considered the instructions as a whole and understood them, and upon this assumption it must be said that they understood the instruction here complained of as we have construed it. This instruction is very much different in its phraseology from the one condemned in the case of the People v. Roberts, 122 Cal. 377, 55 Pac. 137. The instruction in that case treated an alibi as a defense and so characterized it, and declared that it was the duty of the defendant to "prove and establish" it to the satisfaction of the jury. Clearly, such an instruction is erroneous, because an alibi is not a defense, but an element only of the case which the people must make out before they can demand a conviction. In other words, the prosecution must always prove the presence of the accused at the place where the crime was committed, where it is claimed that he personally participated in its commission. The characterization of an alibi as a defense would of itself be almost sufficient to vitiate the instruction; but the statement therein, in connection with declaring it a defense, that an alibi must be "proven and established" to the satisfaction of the jury, rendered it a palpably prejudicial misstatement of the law. We do not approve of the statement in the criticised instruction that an alibi should be "established"; but, as declared, the word as so used should be interpreted and the in-

struction construed by the light of the other instructions, and as so construed, and as undoubtedly it was understood by the jury, it was harmless, if not strictly correct.

The instruction upon flight was given in general language, and stated the law correctly. It does not assume the commission of the crime charged against the defendant in this case. Nor is this instruction erroneous because it declares that flight, "if unexplained by other circumstances," may become a circumstance in the chain of evidence of guilt, "depending upon its connection with all of the other circumstances shown." This is a clear and correct statement of the law.

It is vigorously insisted that the following portion of the given instruction defining "murder of the first degree" does not involve a correct statement of the law on that subject, and that the defendant was thereby greatly prejudiced: "It is only necessary that the act of killing be preceded by a concurrence of will, deliberation, and premeditation on the part of the slayer; and, if such is the case, the killing is murder of the first degree," etc. This instruction, as thus phrased, was criticised by the Supreme Court in the case of the People v. Maughs, 149 Cal. 253, 86 Pac. 187, for the reason that there was an omission to insert therein, immediately following the words "preceded by," the words "and the result of," so that the instruction would have read: "It is only necessary that the act of killing be preceded by and the result of a concurrence of the will," etc. But the court in that case does not say that the instruction as given here amounts to such error as to require a reversal, and it is our opinion that it does not. We readily recognize the soundness of the logic at the bottom of the criticism of the instruction in the Maughs Case, and must as readily concede that the inclusion of the omitted words referred to would render the description of the crime of murder of the first degree clearer and more easily understood by jurors; yet, in view of the evidence in this case that the defendant, just prior to the shooting, was seen walking back and forth from a point on Third street to the corner of Third and I, near which Lee Tong was shot and killed, and that two men were engaged in the shooting, and that, immediately upon the cessation thereof they fled with unusual celerity in different directions from the spot at which the homicide took place, thus strongly tending to show that the shooting and the killing, by whomsoever done, was deliberate, premeditated, and willful, and no element of self-defense appearing from the proven circumstances, we think the jurors must have understood from the instruction that, if the defendant had deliberately and premeditatedly formed the will to slay the deceased, and did thereupon slay him, such slaying must have been the result of the will or intention so formed, and that under such circumstances only could they find him guilty of murder of the first degree. It may be remarked that the judgment of reversal in the Maughs Case, supra, was expressly put upon the ground that the instruction to the effect that it is the duty of a person taking life in self-defense, when attacked, to "employ all reasonable means within his power, consistent with his safety, to avoid the danger and avert the necessity for the killing," was prejudicially erroneous.

Other errors are claimed with reference to instructions given and refused; but they are not of sufficient importance to demand special notice here.

We have extended this opinion to a much greater length than we had intended; but the briefs of the appellant are voluminous and exhaustively argue from appellant's standpoint every question upon which a reversal of this cause was thought to be justified, and we felt that under such circumstances all the main propositions should be to some extent specially reviewed.

We have examined the record with care, and as a result are convinced that the defendant was fairly tried, the court's charge, as a whole, full, clear, and correct, and that the verdict is warranted by the evidence.

For the reasons herein given, the judgment and order appealed from are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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11 Cal. App. 14

In re SHIVELEY'S ESTATE. (Civ. 190.)

(Court of Appeal, Third District, California. July 12, 1909.)

Appeal and Error (§ 773*) — Dismissal — Failure to File Brief.

Where more than three years had elapsed since the transcript was filed, and no brief had been filed, the appeal will be dismissed, under Supreme Court Rule No. 2, subd. 4 (78 Pac. vii), requiring appellant to file his brief 30 days after the filing of the transcript.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3108; Dec. Dig. § 773.*]

Appeal from Superior Court, Humboldt County; G. W. Hunter, Judge.

In the matter of the estate of W. B. Shiveley, deceased. Appeal by Daniel Shiveley and another, administrators. Appeal dismissed.

H. L. Ford and J. S. Burnell, for appellants. J. N. Gillett, for respondent.

PER CURIAM. This is a motion to dismiss the appeal on the ground that appellants have failed to comply with Supreme Court Rule No. 2, subd. 4 (78 Pac. vii), requiring them to file their brief 30 days after the filing of the transcript. The motion is not contested, and as it has been more than three years since the transcript was filed, and no brief has ever been filed, it seems to be peculiarly a case for the enforcement of said rule.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The appeal is dismissed.

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10 Cal. App. 770

RUTH v. KRONE et al. (Civ. 540.)

(Court of Appeal, Third District, California. July 10, 1909. Rehearing Denied by Supreme Court Sept. 7, 1909.)

1. BILLS AND NOTES (§ 492*) — ACTION BY PAYEE—BURDEN OF PROOF.

A payee of a note suing thereon has the burden of proving the due execution and nonpayment of the note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1649; Dec. Dig. § 492.*]

2. BILLS AND NOTES (§ 516*)—ACTIONS—EVIDENCE.

Under Code Civ. Proc. § 1963, subd. 21, providing that the presumption that a note was given for a consideration is satisfactory if uncontradicted, but may be controverted, and Civ. Code, §§ 1614, 1615, providing that a written instrument is presumptive evidence of a consideration, and the burden of showing a want of consideration lies with the party seeking to invalidate it, a plaintiff, in an action on a note payable to him, who proves the note and nonpayment, makes out a prima facie case, on which he may rest until defendant has established his defense of want of consideration; but the burden, in the strict sense, is on plaintiff to prove his case by preponderance of the evidence.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1800; Dec. Dig. § 516.*]

3. EVIDENCE (§ 90*)—"BURDEN OF PROOF."

The phrase "burden of proof" means the necessity of establishing the existence of a certain fact or set of facts by evidence which preponderates to the legally required extent, and in this sense the burden of proof is on the party maintaining the affirmative of the issue; but the phrase also means the necessity which rests on the party at any particular time during a trial to create a prima facie case in his own favor, or to overthrow one when created against him.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 112; Dec. Dig. § 90.*

For other definitions, see Words and Phrases, vol. 1, pp. 904–907; vol. 8, p. 7593.]

4. TRIAL (§ 139*) — WEIGHT OF EVIDENCE — QUESTION FOR JURY.

Code Civ. Proc. § 2061, subd. 2, providing that jurors may be instructed that they need not decide in conformity with the declarations of any number of witnesses, not producing conviction in their minds, against a less number, or against a presumption or other evidence satisfying their minds, recognizes the fact that a presumption is evidence which may outweigh the positive testimony of witnesses against it, though against a proved or admitted fact a disputable presumption has no weight; but, where it is undertaken to prove a fact against the presumption, the jury must determine whether or not the fact has been proven.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 332; Dec. Dig. § 139.*]

5. BILLS AND NOTES (§ 518*) — ACTION BY PAYEE—CONSIDERATION—EVIDENCE.

In an action by the payee of a note against the maker and defended on the ground of want of consideration, the testimony of plaintiff, aided by the presumption of a valid consideration, *held* to justify a finding that the note was supported by a consideration, notwithstanding the contradictory evidence of defendant.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1816; Dec. Dig. § 518.*]

6. PLEADING (§ 205*)—GENERAL DEMURRER—OBJECTIONS REACHED.

Where, in an action on a note, defendant filed a cross-complaint alleging that plaintiff threatened to contest the will of a decedent, unless defendant executed the note; that defendant, in consideration of plaintiff forbearing to contest the will, and, in ignorance of the fact that he had no right to contest it, executed to plaintiff the note, an answer first specifically denying the averments of the cross-complaint and denying that plaintiff was not a party interested in the will, or in decedent's estate, and denying that he had no right to contest the will, and alleging that, within a few weeks of the death of decedent, the latter had executed a will whereby he gave a portion of his estate to plaintiff, and that the will produced by defendant, which excluded plaintiff, was not the last will of decedent, and that the note was made to plaintiff by defendant for a valuable consideration, was good as against a general demurrer, though bad as against a special demurrer on the ground of uncertainty and ambiguity of the denials.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 492; Dec. Dig. § 205.*]

7. PLEADING (§ 21*)—INCONSISTENCY.

Where a court or jury must consider allegations of fact in a pleading as evidence, and the allegations are inconsistent with other allegations setting up a good cause of action or a meritorious defense, such facts must be considered subject to the rules by which evidence of any other character is to be considered, and the court or jury may consider the discrepancies and either reconcile them with the testimony of the pleader or view them as not possessing sufficient importance to justify a total disregard of his testimony.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 44; Dec. Dig. § 21.*]

8. WILLS (§ 82*)—RIGHT TO MAKE WILL.

One may dispose of his property by will to strangers to his blood to the exclusion of those to whom his estate would descend in case of intestacy.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 203; Dec. Dig. § 82.*]

9. WILLS (§ 229*)—PROBATE—WHO MAY CONTEST.

An heir has the legal right to contest the will of his ancestor.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 550; Dec. Dig. § 229.*]

10. WILLS (§ 229*)—PROBATE—CONTESTS—WHO MAY CONTEST.

A legatee under a prior will may contest a later will excluding him, whether or not there is a tenable ground on which to base the exercise of that right, though the legatee is a stranger to the blood of testator, and though the prior will has not been offered for probate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 550; Dec. Dig. § 229.*]

11. WILLS (§ 230*) — RIGHT TO CONTEST — AGREEMENTS—CONSIDERATION.

A promise by a legatee in a prior will to waive his right to contest a later will, excluding him, is a legal one, and is a valid consideration on which to rest an agreement with the legatees under the later will by which they agreed to compensate him for such waiver, and the agreement is enforceable unless tainted with fraud or the result of duress, or marked by other elements vitiating any contract.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 559; Dec. Dig. § 230.*]

12. WILLS (§ 230*) — RIGHT TO CONTEST — AGREEMENTS—CONSIDERATION.

In the absence of a contrary showing, it is presumed that an agreement by legatees in a later will to compensate the legatee in a prior will, excluded in the later will, on his agreement not to contest the later will, is fair and honest.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 559; Dec. Dig. § 230.*]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by J. M. Ruth against Lotta Ruth Krone and another. From a judgment for plaintiff and from an order denying a new trial, defendants appeal. Affirmed.

Daniel A. Ryan, for appellants. Otto Irving Wise and Louis Hirsch, for respondent.

HART, J. This is an action on a promissory note for the sum of $2,000, alleged in the complaint to have been executed by the defendant Lotta Ruth Krone in favor of and payable to the plaintiff. The cause was tried by a jury and a verdict rendered in favor of the plaintiff for the face of the note, with legal interest from the date of its maturity; said note, dated June 3, 1903, having been made payable three years after its date, without interest. Judgment was entered for the plaintiff in accordance with the terms of the verdict. This appeal is prosecuted from said judgment and from the order denying the defendants a new trial.

The complaint is in the ordinary form of actions for recovery upon promissory notes. The defendants, by answer, specifically deny the material averments of the complaint, and, moreover, filed a cross-complaint, in which, admitting the execution of the note, they attack the validity of the instrument upon the ground that it is without consideration for its support. The plaintiff introduced the note in evidence, and thereupon rested his case. The note constituted prima facie proof of all that it purported to be. The presumption is that the note was supported by a sufficient consideration (section 1963, subd. 21, Code Civ. Proc., and section 1614, Civ. Code), and the burden of overcoming such presumption or of showing want of consideration sufficient to support the note was cast upon the defendants (section 1615, Civ. Code; Keating v. Morrissey, 6 Cal. App. 163, 91 Pac. 677).

Considerable space is devoted in the briefs of counsel for both sides to the discussion of the question of the "shifting of the burden of proof." We fail to appreciate the pertinency of the discussion. It is only elementary to say that the burden of proof is always on the party maintaining the affirmative of the issue. In the case at bar it was incumbent upon the plaintiff to prove the due execution and nonpayment of the note; but, when he has made out a prima facie case, then he may rest and thus invite the defendant to exhibit whatever defense he may be able to interpose thereto. Our law, as seen, provides (section 1614, Civ. Code, supra) that a written instrument imports a consideration, and that the burden of showing that such an instrument is without a sufficient consideration to support it rests upon the party seeking to invalidate or avoid it. Section 1615, Civ. Code, supra. Therefore when the plaintiff proved the note and its nonpayment he made out a prima facie case upon which he was at liberty to rest until the defendants had introduced proof showing or tending to show that the note was unsupported by a sufficient consideration. While the burden was upon the defendants to dispel the presumption of a sufficient consideration, the burden in its strict sense was upon the plaintiff to prove his case by a preponderance of the evidence. "The two burdens," says the Supreme Court in Scott v. Wood, 81 Cal. 401, 22 Pac. 872, "are distinct things. One may shift back and forth with the ebb and flow of the testimony." As is said in Encyclopedia of Law and Practice (Cyc.) vol. 16, p. 926: "'Burden of proof,' as a phrase, means either: (1) The necessity of establishing the existence of a certain fact or set of facts by evidence which preponderates to the legally required extent, or (2) the necessity which rests on the party at any particular time during a trial, to create a prima facie case in his own favor, or to overthrow one when created against him." So, in the case at bar, as we have shown, the plaintiff having made the case required of him, it became the duty of the defendants to overthrow it, if they could, by proof sufficient to dispel the presumption which the law raises in favor of a consideration sufficient to support the instrument declared upon. Referring to subdivision 2 of section 2061 of the Code of Civil Procedure, providing that jurors may be instructed "that they are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in their minds, against a less number, or against a presumption or other evidence satisfying their minds," the Supreme Court, in People v. Milner, 122 Cal. 179, 54 Pac. 837, says: "In this is a distinct recognition of the facts: (1) That a presumption is evidence; and (2) that it is evidence which may outweigh the positive testimony of witnesses against it. It has been said that disputable presumptions are allowed to stand, not against the facts they represent, but in lieu of proof of the facts, and that, when the fact is proven contrary to the presumption, no conflict arises, but the presumption is simply overcome and dispelled. [Citing Savings, etc., Soc. v. Burnett, 106 Cal. 514, 39 Pac. 922.] This is true. Against a proved fact, or a fact admitted, a disputable presumption has no weight; but, where it is undertaken to prove the fact against the presumption, *it still remains with the jury to say whether or not the fact has been proven, and, if they are not satisfied with the proof offered in its support, they are at liberty to accept the evidence of the presumption.*" (Italics ours.)

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The jury in the present case accepted the evidence of the presumption, supported by the testimony of the plaintiff, as against the other evidence offered to rebut it; but appellants claim that the jury were not warranted in so doing. Let us briefly examine the evidence by the light of the rules as we have stated and as we understand them. The undisputed facts show that the plaintiff and the defendant, Lotta Ruth Krone, are brother and sister, and that, after the death of their father, their mother married one J. C. Walker, who, subsequently to said marriage, adopted the defendant Lotta Ruth Krone as his own child. On March 30, 1903, Walker died. On January 6, 1903, the deceased executed a will, devising all his real property to his three stepchildren (there was another daughter of Mrs. Walker by her first husband) and a nephew in equal shares, and bequeathing his personal property to the three stepchildren, to the exclusion of said nephew. By the terms of this will the plaintiff was made the executor thereof, to serve as such without bonds. When this will was executed, Walker was in his last illness, being confined to his bed in a hospital in the city of San Francisco. On the 19th day of January, 1903, 13 days after the execution of the first-mentioned will, Walker executed another will by which he gave all his property to the defendant Lotta Ruth Krone, and named her as executrix of said will without bonds. On the day of Walker's death, March 30, 1903, this latter will was filed for probate and was admitted to probate on the 10th day of April, 1903. To dispel the presumption that the note upon which this action is founded is supported by a sufficient consideration, the defendant Lotta Ruth Krone testified, in substance: That, immediately upon the death of Walker and upon learning of the execution by the deceased of the later will, the plaintiff began to ply the defendant Lotta with threats of trouble in the form of litigation unless she made a settlement with him; that he represented to her that the fact that she had been adopted by the deceased gave her no right to participate in the fruits of the estate left by Walker superior to his right to share therein as a stepson; that, as a stepson, he was entitled to one-third of said estate; that she received nothing for the note, but executed it "out of generosity" and to "prevent annoyances." She declared, in explanation of what she meant by her answer, that she made the note "to prevent annoyances"; that she executed the instrument to prevent "being pestered to death by his requests for some kind of a settlement." At first, she testified, he asked for only $1,500, but subsequently demanded $2,000, for which finally, she gave him the note in dispute. The plaintiff thereupon, so said defendant further declared, agreed not to contest the later will. She declared that in none of the conversations with her brother in which he demanded a settlement did he make any reference to the will executed by the deceased on the 6th of January, 1903, and therefore made no claim that he was entitled to share in the estate of the deceased by reason of the provisions of said will.

The plaintiff, testifying in rebuttal, stated: That he had, after the death of Walker, consulted attorneys Reuben Lloyd and E. W. Hill with reference to a contest of the later will of the deceased. That his sister, Mrs. Krone, had telephoned to him on the day she executed and delivered the note to plaintiff, June 3, 1903, requesting him to call at the Alcalde apartment house in San Francisco, "saying that she would like to talk to me. I went there. Mr. Krone, the husband of my sister, was present in the apartment when the note was executed. My sister furnished the paper and ink. I never asked for $1,500 and raised it. * * * When she sent for me, and when I got to her apartments, she stated that she wanted to settle the difficulty between us, and I sat and listened to her. She said, 'Well, Jack, you are entitled to your interest in this will that you claim,' and she said, 'I want to continue the friendly feeling that a brother and sister should have, and I would like to settle this matter now,' and I told her that was agreeable to me; and so she told me of her condition then, that she was going to build flats in Fresno, and use the money that was in the bank, and borrow money from her father-in-law, and that she was perfectly willing to pay me if she had the money on hand. I told her that I was in no need of money then, and that I was perfectly willing to wait. She felt that she was not able to pay more than $2,000, and she volunteered that amount. I had not made any proposition. I accepted her offer then and there. I received nothing from the estate of Mr. Walker directly or indirectly, other than this promissory note. * * * She said that we were entitled to what was coming to us, my other sister and myself, but she thought it was hard that a distant nephew like Axon Walker should get any part of the money. She said that she wanted to keep the money among her own relatives." Plaintiff further testified that, immediately upon hearing of the death of Walker, he went to the city hall in San Francisco for the purpose of filing for probate the will of January 6, 1903, but did not do so because the said defendant had already filed a will (referring to the later will of the deceased), and because, also, he desired to consult an attorney. He denied saying to his sister that as a stepson of deceased he was entitled to a share in the estate. He declared that he never threatened the defendant Lotta, but said that "I told her husband that I was going to contest the will, and he told her." The note, he said, was given by Lotta upon the agreement that he "would not petition for the probate of the will," referring to the first will executed by deceased, and that, upon receiving the note, he ceased to take further steps in the matter. The plaintiff further testified: "She gave me a note for $2,000, and, for reasons of my own, I wished to take the note and compromise the whole matter in that way. The reasons were that I was willing to compromise because Mr. Walker was moved one night by Mrs. Krone from St. Mary's hospital, without anybody's knowledge. He was so ill at the hospital that the doctors said that if he was moved he would die in the ambulance. I was told by the nurse that, although Mr. Walker was as a rule given but one powder, they gave him two the night he made out the will, which my sister had, and that he was in no condition to execute that will. Further, because the nurse told me that Mr. Krone, my sister's husband, had blackened himself and introduced himself to Mr. Walker as his brother, and on another occasion had brought in a doll made of rags and introduced the doll as the child of my sister, and I did not want to give information to distant relatives so that they could attack us upon other property which was not involved, and, rather than give such testimony in law, I promised to take that money, rather than to have any trouble." He said that he had intended to file the will of January 6, 1903, up to the time that his sister compromised or settled their differences by executing the note in dispute, and then, having agreed as a consideration for said note to stop further proceedings on his part, he abandoned any intention he might have had to file said will.

We have thus given a substantial epitome of the important and vital facts to which both the defendant Lotta and the plaintiff testified upon the issue tendered and submitted by the pleadings. The testimony of these two parties constituted all the evidence received at the trial, except certain documentary evidence in the form of certain deeds and the two wills, etc. It will readily be observed that there is a marked variance between the testimony given by the defendant Lotta Ruth Krone and that of the plaintiff upon the vital question whether the note in controversy was executed and given upon a valid or sufficient consideration, and we think the case as to that fact is, therefore, clearly within the rule as to conflicting evidence. Counsel for the appellants suggests some dozen or more reasons for which, he claims, the judgment and order should be reversed. We have carefully gone over all the grounds for a reversal thus presented, but we consider it necessary to give particular attention to a few of them only. The claim that the evidence discloses that the note was given without a valid consideration for its support is based not only upon the testimony given by the defendant Lotta, but also upon the testimony of the plaintiff and alleged variances between his testimony and certain allegations contained in the answer to the cross-complaint filed by defendants, the purpose of which was to secure a decree that the note be surrendered for cancellation upon the ground that it was void for want of a valid consideration to support it.

The answer to the cross-complaint we would not commend as an exhibition of model pleading of the negative kind. Its denials seem to be not only inconsistent with each other, but some of them, if taken alone, would fall far short of tendering an issue upon the important question involved in the litigation and upon the solution of which alone hinges the determination of the proposition whether the plaintiff is or is not entitled to recover upon the note upon which he declares. The theory of the defendants, as evidenced by the averments of the cross-complaint, seems to have been that the plaintiff was without any right whatever to contest the later will of the deceased, notwithstanding the fact that in the earlier will of Walker the plaintiff was named as one of the four devisees and legatees, to share equally with the others so named in said will in the estate of the deceased. The cross-complaint alleges: "That on or about the 3d day of June, 1903, said plaintiff, J. M. Ruth, threatened to contest the last will and testament of said J. C. Walker, deceased, unless said defendant, Lotta Ruth Krone, executed and delivered to him the said promissory note mentioned in said amended complaint; that said Lotta Ruth Krone thereupon and in consideration of said plaintiff forbearing to contest said will, and in ignorance of the fact that said plaintiff had no right to contest said will, executed to plaintiff said promissory note set forth in said amended complaint; that said agreement of said plaintiff to forbear contesting said will was the sole consideration for the execution of said promissory note; that said plaintiff was not a blood or any relation of said J. C. Walker, save and excepting that the said J. C. Walker was at one time married to the mother of the plaintiff"; that his said mother died before the death of said J. C. Walker; "that said plaintiff was not a party interested in said will or in the estate of said deceased and had no right to contest said will and could not have contested said will." The answer to the cross-complaint first specifically denies all the foregoing averments, and then denies that plaintiff was not a party interested in the last will and testament of the deceased or in the estate of said deceased, "and he denies that he had no right to contest the last will and testament of the said J. C. Walker, and in this behalf this plaintiff alleges that, within a few weeks of the death of the said J. C. Walker, the said J. C. Walker made, published, and executed his last will and testament wherein and whereby, among other things, he bequeathed a very large portion of his estate to this plaintiff, and in which he named this plaintiff as an executor thereof, and that the alleged will produced by said defendant Lotta Ruth Krone was not the last will and testament of the said J. C. Walker, deceased, and that the said promissory note in the amended complaint set forth was made and delivered to this plaintiff by the defendant Lotta Ruth Krone for a good and valuable consideration other than in the said amended cross-complaint set forth." The answer, taken as a whole, states a defense to the claims of the cross-complaint. It is not easy to understand why the plaintiff denied that he threatened to contest the later will of the deceased, since the promise to waive his right to contest said will could be the only valid consideration for the support of the note, unless the denial was intended only to negative the charge, if such was its meaning, that such "threat" was made in its offensive or illegal sense, or to deny, as plaintiff denied when testifying, that he made the alleged "threat" to the defendant Lotta personally; but, whether the special demurrer should have been sustained or not, the answer was, in any event, good as against a general demurrer, and, the trial of the main question having been fully gone into under the issues as thus framed, no objection being made to the evidence addressed thereto, except as to the form and competency of certain questions, the error in overruling the special demurrer was thereby cured.

The plaintiff, as we have seen, testified to the effect: That he had consulted his attorneys with a view of taking proceedings to contest the later will of the deceased; that he had reason to believe that said will was not, in law, the last will and testament of the deceased; that such reason was founded upon the circumstances under which he had been informed said alleged will had been made and executed by the deceased; that he had informed Lotta's husband of his intention to contest the said will; that such intention had been communicated to Lotta by her husband; that, upon receiving the note in dispute from his sister, he abandoned further intention to contest said will; and that that was the agreement upon his part upon which the note was executed and delivered to him. It is now claimed by counsel for the appellants that this testimony by the plaintiff is inconsistent with the denials of his answer to the cross-complaint, and that the effect of such denials is to impeach his testimony given at the trial. The claim that such inconsistency exists has, apparently, some foundation. As a pleading, as we have before said, the answer is not a model specimen, and the special demurrer thereto should have been sustained upon the ground of the uncertainty and ambiguity of its denials; but when a court or jury is called upon to consider certain allegations of fact in a pleading as evidence in the case, and which allegations are inconsistent with other allegations setting up a good cause of action or a meritorious defense, such facts are to be so considered by and subject to the same rules by which evidence of any other character is to be considered. Assuming that the denial in the answer to the cross-complaint that plaintiff ever threatened to contest the later will of the deceased, etc., is to be construed as meaning what the language of the averment or denial appears upon its face to imply, yet that declaration in the answer, when viewed with the other allegations therein, is not necessarily conclusive evidence upon the point, no more than would be the declaration made in a different form. It, like any other statement inconsistent with a witness' testimony, could have no other effect than to either impeach or weaken the testimony given by the plaintiff, according as the jury or court might view the variance. Therefore, the jury having found in favor of the plaintiff on the question of consideration, it is to be presumed that they fully and fairly considered the alleged discrepancies, and either reconciled them with the testimony as given by plaintiff, or viewed them as not possessing sufficient importance to justify a total disregard of plaintiff's testimony. In any event, the jury must have found that, whatever disparity may have been disclosed between the denials in the answer to the cross-complaint and plaintiff's testimony, or whatever discrepancies, if any, may have been developed in plaintiff's testimony through cross-examination, these, even when considered with the testimony of the defendant, were insufficient to dispel the presumption that the note was given for a valid consideration. In this connection, it may be stated that, when plaintiff's attention was called to the denials in his answer to the cross-complaint, which counsel for appellants claims are inconsistent with a valid defense to the charge of want of consideration, he explained that the answer and the particular averments thus referred to were the work of his attorney and not his, thereby disclaiming personal responsibility for said declarations.

It is next claimed by the appellants that, assuming that the consideration moving the defendant Lotta Ruth Krone to execute and deliver to plaintiff the note was a promise on his part to forbear instituting a contest of the will of January 19, 1903, the note is nevertheless without consideration "because plaintiff had no such right." In the case of the Estate of Langley, 140 Cal. 130, 73 Pac. 824, the Supreme Court held that claimants under an alleged prior will have the right to appear as contestants of a subsequent will; but the appellants undertake to differentiate that case from the one at bar on the ground that in that case the "alleged prior will" had been filed for probate, and in the present case the prior will was not filed or offered for probate. We are, however, unable to appreciate the force of the suggested distinction. The first will executed by the deceased appears upon its face to be in all respects valid, having been, apparently, executed with all the formalities required by our law. If it could have been shown that the later will had been procured to be executed through undue influence, or while the deceased was laboring under a mental state in which he would have been incompetent to make a will, and such will set aside for such reason, then the earlier will, assuming it to be perfectly valid, as it appears on its face to be, would have been the last will and testament of the deceased; and we can see no possible reason upon principle why the plaintiff, as a beneficiary under the first will, has not equal right with a lawful heir to institute a proceeding by which the pretended will could be shown and declared to be no will at all, and thus open the way for the disposition of the estate of the deceased in accordance with his expressed intention. And, whether the first will could have been shown not to express the intention of the deceased, whether it could have been shown that its execution was brought about by the exercise of undue influence over the deceased, or under other circumstances which would render it invalid as a testament, are questions which cannot constitute an answer to the proposition that the plaintiff, as a legatee under said first will, had the right to contest the later will. A man is the disposer by law of his own fortune or estate, and if, in conformity with the formalities prescribed by our law, he gives, as he has the undisputed right to do, his property by will to persons who are strangers to his blood, to the exclusion of those to whom his estate would descend in the case of intestacy, those who are so made the beneficiaries of his bounty stand upon just as firm a foundation in their relations to the estate of the deceased testator as if they were his lawful heirs, capable of acquiring his estate under the laws of succession. A person, as suggested, is under no legal obligation to leave his estate, at his death, to his heirs or other kin, and when he elects to give his fortune to those who are not related to him by consanguinity, and does so according to the forms of law, he substitutes them as the beneficiaries of his bounty for those who would succeed to his estate if he were to die without making a testamentary disposition thereof. It might be an unnatural disposal of his estate, but not an unlawful one. We are therefore, as declared, unable to conceive any sound or sane principle of law which would prevent strangers to the blood of the testator from contesting any subsequent will of the deceased, by the terms of which, if valid, a prior will, under whose provisions they were entitled to succeed to his estate, would be nullified or destroyed; and we think that the principle here stated has a much broader application as it is enunciated in the case of Estate of Langley, supra, than appellants are disposed to accord to it. The case of Prater v. Miller, 25 Ala. 320, 60 Am. Dec. 521, which is called to our attention by appellants, is not, in our opinion, an authority against the application of the principle referred to in the case at bar. In that case there was no prior will, nor did there appear to exist in that case any circumstances, as the plaintiff here testified he had information existed, from which a reasonable inference might follow that the will of the deceased had been brought into existence either through undue influence or when the deceased was mentally incompetent to make a will. In the case cited, the court, referring to the facts, says: "Her [a daughter of the testator] engagement was to interpose no objection to the probate of her father's will—a general forbearance to gainsay its validity in the probate court"—and then declares that such general forbearance is not a sufficient consideration to support a verbal agreement to pay the sum demanded by the proposed contestant. The court in that case deals with the facts as they were established therein, and here we must treat the questions presented by the light of the record in this case. Manifestly, the plaintiff here should not recover if the evidence clearly disclosed that he had procured the making of the note through fraudulent representations or by threats amounting to duress; but the facts in this case, as found by the jury, do not show such to have been the character of the transaction culminating in the execution of the note.

Although counsel for the appellants expressly disclaims that his contention is that an heir has no right to contest his ancestor's will until he has first shown that there is available to him proof which will fully sustain his claim, we think that such is the necessary assumption of his argument, or at least the effect of it. Clearly and concededly, an heir has the legal right to contest the will of his ancestor, and, with equal right, a legatee under a prior will may contest a later will of a testator excluding him, whether there is tenable ground upon which to base the exercise of that right or not. The heir or legatee may not succeed, because of paucity of proof to sustain his contest, in setting aside the will; yet the right to attempt to do so by appropriate proceedings is one of which he cannot be divested by any means of which we have any knowledge. And, having the legal right to contest, who is there to gainsay his legal right to dispose of such right? Or, to put the proposition concretely, a promise to waive such right would, obviously, it being in all respects a legal one, operate as a valid consideration upon which to rest an agreement with the other heirs or interested parties by which the latter agree to compensate him for such waiver, and such an agreement would be enforced where there was no showing that the transaction resulting in the making of the agreement was tainted with fraud or the result of duress or marked by other elements which would vitiate any contract. The presumption is that the transaction here was fair and honest, and that the parties making the agreement, being fully cognizant of all the facts, acted in perfect good faith with each other, recognizing the consummation of the transaction in the light of the facts known to them as being justified and warranted upon principles of fair dealing and honesty. Such we say it is to be presumed was the character of the transaction here until the contrary might be made to appear by evidence of so satisfactory a nature as to so convince the jury or the trial court.

But, after all, the main proposition here is, as declared in the outset, that it was the duty of the defendants, in order to have defeated plaintiff's action, to overthrow the presumption that the note which is the subject of the controversy is supported by a valid or sufficient consideration. The jury found against the defendants upon this issue, and, as there appears a substantial conflict in the evidence upon the question of consideration, which is in effect merely to say that defendants' proof was not strong enough to overcome the presumption of consideration, this court cannot interfere with that finding.

Complaint is made that the court erred to the prejudice of the defendants in giving and refusing to give certain instructions. We shall not review these assignments in detail; it being sufficient to say that we have given the charge of the court to the jury painstaking examination and are of the opinion that therein the law applicable to the issues and the evidence presented was fairly, fully, and correctly declared. Many of the rejected instructions do not contain correct statements of the law, while the principles correctly stated in other rejected instructions were covered by the court's charge.

Objection is also urged against some of the court's rulings admitting and excluding certain evidence. These rulings we have examined carefully, and find nothing in them invading the substantial rights of the defendants.

For the foregoing reasons, the judgment and order appealed from are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

10 Cal. App. 785

JAMES v. OAKLAND TRACTION CO.

(Civ. 501.)

(Court of Appeal, Third District, California. July 10, 1909. Rehearing Denied by Supreme Court Sept. 7, 1909.)

1. EVIDENCE (§ 598*) — PREPONDERANCE OF EVIDENCE.

Under the express provisions of Code Civ. Proc. § 2061, subd. 2, the preponderance of the evidence does not depend on the number of witnesses introduced to support the affirmative of the issue, but lies with the person producing the testimony which carries conviction to the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2450; Dec. Dig. § 598.*]

2. CARRIERS (§ 318*)—INJURIES TO PASSENGER —NEGLIGENT TRANSPORTATION—EVIDENCE.

In an action for injuries to an infant street car passenger, evidence *held* to sustain a verdict in her behalf.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1270, 1307–1314; Dec. Dig. § 318.*]

3. APPEAL AND ERROR (§ 1002*)—VERDICT—EVIDENCE—REVIEW.

Where there is a substantial conflict in the evidence, a verdict for plaintiff cannot be set aside on appeal, unless it appears from plaintiff's testimony that in the nature of the case the accident could not have happened in accordance with her theory.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935–3937; Dec. Dig. § 1002.*]

4. TRIAL (§ 62*)—RECEPTION OF EVIDENCE—REBUTTAL.

Where, in an action for injuries to a street car passenger, defendant's witnesses testified that plaintiff, during the "trolley ride" in which she was injured, stood on one of the steps of the car, and attempted by stooping to catch hold of the grass growing near the track, while the car was in motion, and that she was warned that if she did not get on the car she might fall, the court properly permitted witnesses to testify in rebuttal that plaintiff was not at any time occupying a position on the steps, that she was not cautioned against riding on the step, and did not attempt to catch hold of the grass while the car was in motion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 148, 149; Dec. Dig. § 62.*]

5. CONSTITUTIONAL LAW (§ 93*) — VESTED RIGHTS—STATUTES—AMENDMENT.

Civ. Code, § 501, as it stood at the time plaintiff was injured, provided a maximum fare for trolley cars, and also declared that the rate of speed must not be greater than eight miles an hour. The speed provision was eliminated after the accident by St. 1903, p. 172, c. 156. *Held*, that since a cause of action for injuries to a passenger on a street car, by excessive speed, vested in her independent of the statute at the time of the accident, and the statute as it then existed merely prescribed the measure of care in the matter of speed, plaintiff had a vested right to have her contract of transportation performed in the manner specified by the statute, and hence the subsequent repeal did not affect plaintiff's right to rely on the violation of the statutory regulation as constituting negligence per se.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 93.*]

6. Carriers (§ 297*)—Repeal—Effect.

Under Civ. Code, § 3, providing that no part of the Code shall be retroactive unless expressly so declared, Pol. Code, § 8, providing that no action or proceeding commenced before the Code takes effect and no right accrued is affected by its provisions, but that the proceedings therein must conform to the Code as far as applicable, and Civ. Code, § 6, providing that no action or proceeding commenced before the Code takes effect and no right accrued is affected by its provisions, St. 1903, p. 172, c. 156, amending Civ. Code, § 501, by eliminating the provision limiting the speed of electric cars to eight miles an hour, was ineffective to deprive a person injured by the alleged violation thereof prior to its repeal of her right to rely thereon.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 297.*]

7. Statutes (§ 274*) — Repeal—Retroactive Operation.

The rule that when a right of action exists independent of statute, and a statute is enacted prescribing a condition constituting an additional element of the matter out of which the right of action arises, the repeal of the statute after the right of action accrued and prior to the trial will not affect its application to such action, is applicable to causes of action ex delicto, as well as to those sounding in contract.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 366; Dec. Dig. § 274.*]

8. Carriers (§ 297*)—Street Railroads—Injuries to Passengers—Excessive Speed.

A carrier's breach of Civ. Code, § 501, limiting the speed of electric cars to eight miles an hour, alleged to have caused injury to a passenger, is negligence per se, which, in the absence of evidence that plaintiff's own act or conduct contributed proximately to the injury, is sufficient to sustain a verdict in his favor.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1204; Dec. Dig. § 297.*]

9. Damages (§ 132*)—Personal Injuries—Excessiveness.

Plaintiff, a female child 13 years of age, of robust health, was thrown from an electric car and injured. Her physician testified: That her face was torn to ribbons; that the only part that could be recognized as a face was one eye and the teeth; that two of the tendons of the right wrist were cut, and an artery injured; that the left wing of the nose was split through to the bone; that he found the upper lip in her throat; that there was an area of two by three inches on the right side that was lost entirely; that she sustained a fracture of the orbital plate of the frontal bone, and also had a comminuted fracture of the ankle, and would be permanently disfigured. Three years after the injury, she testified that her ankle was still weak, and that she experienced difficulty in walking. *Held*, that a verdict for $15,000 was not excessive, under the rule that there is no precise measure of damages in actions for personal torts, except the good sense and unbiased judgment of the jury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 178, 372–385; Dec. Dig. § 132.*]

10. New Trial (§ 102*)—Newly Discovered Evidence—Diligence.

An action for a new trial for newly discovered evidence was properly denied, where it appears that the witness' testimony could have been obtained at the trial before the close of defendant's case, by the exercise of proper diligence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 210–214; Dec. Dig. § 102.*]

11. New Trial (§ 105*)—Newly Discovered Evidence — Cumulative or Impeaching Evidence.

Where alleged newly discovered evidence urged as a ground for new trial was both cumulative and impeaching, the denial of the application was not an abuse of the trial court's discretion.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 221–223, 229; Dec. Dig. § 105.*]

Appeal from Superior Court, Alameda County; Harry A. Melvin, Judge.

Action by Rosie James, a minor, by George James, her guardian ad litem, against the Oakland Traction Company. From a judgment for plaintiff and from an order denying a new trial, defendant appeals. Affirmed.

Harmon Bell, for appellant. M. C. Chapman and Reid & Nusbaumer, for respondent.

HART, J. This is an action for damages for personal injuries alleged to have been inflicted upon the plaintiff through the negligence of the defendant. The cause was tried by a jury, and a verdict returned in favor of the plaintiff in the sum of $15,000. The defendant appeals from the judgment entered in accordance with the terms of said verdict and from the order denying it a new trial. A reversal of the judgment and the order is insisted upon because the evidence, it is claimed, is insufficient to justify the verdict, and because of alleged erroneous rulings admitting and rejecting certain testimony and for giving and refusing to give certain instructions.

1. The claim as to the insufficiency of the evidence to support the verdict is founded upon the contention that the testimony of the plaintiff and of the other witnesses testifying in her behalf describing the circumstances under which the accident occurred is inherently improbable. It is therefore the position of counsel for the appellant that there is not that conflict in the evidence upon the salient points in the case which would preclude, under our constitutional provision confining the appellate jurisdiction of courts of appeal in this state to the consideration of questions of law alone, a review of the evidence and a determination by this court that, as a matter of law, the verdict is unwarranted and unjustified under the proofs. It may be just as well to declare at the outset that we are unable to perceive in the story of the plaintiff and that of her witnesses, detailing the circumstances of the accident, anything which would authorize this court to say that they bear upon their face the earmarks of improbability. Counsel for appellant devotes much space in his briefs to a critical and an analytical discussion of the evidence for the purpose of demonstrat-

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ing the utter unreliability of the testimony from which the verdict was, manifestly, deduced. Addressed to a jury, as the sole arbiters of the questions of fact, the argument would be appropriate; but when addressed to a court of review, under our system, it is lost labor. It is true, as appellant declares, that by far the larger number of witnesses testified favorably to its contention or the theory upon which it undertakes to account for the accident; but it is only stating a commonplace to say that the preponderance of evidence in a civil case is not determinable by the number of witnesses introduced to support the affirmative of the issue, and, indeed, our Code so expressly provides (subd. 2, § 2061, Code Civ. Proc.); but, tested by those rules which were established and are approved by long usage as the best and the surest means of facilitating such determination, that testimony which produces conviction in the unprejudiced minds of the jurors represents the preponderance of proof, regardless of the number of witnesses from whom it proceeds, whether from one or a hundred. We shall not undertake to follow counsel in his argument of this feature of the case, nor shall we examine minutely in this opinion the record evidence. It will be sufficient to state in substance the evidence adduced in support of the averments of the complaint and from which the jury, obviously, reached the conclusion represented by their verdict.

The accident occurred in the city of Oakland on the evening of the 26th day of April, 1900. It appears that on that evening (a number of cars of the defendant having previously been chartered for that purpose) a "trolley ride" or an excursion was conducted by the "Maccabees," a fraternal organization. The cars left the Masonic Temple in East Oakland early in the evening, and were so "crowded" that all the seats inside and in the open spaces of the cars, as well as all available "standing room," were occupied. The plaintiff, her mother, a sister, and a brother were in one of the cars. The route of the cars was from East Oakland to Alameda, and thence to Berkeley, where the plaintiff, her mother, sister, and brother changed to another car, which carried them back to Oakland by way of Grove street. The defendant, at the time of the accident, maintained and operated a double track on said street. The car on which the plaintiff was riding was known and numbered as "car No. 139," and was traveling south on Grove street, on the west track. When this car reached Twenty-Seventh street, car No. 125, traveling on the east track and going in the opposite direction, or northerly, came along, and at this juncture, and as the two cars were passing each other, a crash and the sound of breaking glass was heard. The two cars came to a stop, and the respondent, having been by some means thrown from the car on which she was riding, was found lying in the street north of car No. 139. She was unconscious, and the flesh was almost entirely torn from one side of her face.

The testimony of all the witnesses for the plaintiff was to the effect: That the car on which plaintiff was riding had so many passengers aboard that there was scarcely "standing room" left; that the car, at the time plaintiff fell or was hurled to the ground, was traveling at a high rate of speed, the witnesses for plaintiff estimating the speed of the car variously at the rate of from 15 to 25 miles per hour. The evidence submitted by plaintiff further shows that the car at and near the point at which the accident occurred swayed back and forth from one side of the track to the other, and, as some of the witnesses put it, "bobbed up and down and pitched" very much after the fashion, we infer, of the movements of a bark sailing over a high sea. The plaintiff's testimony is, in part, as follows: "Coming from Berkeley to the point of the accident, I was on the front of the car on the east side. There was no one to the east of me. * * * When I first boarded this car, I came on to the rear and went through the car to the door, in the position where I was standing at the time I was pitched from the car. When I went through the car, all the seats were occupied excepting the one my mother sat in. * * * I occupied the same position from the time I went outside until the time I was pitched from the car. The window that I had my back against was protected by a few iron rods. I had one of my hands behind me, holding on to the iron bars going across the window. * * * I had hold of the bar from the time we left the power house until the time I was thrown from the car. * * * The car was going at a swift rate, and was swaying and pitching from side to side, and it appeared to me just when it landed on the east side of the track it went over to the west side of the track and back again. It was swaying, jolting, and jerking, and the general condition as to speed was going faster, very fast, it appeared to me. * * * I was pitched from the car by the force of the swaying and rolling. I don't know what happened. I remember the sensation was just as if I was going up in a swing. I lost consciousness then. I can't remember of having been struck by anything."

The theory of the defense is that the plaintiff was standing on one of the steps of the car at the moment the accident occurred and was leaning out from the car, looking back at a car following the one on which she was riding, and that her body was struck by the car going north, thus causing her to be thrown to the ground and thus sustaining the injuries she received. There was testimony received on behalf of the defendant supporting this theory; but the plaintiff positively denied that she was at any time during the course of the trip from Berkeley to the point at which she received her injuries standing on one of the steps of the car, or that she leaned out so that her body could have been struck by the north-bound car. She declared, as we have seen, that she remained all the while standing on the front platform of the car, with her back against the front window on the east side, holding on with one hand to one of the iron bars crossing said window. In this, as shown, she was corroborated by a number of her own witnesses. The defense also introduced testimony showing: That the track over which the car was passing when the accident happened was then in excellent condition; that there was no swaying or pitching or "jolting" by the car at that time; that the car was traveling at a moderate rate of speed—not over 10 miles an hour, some of the witnesses declared. In short, the important testimony introduced in support of the allegations of the complaint was flatly contradicted by the witnesses for the defense.

It is thus readily perceivable that there exists a substantial conflict in the evidence, and that unless, as contended by the appellant, it can be said that the testimony presented by the plaintiff is, upon its face, or in its very nature, improbable, there is no room for an interference by this court with the verdict upon the ground of the insufficiency of the evidence to justify it, and, as we have declared, it cannot be said that plaintiff's evidence is inherently improbable. To the contrary, if the car on which she was riding and from which she fell or was thrown to the ground was traveling at the rate of 20 or 25 miles an hour, and as a result of the rapidity with which it was going the car swayed from one side of the track to the other and pitched forward, etc., in the manner described by plaintiff's witnesses, the story of the circumstances under which the accident happened as told by plaintiff and her witnesses is, in our opinion, a most probable one. Indeed, assuming the plaintiff's testimony to be true, which we are required to do, since the jury so found, it is only to be wondered that the car did not leave the track altogether, and it is no matter of surprise that a passenger standing in the position which plaintiff claimed to have occupied on the car should have been hurled from the car under the circumstances disclosed by the evidence she presented.

2. There is nothing in the claim that the 20 rulings of the court receiving and rejecting certain evidence are prejudicially erroneous. Most of these rulings were upon objections that the testimony offered in rebuttal of the defendant's case was not in fact proper rebuttal, and in a number of instances it is objected that the facts thus sought to be established were brought out by plaintiff in her original case. We have been unable, after a careful examination of the rulings complained of, to discover any testimony received at the behest of the plaintiff after the close of the defendant's case which was not relevant, material, and therefore proper. For example, certain witnesses for the defendant testified: That the plaintiff during the course of the "trolley ride" stood upon one of the steps of the car and engaged herself in stooping and attempting to catch hold of the grass growing near the track as the car was in motion; that she was warned that if she did not get upon the car or go "inside" she might probably fall from the car. In rebuttal, over the objection of counsel for the appellant, witnesses were permitted to testify that she was not at any time occupying a position on one of the steps, nor was she at any time cautioned against riding on the step or requested to get on the platform of the car, nor did she attempt to catch hold of the grass growing alongside of the track while the car was in motion. This was clearly relevant testimony, and even if these facts were brought out in her original case, either through direct or cross examination, their admission in rebuttal, while in such case perhaps unnecessary, could not, obviously, have been harmful to the defendant. It is so manifest from a mere examination of the alleged errors involved in the rulings of which complaint is made that the defendant could not have been prejudiced thereby, even if it may be conceded that some of the objections might have well been sustained, that we shall not attempt to give them specific or further attention.

3. We find no error in the action of the court in refusing to give and in giving in a modified form certain instructions proposed by the defendant. Some of these instructions involved, virtually, a direction to the jury to find for the defendant. The answer to the complaint that the court erred in declining to submit such instructions to the jury may be found in the discussion in this opinion of the proposition that the evidence is insufficient to justify the verdict. The instructions which the court gave at the request of the defendant after altering them in certain particulars did not, as originally proposed, correctly state the law, and their modification was therefore proper.

It is, however, contended with vigorous insistence that the court erred in giving the following instruction on the motion of the plaintiff: "I further instruct you that it is the law of this state that the rate of speed of street cars within the corporate limits of towns and cities of this state must not be greater than eight miles per hour, and if you find from the evidence in this case that the car upon which the plaintiff was riding at the time of the accident to her was running at a greater rate of speed than eight miles per hour at the time she received said injuries, and solely by reason thereof, and without any fault on her part, the plaintiff was injured, then your verdict will be in favor of the plaintiff, for the violation, if any, of any statutory regulation established for the purpose of protecting persons or property from injury is of itself sufficient to prove such a breach of duty as will enable this plaintiff to maintain this action, if the other elements of actionable negligence concur as explained in these instructions. In other words, the violation of a statute of this state regulating the speed of street cars is such a breach of duty as may be made the foundation of an action by any person belonging to the class intended to be protected by such regulation, provided he is without fault on his part specially injured thereby." Section 501 of the Civil Code, as it read at the time at which the respondent sustained the injuries complained of here, contained the following provision: "The rate of fare on the cars must not exceed ten cents for one fare, for any distance under three miles. The cars must be of the most approved construction for comfort and convenience of passengers, and provided with brakes to stop the same, when required. *The rate of speed must not be greater than eight miles per hour.* A violation of the provisions of this section subjects the corporation to a fine of one hundred dollars for each offense." The Legislature of 1903 (St. 1903, p. 172, c. 156) amended the foregoing section in several particulars, and, among other amendments of the section thus effected, eliminated the language therein which we have put in italics, so that under the existing general law there is no provision regulating the rate of speed at which cars may travel within the limits of cities.

The contention of the appellant is that the quoted instruction involves an erroneous statement of the law because of the pretermission in the said amendment of section 501 of the Civil Code of the provision prescribing the maximum rate of speed beyond which cars were not suffered to travel within the limits of cities. The argument of counsel is that the repealed provision with reference to the rate of speed to which cars were limited in traveling over the streets of cities is merely a rule of evidence, and that, quoting from Marx v. Hanthorn, 148 U. S. 181, 13 Sup. Ct. 508, 37 L. Ed. 410, "rules of evidence may be changed. They form no part of contracts made while they are in force. As changed they apply to existing causes of action even where retrospective legislation is forbidden"—citing, also, Coe v. Ritter, 86 Mo. 282; Chicago, B. & Q. R. Co. v. Jones, 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141, 41 Am. St. Rep. 278.

We think the criticised instruction states the law upon the subject to which it relates as it existed at the time the accident happened clearly and with accuracy, and we do not assent to the proposition that the repeal by the Legislature subsequently to the happening of the accident of that portion of the section regulating the rate of speed of cars within cities had the effect of depriving the plaintiff of any rights vouchsafed to her by the statute at the time her injuries were sustained. The action here is not founded upon the statute. In other words, there was immediately vested in plaintiff, upon receiving the injuries of which she complains, the right to institute an action, independently of the statute, to recover damages for such personal injuries as she might have sustained through the negligence of the defendant. The statute prescribed the measure of care, in the matter of speed, which the defendant was required to exercise in the execution of its contract with her to transport her with safety from one point to another over its lines. While it may be correct to say that the breach of the condition thus imposed upon the defendant by the Legislature in the operation of its business as a common carrier would operate as a rule of evidence, since the violation of the condition would raise the presumption of negligence, the condition was nevertheless an element entering into the contract with plaintiff as important and substantial as any other essential element involved in the care with which common carriers are charged by the law in the transportation of passengers. This condition is not therefore, as appellant contends, a mere matter of procedure or a rule of evidence which, having been abrogated after a right of action had accrued and before the trial thereof, cannot be invoked or applied in such action under the rule laid down by the authorities cited. In the case of Jordan v. Fay, 98 Cal. 267, 33 Pac. 96, discussing the effect of the amendment by the Legislature of 1889 (St. 1889, p. 328, c. 219) of section 164 of the Civil Code upon the status of property conveyed to a wife after marriage, the Code providing before the amendment that "all other property acquired after marriage by either husband or wife, or both, is community property," the Supreme Court, in reply to the contention that the section before its amendment prescribed only a rule of evidence, says: "But the rule declared by the statute was more than a rule of evidence. It was a rule of property as well, and we do not think the Legislature intended or had the power to change it so that it would be retroactive in effect and disturb titles already vested."

In the case here the plaintiff's right of action was a vested right, founded in the breach of the contract of carriage between herself and the defendant; one of the substantial elements of the agreement upon the part of the latter being that, in order to insure the safe and comfortable carriage of plaintiff, the rate of speed of the car on which she took passage, when passing through the streets of a city, would not exceed the limit prescribed by the statute. In other words, the law regulating the business of the transportation of passengers by street railroad corporations subsisting at the time and place of the making of a contract of carriage and where such contract is to be performed enters into and forms a part of it, as if such law was expressly referred to, or incorporated in its terms. "This principle," says the Supreme Court of the United States, in Von Hoffman v. City of Quincy, 4 Wall. 535, 18 L. Ed. 403, "embraces alike those which affect the validity of the contract, its construction, discharge, and enforcement." See, also, Edwards v. Kearzey, 96 U. S. 595, 24 L. Ed. 793; Wolff v. New Orleans, 103 U. S. 358, 26 L. Ed. 395; People v. Bond, 10 Cal. 563. Clearly, we think, the provision of section 501 of the Civil Code fixing the maximum rate of speed of street cars when traveling over the streets of a city is more than a rule of evidence. It is a rule of property, for a vested right is property whatever may be the nature or condition of the object of such right; that is to say, that "a vested right of action is 'property' in the same sense in which tangible things are property, and is equally protected against arbitrary interference." Cooley's Const. Lim. (4th Ed.) p. 449. Of course, a distinction is to be observed between the right of action and the remedy, for the right to a particular remedy is not a vested right, unless the destruction of the remedy necessarily operates to destroy the right of action, in which case an act abrogating the remedy could not, obviously, have a retroactive effect.

All the judicial law to which our attention has been directed very clearly points out the distinction between those cases in which the repeal involved only some rule of procedure in no way materially affecting contractual rights or the essential remedy for the enforcement of such rights and those cases where the repeal or the amendment either necessarily destroyed the only possible remedy by which rights could be restored or wrongs redressed or had the effect of directly impairing the obligations of a contract. As is said in Williams v. Johnson, 30 Md. 500, 96 Am. Dec. 616, in passing upon a proposition analogous to the one under discussion here: "It would be extending this opinion to an unnecessary length to review in detail the many authorities relied upon by the counsel for the appellee. It is sufficient to say that upon examination they will be found to be cases arising upon penal statutes, where it was held that the action was defeated by the repeal of the law; or where a statute conferring an executory right was repealed before the right became executed; or where it was held that the remedy, procedure, and even the statute of limitation, may be changed or modified without impairing the right of action or the obligation of the contract. But no case can be found in which it has been held that a right of action, founded upon the municipal law of a country, is defeated by change or abrogation of the law. Apart from this view, it is a sound rule of construction, founded in the wisdom of the common law, that whenever a statute is susceptible, without doing violence to its express terms, of being understood, either prospectively or retrospectively, courts of justice invariably adopted the former construction. A statute ought not to have a retroactive operation, unless its words are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the Legislature could not be otherwise satisfied; and especially ought this rule to be adhered to when such a construction would alter the pre-existing situation of parties, or would affect or interfere with their antecedent rights."

As we have declared, and as is plainly obvious, the action here is not one the authority for which is to be found in the section of the Code under consideration, for, as seen, the moment the accident occurred and the plaintiff thereby injured, there vested in her, eo instante, a right of action against the defendant which it was not within the power of the Legislature to destroy. Nor is the action upon an executory right yet uncrystallized into an executed one, and neither is the proposition one involving merely the modification or a change in the remedy or procedure. No one will question the right of the Legislature to change or modify the remedy and prescribe rules of evidence, if such legislation does not have the effect of creating a new obligation, or of attaching a new disability, retrospectively; but, as is well said in Hope Mutual Ins. Co. v. Flynn, 38 Mo. 483, 90 Am. Dec. 440: "It is not within the constitutional competency of the Legislature to annul by statute any legal ground on which a previous action is founded, or to create a new bar by which said action may be defeated." In Dash v. Van Kleeck, 7 Johns. (N. Y.) 477, 5 Am. Dec. 306, it is said: "The very essence of a new law is a rule for future cases. The construction here contended for on the part of the defendant would make the statute operate unjustly. It would make it defeat a suit already commenced upon a right already vested. This would be punishing an innocent party with costs, as well as divesting him of a right previously acquired under the existing law. Nothing could be more alarming than such a subversion of principles." See, also, Bailey v. P. W. & B. R. R. Co., 4 Har. (Del.) 389, 44 Am. Dec. 389; Terrill v. Rankin, 2 Bush (Ky.) 453, 92 Am. Dec. 500; Creighton v. Pragg, 21 Cal. 115; Pacific M. S. Co. v. Joliffe, 2 Wall. 450, 17 L. Ed. 805; Vandekar v. Rensselaer, etc., R. Co., 13 Barb. (N. Y.) 393; Taylor v. Woodward, 10 Cal. 90.

But the instruction under review is not

alone supported as a correct exposition of the law by the principles established by the foregoing authorities. Our own Legislature has expressly prescribed certain rules of interpretation which reflect the general legislative policy of the state upon the question of the effect of legislation repealing or amending statutes upon rights of action which have accrued prior to the enactment of such legislation. Section 3 of the Civil Code provides: "No part of it [said Code] is retroactive, unless expressly so declared." Section 8 of the Political Code reads: "No action or proceeding commenced before this Code takes effect, and no right accrued, is affected by its provisions, but the proceedings therein must conform to the requirements of this Code as far as applicable." Section 6 of the Civil Code contains the following: "No action or proceeding commenced before this Code takes effect, and no right accrued, is affected by its provisions." The foregoing Code provisions were, no doubt, enacted for the express purpose of preventing interference with and disturbance of vested rights subsisting prior to and at the time of the adoption of the Codes, yet they nevertheless serve to display a legislative recognition of those principles which forbid the retroactive operation of statutes in cases where the effect thereof would be to destroy vested rights. Counsel for appellant cites many authorities in his voluminous briefs which he contends sustains his position on the proposition we are considering. We shall not review these cases, for it is enough to say that they are not in point here because they involve actions deriving the authority for their institution and maintenance entirely from the statute itself, as, for instance, actions for recovery of statutory penalties, and the like. As an illustration, however, of the class of cases upon which appellant relies for the support of his contention, we may refer to the case of Napa State Hospital v. Flaherty, 134 Cal. 315, 66 Pac. 322, where it is said that: "It is a rule of almost universal application that when a right is created solely by a statute, and is dependent upon the statute alone, and such right is still inchoate, and not reduced to possession or perfected by a final judgment, the repeal of the statute destroys the remedy unless the repealing statute contains a saving clause." With this declaration we can find no fault; but, as we have already said, the action here is not for the enforcement of or recovery upon a right "created solely by statute and dependent upon the statute alone." It is a right which existed, we may say at the expense of repetition, independently of the statute, which went no farther than to prescribe a condition constituting an additional element entering into the contract out of which the right of action arose.

It will not be questioned, we apprehend, that the principles herein discussed are applicable alike to cases of tort or actions arising ex delicto as well as to those sounding in contract. This proposition is so well settled that we shall content ourselves with the mere mention of some of the innumerable authorities establishing and confirming it: Chalmers v. Sheehy, 132 Cal. 465, 64 Pac. 709, 84 Am. St. Rep. 62; Melvin v. State, 121 Cal. 24–26, 53 Pac. 416; Hunsinger v. Hofer, 110 Ind. 390, 11 N. E. 463; Cooke v. Cooke, 43 Md. 522; Miner v. Warner, 2 Grant Cas. (Pa.) 448; Martin v. Walker, 12 Hun (N. Y.) 46; Weir v. Day, 57 Iowa, 84, 10 N. W. 304. But appellant objects to the instruction for other reasons than that to which we have perhaps given more extended attention than was necessary; but we think it is not obnoxious to those objections. The instruction declares, to paraphrase it negatively, that, notwithstanding the fact, if it was a fact, that the car on which plaintiff was riding was, at the time, running at a greater rate of speed than eight miles per hour, the plaintiff could not recover unless it was shown that she received her injuries solely by reason of said excessive rate of speed and without any fault on her part. It further declares that the "violation, if any, of any statutory regulation established for the purpose of protecting persons or property from injury is of itself sufficient to prove such a breach of duty as will enable this plaintiff to maintain this action, *if the other elements of actionable negligence concur* (italics ours), as explained in these instructions." It is hard to conceive of a clearer and more accurate statement of the rule applicable to the circumstances of this case. That the breach of such a statutory regulation constitutes negligence per se is well settled, and where, in such case, the evidence introduced does not show that the plaintiff's own acts or conduct contributed proximately to the injury sustained, the proof of such breach is manifestly sufficient to support a verdict. See Bresee v. Los Angeles Traction Company, 149 Cal. 139, 85 Pac. 152, 5 L. R. A. (N. S.) 1059.

4. Appellant complains of the verdict, declaring the damages thereby awarded to be so excessive as to compel the conclusion by this court that they were given under the influence of passion or prejudice. Section 657, Code Civ. Proc. There is nothing appearing from the evidence indicating that the damages given were the result of passion or prejudice upon the part of the jurors returning the verdict, and in the absence of any such showing upon the face of the record we cannot say that, as a matter of law, they are excessive, simply because the amount may be larger than is ordinarily allowed in such cases. The judge who presided over the trial of the cause, and who had equal opportunity with the jury to hear the testimony as it came directly from the lips of the witnesses and of observing the manner in which the latter testified, approv-

ed the verdict, and certainly he was in a much better position than this court to say whether the verdict was or could have been inspired by or tainted with passion or prejudice. The rule as to the admeasurement of unliquidated damages in actions for personal torts, as enunciated in Aldrich v. Palmer, 24 Cal. 516, has been uniformly followed in California. There it is said: "In actions for personal torts the law does not attempt to fix any precise rules for the measurement of damages, but, from the necessity of the case, leaves their assessment to the good sense and unbiased judgment of the jury. * * * The leading object of such actions is to obtain reasonable and just compensation for the injury sustained, comprehending both the present and the future." See Clare v. Sac. Elec., etc., Co., 122 Cal. 506, 55 Pac. 326; Walker v. Erie Railway Co., 63 Barb. (N. Y.) 260–267; Morgan v. S. P. Co., 95 Cal. 508, 30 Pac. 601; Sherwood v. Kyle, 125 Cal. 654, 58 Pac. 270; Lee v. S. P. Co., 101 Cal. 118, 35 Pac. 572; Lanigan v. Neely, 4 Cal. App. 760, 89 Pac. 441; Marshall v. Taylor, 98 Cal. 55–63, 32 Pac. 867, 35 Am. St. Rep. 144; Howland v. Oakland C. St. Ry. Co., 110 Cal. 513, 42 Pac. 983. The court before which an action for a personal tort is tried should not substitute its judgment for that of the jury, nor should a new trial be granted merely because the judge deems the verdict excessive, unless it is so excessive as to indicate that it proceeded from passion or prejudice. Sherwood v. Kyle, supra. And much less is a reviewing court justified in setting aside a verdict because of the alleged excessiveness of the damages awarded. The injuries inflicted upon the plaintiff through the accident were, in their nature and effect, but a little short of fatal, according to Dr. Porter, the physician who attended her. His description of her wounds is as follows: "Her face was torn into ribbons by coming in contact with something, and the only part about the face that you could recognize as a face at the time was one eye showing and the teeth. The rest of it was torn into shreds. * * * Two of the tendons of the right wrist were cut out and the artery so that a good deal of the hemorrhage was due to bleeding. * * * The right cheek was badly lacerated, and the tissues about the face torn into ribbons, the left wing of the nose incised or split right through to the bone beneath, and the upper lip I got in her throat. Then there was an area of about two inches by three on the right side that was entirely lost, from which the tissues and flesh of the cheek were gone. Then there was a fracture of the orbital plate of the frontal bone; that is, over the ridge of the eye. That bone was fractured, and there were several 'horseshoe' flaps—that is, the skin was cut through and down over the face—and she had comminuted fracture of the ankle of the right leg. The ankle bone was broken on the outside. A comminuted fracture is one which has several fragments, broken into several pieces—a simple fracture is just a simple break." The doctor further testified that the face and nose of the plaintiff were noticeably disfigured, and that such disfigurement would be permanent. The plaintiff testified that, even up to the time of the trial of this cause, over three years after her injuries were received, her right ankle, which sustained a comminuted fracture, as the doctor explained, was still weak, and that at times she experienced some difficulty in walking. The condition, as thus described, in which the plaintiff has been left by reason of the severe injuries she received as a result of the accident, furnishes ample proof, so far as this court is concerned, of the soundness and fairness of the judgment of the jury in finding that the sum of $15,000 represents a just and reasonable compensation for the great and irreparable loss which the plaintiff has suffered through the culpable negligence of the defendant. She was only 13 years of age and in robust health at the time of the accident. The injuries inflicted upon her have permanently disfigured her face and otherwise crippled her so that she is seriously handicapped in the waging of life's battles, if circumstances should require her to do so upon her own responsibility, as well perhaps in greatly impeding her in the accomplishment in full measure of many of the laudible purposes peculiar to her sex. Under the circumstances of this case, we commend the verdict of the jury as an exemplification of the exercise of a just judgment.

5. One of the grounds upon which the motion for a new trial was made was that of newly discovered evidence, which the defendant asserts that it could not, with the exercise of reasonable diligence, have discovered and produced at the trial. The alleged newly discovered evidence is set out in the affidavits of John Ferrin, Sallie B. Hughes, and Harry R. Meade. Ferrin was the claims agent of the defendant, and in his affidavit declares that it was his duty to look up evidence for the defendant, and that he learned and knew nothing of the testimony that Mrs. Hughes and Meade would give until during the progress of the trial, that, for the first time during the trial, he also learned that one Mrs. O. P. Hamlin, a resident of Oakland, would testify that she was on the car from which plaintiff claimed to have been hurled when the accident happened, and that said car was neither traveling at an unusual rate of speed nor "swaying and rocking," as described by plaintiff's witnesses. Mrs. Hughes deposed that she would testify that on the morning after the plaintiff was injured she called at the residence of Mrs. James, mother of plaintiff, and made inquiry concerning the condition of the plaintiff and how the accident happened, that Mrs. James told affiant that the accident was "through

Rosie's disobedience; that she (Mrs. James) had told Rosie to keep still and not be carrying on, that something would happen," etc., and that at about that time plaintiff either fell or was pitched from the car. Meade declared that he would testify that he was riding in a car a short distance behind the car on which plaintiff was riding at the time of the accident, and that a few minutes prior to the accident he "noticed a lady who was standing on the step on the left-hand side of the front open section of the car upon which Miss Rosie James was riding, was holding on to one of the stanchions and leaning out from the car at arm's length." A number of witnesses, testifying for the defense, stated that the car was not traveling at more than an ordinary rate of speed when the accident occurred, and that the car did not pitch and sway and rock as described by plaintiff's witnesses. It will thus be seen that the testimony of Meade and Mrs. Hamlin would have been only cumulative of a large amount of testimony to the same point. Besides, Mrs. Hamlin, it was shown, resided in Oakland at the time the trial was going on, and it would seem that her testimony could have been secured before the close of defendant's case by the exercise of the most ordinary diligence. Mrs. Hughes' testimony could be offered, manifestly, only for the purpose of impeaching Mrs. James, while Meade does not pretend to say that the "lady he noticed standing on one of the steps of the car holding on to one of the stanchions and leaning out from the car at arm's length" was the plaintiff. Besides, Margaret James, a sister of plaintiff, testified that she was "on the only step there was on the front platform on the east side of the car," and that she occupied "that position all the way from Berkeley."

There is no rule better understood or more impregnably settled in this state than that the granting or refusing a motion for a new trial on the ground of newly discovered evidence is a question committed to the sound legal discretion of the trial court, and that, before an interference with the exercise of such discretion by an appellate court can be justified, there must appear from the record a plain and palpable abuse thereof, and where it appears that the diligence required by the statute for the procurement of the alleged newly discovered evidence before the beginning of the trial has not been exercised, or that the evidence is merely cumulative, or the only office of such evidence is to impeach an adverse witness, then it is clear that the ruling of the court on the motion based upon purported newly discovered evidence cannot be disturbed. Spelling on New Trial & Appellate Practice, vol. 1, § 206; Hayne on New Trial & Appeal, § 88; People v. Demasters, 109 Cal. 608, 42 Pac. 236; Sonoma County v. Stofen, 125 Cal. 32, 57 Pac. 681; Harralson v. Barrett, 99 Cal. 607, 34 Pac. 342; People v. Loui Tung, 90 Cal. 377, 27 Pac. 295; McCormick v. Central R. R. Co., 75 Cal. 506, 17 Pac. 542; Stoakes v. Monroe, 36 Cal. 388; People v. Warren, 130 Cal. 683, 63 Pac. 86; Chalmers v. Sheehy, 132 Cal. 459, 64 Pac. 709, 84 Am. St. Rep. 62. The showing here for a new trial on the ground of newly discovered evidence may well be said to be wanting in every one of the essential requisites which alone justify an order granting a new trial upon such ground.

Our conclusion is, as is obvious from the foregoing views, that the verdict is sufficiently supported by the evidence, that the law was fully, fairly, and correctly declared to the jury, that those rulings upon the evidence which, strictly speaking, may be erroneous, are without prejudice, and that the amount of damages awarded is not excessive, but reasonable and just.

The judgment and order appealed from are therefore affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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11 Cal. App. 83

KLEINPETER et al. v. CASTRO et al.

(Civ. 634.)

(Court of Appeal, Second District, California. July 21, 1909. Rehearing Denied by Supreme Court Sept. 16, 1909.)

1. NOTARIES (§ 11*)—LIABILITIES ON BOND—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action against the bondsman of a notary public for damages caused by making a false certificate of acknowledgment to a deed, evidence *held* to sustain a finding that the certificate was false, and that the true name of the signer of the deed was other than that signed thereto.

[Ed. Note.—For other cases, see Notaries, Dec. Dig. § 11.*]

2. NOTARIES (§ 11*)—LIABILITIES ON BOND—ACTIONS—BURDEN OF PROOF.

Where the evidence sustains a finding that a notary's certificate that a grantor was the person who signed the deed was false, the grantee, in an action to recover damages caused by the falsity of the certificate, need only produce slight evidence as to whether the grantor was known to the notary as the person who signed the deed, in order to shift the burden of proof to defendant; those facts being peculiarly within his knowledge.

[Ed. Note.—For other cases, see Notaries, Dec. Dig. § 11.*]

3. NOTARIES (§ 11*)—NEGLIGENCE—DAMAGES—PROXIMATE CAUSE.

A notary's negligence in issuing a false certificate of acknowledgment stating that the grantor of a deed was personally known to him as the person signing was the proximate cause of the grantee's loss, where the grantor proved not to be the owner, and not the act of the bank which paid the grantee's check to the grantor.

[Ed. Note.—For other cases, see Notaries, Dec. Dig. § 11.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by Louis Kleinpeter and another against Andrew R. Castro and another. From a judgment for plaintiffs, the unnamed defendant appeals. Affirmed.

Haas, Garrett & Dunnigan, for appellant. Gray, Barker & Bowen, for respondents.

SHAW, J. Defendant Castro was a notary public whose official bond was made by the defendant American Bonding Company of Baltimore. The action was instituted against Castro as principal and American Bonding Company as surety upon this bond to recover damages alleged to have been sustained by plaintiffs as the result of a false certificate of acknowledgment to a deed made by Castro as such notary. Castro was not served with process, his whereabouts being unknown; neither was his testimony produced at the trial. Judgment was given in favor of plaintiffs against the bonding company, from which defendant prosecutes this appeal upon the judgment roll and a bill of exceptions.

The court, among other things, found: That the certificate of the notary was false and that the true name of the person who signed and acknowledged the deed was other than the name signed thereto. Says appellant: "Upon the sufficiency of the evidence to support these two findings the merits of this appeal depend." The deed purported to be a grant of a lot to plaintiffs, and appellant concedes that the person who executed it was not the owner thereof, but that he, whatever his name, so far as the ownership of the property is concerned, was an impostor for the time being personating the true owner of the lot. At the time of the transaction the real estate in question, consisting of lot 13, block 23, Park tract, in Los Angeles, was owned by George A. Peterson, a resident of Oakland, Cal. In September, 1905, a party unknown to them called at the office of Justice, Moss & Co., real estate agents in Los Angeles, stated that his name was George A. Peterson, that he owned the lot in question, and desired to sell it, and showed them a certificate of title to the property theretofore obtained by him from the Title Insurance & Trust Company of Los Angeles, together with certain tax receipts which he claimed he had just paid. Negotiations were entered into, as a result of which this firm of agents took an option on the property at the price of $1,100, and soon thereafter effected a sale thereof to plaintiffs for $1,500. This impersonator of the true owner described himself as being a waiter or cook at a hotel in San Pedro, and gave his post-office address as San Pedro, directing that letters be addressed to a certain post-office box at that place, and in response to letters so addressed called upon the agents from time to time pending the consummation of the sale. He protested against making the deal through an escrow and objected to payment of the money by check. In making the purchase plaintiffs deposited with the Title Insurance & Trust Company the amount of the purchase price, instructing the company to pay the same upon title to said lot vesting in them. At the same time the real estate agents left with the company for delivery a deed to said lot, wherein plaintiffs were made grantees, which purported to be signed by George A. Peterson, the acknowledgment to which was duly certified by defendant Andrew R. Castro, reciting therein that the person executing the deed was personally known to him. The escrow holder in carrying out the instructions paid to the agents by check $400 and delivered to them a check for the balance of the purchase price of the property payable to the order of George A. Peterson, which check was given to the signer of the deed, who presented the same to the bank on which it was drawn, and, upon being identified by a member of said real estate firm, received payment thereof, since which time, so far as disclosed by the record, his whereabouts have been unknown. The deed described the grantor therein solely as "George A. Peterson, unmarried," and there is no evidence touching the question as to whether the impostor was single or married. George A. Peterson, the owner of the lot, did not sign or acknowledge the deed. There is no direct evidence showing when or how Castro met the impostor, though the members of the firm of Justice, Moss & Co. testified that his office was near theirs, and it was their custom to send him notarial work. Upon discovery of the fraud, some two years afterward, search and inquiry was made for a George A. Peterson at San Pedro, but no one was found who had ever known such person. There was also testimony given by one of that name, a resident of Los Angeles (not the impostor nor the owner of the lot), that he knew of no other than himself in Los Angeles bearing the name of George A. Peterson, and that he had not signed or acknowledged the deed.

Defendant offered no evidence to show that the name of the person who signed and acknowledged the deed was George A. Peterson, but relied solely upon the certificate as furnishing prima facie proof of such fact. The evidence controverting the truth of the certificate in this respect must of necessity be of a negative character. Undoubtedly there are a great many persons bearing the name of George A. Peterson, and appellant's position is that it devolved upon plaintiffs to show that the person who appeared before the notary was not some member of this numerous family. In support of this contention, counsel cite Overacre v. Blake, 82 Cal. 77, 22 Pac. 979. That was an appeal upon the judgment roll, and the court held there was nothing in the findings justifying the deduction made by the trial court to the effect that the certificate was untrue, and, as disclosed by the findings, there was an utter failure to show that the person who signed the instrument did not in truth and in fact bear the name signed thereto. The controlling point, however, on which the opinion in that case is based, was that the party seeking to recover upon the bond introduced the impostor to the notary, thus vouching for his identity, and the court held that by reason of such fact she was estopped from recovering upon the bond. In neither aspect does Overacre v. Blake have any bearing upon the case at bar.

The trial court found that George A. Peterson did not sign the deed, and that the certificate in this regard was false. There was some evidence, however meager, tending to establish this fact. It was conclusively shown that the owner whose name was George A. Peterson did not sign the deed, and that some inquiry was made at San Pedro, where the impostor received his mail and claimed to be employed at the time of the transaction, for George A. Peterson, with the result that no one was found who had ever known him, and that another person by the name of George A. Peterson, residing in Los Angeles, testified that he did not sign the deed and knew no other of that name in Los Angeles county, all of which constituted some evidence tending to controvert the truth of the certificate, and, taken in connection with the "preponderance of probabilities" (Murphy v. Waterhouse, 113 Cal. 473, 45 Pac. 866, 54 Am. St. Rep. 365; Hutson v. Railway Co., 150 Cal. 705, 89 Pac. 1093), fairly deducible from other circumstances connected with the transaction, satisfied the trial court of the fact found. As to whether or not the name of the impostor who forged the deed was in truth George A. Peterson and known to the notary were facts peculiarly within his knowledge. Under these circumstances, plaintiffs should not be required, in order to shift the burden of proof, to produce other than slight evidence. Barnard v. Schuler, 100 Minn. 289, 110 N. W. 966; Joost v. Craig, 131 Cal. 504, 63 Pac. 840, 82 Am. St. Rep. 374; People v. Lundin, 120 Cal. 308, 52 Pac. 807.

There is no merit in the suggestion that plaintiffs' remedy for the loss sustained is against the bank which paid the check. The money was paid pursuant to plaintiffs' direction to the person who received it. They were, by reason of the false certificate, deceived as to his identity, which fact was the proximate cause of the loss. No intervening negligence of any one contributed to it. The facts in Hatton v. Holmes, 97 Cal. 208, 31 Pac. 1131, cited in support of this contention, bear no analogy to the case at bar. The check there was payable to the order of Maria J. Keifer and delivered to one Jenkins, who forged her indorsement thereon and presented it to the bank, which, without inquiry, negligently paid it. The court held that, assuming the check was given upon a forged mortgage, the certificate of acknowledgment to which was false, nevertheless the direct cause of the loss was the forged indorsement of the name of the party to whom it was made payable.

The judgment is affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

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11 Cal. App. 60

TU JUNGA CO. v. BARCLAY et al.

(Civ. 589.)

(Court of Appeal, Second District, California. July 21, 1909.)

PARTITION (§ 62*)—PLEADING—ISSUES.

In partition the property described in the complaint consisted solely of land, and no reference was made to riparian or other waters or water rights to which the land might be entitled. One of defendants by answer claimed affirmatively that as owner of an undivided interest in the land he also owned an interest in the waters of certain streams flowing through the tract as to which it was riparian, but none of the parties but plaintiff were served with such answer. *Held*, that the subject-matter of such affirmative allegations was not involved in the issues of the action.

[Ed. Note—For other cases, see Partition, Dec. Dig. § 62.*]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by the Tu Junga Company, a corporation, against H. A. Barclay, Giovanni Gai, and others. From an order denying a motion for a new trial, said Gai appeals. Affirmed.

McNutt & Hannon, for appellant. Jones & Weller, Geo. S. Hupp, Munson & Barclay, W. R. Hervey, F. E. Davis, and J. W. Cochran, for respondents.

SHAW, J. This action was instituted against a number of defendants for the partition of real estate. Defendant Gai appeals from an order of the court denying his motion for a new trial.

The property described in the complaint consists solely of land, and no reference is made to riparian or other waters or water rights to which the land may be entitled. By answer, appellant claimed affirmatively that as an owner of an undivided interest in the land he likewise owns an interest in the waters of certain streams flowing through the tract as to which it is riparian.

There were numerous parties whose rights were being litigated in the action, upon none of whom, however, other than plaintiff, was the answer served. For this reason the affirmative matter, conceding it was properly alleged, as to which we express grave doubts, could not be litigated. As to such new matter appellant's codefendants were not in court. Hence, for this reason, if no other, it was not error for the court to find, in effect, that the subject-matter of the affirmative allegations of appellant's answer was not involved in the issues of the action. The case of Rose v. Mesmer, 142 Cal. 322, 75 Pac. 905, cited by appellant in support of his contention, bears no analogy to the case at bar. It might furnish authority under which a party interested in the land could, after the partition thereof, maintain an action for the protection of rights in the waters of the stream to which ownership of land might entitle him.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The order appealed from is affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

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11 Cal. App. 97

POTTS v. KNERR. (Civ. 678.)

(Court of Appeal, Second District, California. July 21, 1909.)

1. MASTER AND SERVANT (§ 294*)—INJURIES TO SERVANT—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

Where, in an action for injuries to a servant through the breaking of a defective ladder, there was no claim, under the issues presented, nor any evidence tending to show, that the injury resulted from any act of a fellow servant, an instruction that an employer is not liable for damages sustained by an employé through the negligence of a fellow employé employed in the same general business, and that the law respecting the negligence of a fellow servant, where there is no want of ordinary care on the master's part, recognizes no distinction growing out of the grades of employment of the respective employés, nor does it give effect to the circumstance that the fellow servant through whose negligence the injury was received was plaintiff's superior in the general business in which they were employed, etc., was erroneous as leading the jury to believe that plaintiff could not recover if the ladder was constructed by a fellow servant, or that the foreman who supplied the ladder should be regarded as a fellow servant in the discharge of his duty in connection therewith.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1162–1167; Dec. Dig. § 294.*]

2. MASTER AND SERVANT (§ 294*)—INJURIES TO SERVANT—FELLOW SERVANTS—INSTRUCTIONS.

In an action for injuries to a servant, an instruction that though the servant through whose negligence the injury was received was the plaintiff's superior, if both were employed in the general service working to one general end in the construction of the building, then they were fellow servants, and the master is not liable for the negligence of one which injures the other, is too broad as eliminating the element of responsibility on account of the action of a fellow servant intrusted with duties which the law enjoins on the master and in performing which the servant is a vice principal.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1162–1167; Dec. Dig. § 294.*]

Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by Fred E. Potts against H. E. Knerr. Judgment for defendant, and plaintiff appeals. Reversed, and cause remanded for new trial.

Sidney J. Parsons and O. P. Widaman, for appellant. M. E. C. Munday, for respondent.

ALLEN, P. J. The action was one brought by a servant against a master on account of personal injuries alleged to have been occasioned by the negligence of the latter. Plaintiff, a plasterer, was engaged by defendant to perform work as plasterer and to superintend the work of plastering a schoolhouse, for the construction of which defendant had entered into a contract. The general work of the construction was under the supervision of one Hunter, the foreman employed by defendant. Defendant, when he employed plaintiff, agreed to furnish ladders and scaffolding necessary in the prosecution of the work. Hunter, as foreman, directed the immediate performance by plaintiff of certain plastering work and directed him to use a certain ladder then on the lower floor of the building, and one of the appliances used in the work of construction and the only ladder in use on the lower floor. This ladder had originally been made a month or so before under the direction of the foreman, and, had it been properly constructed upon the lines intended would have carried a weight of more than 400 pounds. The workmen who constructed this ladder used what is known as finishing nails in the supporting part thereof, the upper part of which support broke with the weight of plaintiff thereon and caused the injury. This ladder had been repaired a number of times and had been nailed and renailed until the timbers had become weakened and through use it had become covered with mortar and dirt, and its real condition could not be ascertained except by a minute examination. The foreman never inspected the ladder after its construction or repair in order to determine its efficiency or condition. Plaintiff, a man weighing 200 pounds, acting under the instructions of the foreman, ascended the ladder so provided for the purpose of doing some work, and, when he had reached the top, the ladder collapsed, and as a consequence plaintiff was thrown to the floor and upon timbers, the effect of which was to break his arm near a joint and strain certain ligaments. The proximity of this fracture to a joint rendered it difficult to treat and occasioned a partial loss of the use of the arm, not permanent, but of a serious character.

The primary and controlling question involved in the case, under the issues presented by the pleadings, was as to the discharge of the master's duty in providing reasonably safe appliances connected with the work of the servants. There was no claim under the issues presented, nor was there any evidence offered tending to show that the injury was in any manner the result of an act, either of omission or commission, upon the part of a fellow servant. Notwithstanding this, the court, at the instance of the defendant, charged the jury: "An employer is not bound to indemnify an employé for damages which the employé sustains in consequence of the negligence of a fellow employé employed by the same employer in the same general business. The law of this state respecting the negligence of a fellow servant where there is no want of ordinary care upon the part of the employer recognizes no distinction growing out of the grades of employment of the respective employés; nor does it give effect to the circumstance that the fellow servant through whose negligence the injury was received was the superior of the plaintiff in the general service in which they were employed. If both were employed in the general service working to the general end in the construction of the building, then they were fellow servants, and the master is not liable for the negligence of one which injures the other." Under voluminous instructions, of which this formed a part, unmodified or unaffected by other independent instructions, the jury returned a verdict in defendant's favor. The evidence in the record is such that a charitable view of the action of the jury must lead to the conclusion that it was misled and improperly influenced by the charge above specified. The jury must have assumed that such charge was a suggestion or declaration that the plaintiff could not recover if the ladder had been constructed by a fellow servant, or that the foreman, who supplied the ladder, should be viewed and regarded as a fellow servant in the discharge of his duty in connection therewith. There was no evidence of any character to justify the court in submitting to the jury any question relating to the liability of the defendant on account of the act of a fellow-servant. Whatever was done by the foreman in relation to supplying the appliances necessary in the prosecution of the work was done by the foreman as the representative of defendant. In so far as the charge above given stated abstract questions of law disconnected with the case, if the same were calculated to mislead the jury, prejudicial error resulted. Hirshberg v. Strauss, 64 Cal. 272, 28 Pac. 235. In addition, however, the general statement in the last paragraph of the charge is too broad, eliminating, as it does, the element of responsibility on account of the action of a fellow servant who is entrusted with duties which the law enjoins upon the master and in the performance of which the servant is a vice principal. It is evident from the verdict under the evidence that the jury were misled by the charge above set forth.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

We refrain from commenting upon the conflict in other instructions appearing in the record and to which exceptions were taken, there being no reason to apprehend a repetition thereof in a subsequent hearing under the issues presented by the pleadings.

The judgment and order are reversed, and cause remanded for a new trial.

We concur: SHAW, J.; TAGGART, J.

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11 Cal. App. 94

LONG v. AMERICAN SURETY CO.

(Civ. 629.)

(Court of Appeal, Second District, California. July 21, 1909.)

APPEAL AND ERROR (§ 773*)—FAILURE TO FILE BRIEF.

Supreme Court rule 2 provides that appellant shall file his points and authorities 30 days after the transcript is filed. Subdivision 5 provides that the time limited shall not be extended except by order on stipulation of the parties, or on affidavit showing good cause therefor. Rule 5 provides that on failure to file in time, the appeal may be dismissed on motion. After an extension of time for filing points and authorities had expired respondent's attorney refused to stipulate further extending the time, but told appellant that he would not take advantage of the latter's failure to file his brief in time. Appellant did not offer to file the brief until nearly three months thereafter or four months after the original extension expired, and after service and filing of notice to dismiss the appeal. *Held* that, 30 days being under the rules a reasonable time in which to file briefs respondent was entitled to a dismissal, no showing to excuse the default being made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3108; Dec. Dig. § 773.*]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by S. C. Long against the American Surety Company (a corporation). From an order denying a motion for a new trial, plaintiff appeals. Dismissed.

W. W. Kaye (V. T. Watkins, of counsel), for appellant. T. F. Allen (Norman Williams, of counsel), for respondent.

SHAW, J. Motion to dismiss an appeal for failure to file points and authorities. The court, under a misapprehension of the facts disclosed by the record heretofore, made an order denying the motion. The appeal is from an order of the trial court denying plaintiff's motion for a new trial.

The transcript was filed on October 22, 1908 (not November 21st, as stated by appellant's affidavit). On November 18th, pursuant to stipulation filed, this court made an order granting appellant 30 days' additional time within which to file his points and authorities. This extension of time expired on December 21st, and, so far as disclosed by the record, no further stipulation was filed herein, and no order made further extending the time. On April 1, 1909, appellant not having filed his points and authorities, respondent served notice on his attorney that it would on April 26, 1909, move the court for an order dismissing the appeal upon the ground of appellant's failure to file such points and authorities within the time prescribed by the rules therefor, which notice of motion was filed in this court on April 7th. Thereafter, on April 24th, appellant delivered to the clerk of this court his points and authorities, which, however, were not filed, owing to the time therefor having elapsed. It thus appears that the points and authorities were not presented for filing until the expiration of a period of more than four months after the expiration of the time for filing the same. At the hearing of the motion appellant's attorney presented affidavits of himself and his stenographer, from which it appears that on February 1, 1909, he applied to T. F. Allen, respondent's attorney, for a stipulation extending the time within which he might file his points and authorities; that Allen refused to make any stipulation granting further extension of time for such purpose, but stated to appellant's attorney that he would not take advantage of appellant's failure to file his brief in time and would not move to dismiss "the appeal on the ground of the appellant's failure to comply with the provisions of rule 4" of the Supreme Court governing this court. (This rule has no application whatever to the case.) It is further averred that, owing to pressure of other professional engagements during the period extending from the time of filing said transcript to April 1st, affiant did not have time to prepare appellant's points and authorities, the preparation of which required three or four days' careful labor. It is also averred that appellant had stipulations from respondent extending the time to February 1, 1909. No such stipulations were filed, however, and no order made by this court based thereon extending the time as required by subdivision 5 of rule 2, nor were such stipulations presented upon the hearing. It appears, therefore, that more than a month elapsed after appellant's default before application was even made on February 1st for a further extension of time, at which time appellant had no existing right to file points and authorities, and that respondent refused to grant the same. Conceding, but not holding, that an affidavit of an oral statement made under such circumstances to the effect that the respondent would not take advantage of such default might be considered in opposition to a motion to dismiss, and accepting this statement at its full value, it could not be construed as effective in extending the time beyond a reasonable time. Appellant took no step in the matter until the lapse of nearly three months, and after service and filing of notice of motion to dismiss. Under the rules 30 days is regarded as a reasonable period within which to file points and authorities, yet in this case appellant is claiming more than four months without any showing that can be regarded as an excuse for his default. Rule 2 of this court provides that appellant shall file his points and authorities 30 days after the transcript is filed, and by subdivision 5 of said rule it is provided that "the time above limited for filing points and authorities shall not be extended except by order of the court upon stipulation of the parties, or an affidavit showing good cause therefor." Rule 5 provides, if "appellant's points and authorities be not filed within the time prescribed, the appeal may be dismissed on motion, upon notice given." In order that the court may control its calendars and dispose of its business in an orderly and convenient manner, a compliance with these rules must be exacted from litigants. No hardship can result therefrom, for the rules themselves provide for the granting of further time to perform the acts required upon a proper showing. Shain v. People's Lumber Co., 98 Cal. 120, 32 Pac. 878; McCabe v. Healey, 139 Cal. 30, 72 Pac. 359; Coats v. Coats, 146 Cal. 443, 80 Pac. 694.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

No showing is made which even tends to excuse this long continued default, and it is respondent's right to have the rule for dismissal of the appeal enforced. McCabe v. Healey, 139 Cal. 30, 72 Pac. 359.

The order heretofore made is therefore vacated and set aside; and for the foregoing reasons it is now ordered that respondent's motion be granted, and the appeal be dismissed.

We concur: ALLEN, P. J.; TAGGART, J.

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11 Cal. App. 88

REED v. SEFTON. (Civ. 677.)

(Court of Appeal, Second District, California. July 21, 1909.)

1. VENDOR AND PURCHASER (§ 341*) — OPINIONS—MARKETABLE TITLE.

The opinion of an attorney examining an abstract of title is not admissible in evidence on the issue as to whether the title tendered by the vendor is marketable.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 341.*]

2. VENDOR AND PURCHASER (§ 133*)—COVENANT OR CONTRACT FOR PERFECT TITLE—PERFORMANCE.

A covenant or contract for a perfect title requires the tender of a title free from litigation, palpable defects, and grave doubts, and should consist of both legal and equitable titles, and be fairly deducible from the record.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 234–237; Dec. Dig. § 133.*]

3. VENDOR AND PURCHASER (§ 130*)—MARKETABLE TITLE.

March 3, 1874, the owner of land gave a bond to convey it for $1,400, $27 being paid, $1,000 to be paid by July 1, 1874, and the balance 15 months from the date of the writing. No conveyance under the bond was made and no relinquishment of the rights of the vendee thereunder shown, and on November 5, 1877, the land was conveyed by the owner to another party through whom defendant deraigned title. January 8, 1904, defendant contracted to convey the land, which had increased in value tenfold, to plaintiff. *Held*, that there was no reasonably decent probability of litigation on the bond, and that defendant's title was marketable.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 245, 246; Dec. Dig. § 130.*]

4. LIMITATION OF ACTIONS (§ 60*) — RECOVERY OF PURCHASE MONEY BY VENDEE—STATUTE OF LIMITATIONS.

A right of action by a vendee to recover purchase money paid on a land contract accrues and the statute of limitations begins to run when the vendor tenders a deed and the vendee refuses to accept it because of defects in title.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 339; Dec. Dig. § 60.*]

Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by D. C. Reed against J. W. Sefton. Judgment for defendant, and, from an order denying a new trial, plaintiff appeals. Affirmed.

Luce, Sloane & Luce, for appellant. Stearns & Sweet, for respondent.

TAGGART, J. Action to recover money paid for option to purchase real estate, and for damages for failure of vendor to perfect title and make conveyance. Judgment was for defendant, and plaintiff appeals from an order denying his motion for a new trial.

On January 8, 1904, in consideration of the sum of $500, defendant gave plaintiff an option to purchase within 20 days from that date a block of land in the city of San Diego. The sum paid ($500) was to be applied upon purchase price of $15,000, if the purchase was completed, otherwise to become forfeit, "for liquidated damages for such failure to complete said purchase." Time was made of the essence of the option. On January 28, 1904, the plaintiff paid defendant the further sum of $1,000 for an extension of said option for fifteen days upon the same terms; and again on February 12, 1904, in consideration of the payment of an additional sum of $1,000 by plaintiff to defendant, a further extension of 30 days upon the same terms was granted. The same form of forfeiture for failure to complete the purchase is provided as in the original option, and time is made of the essence of both these extensions of the option.

The court finds that prior to the expiration of the time given by the last-named extension of option to purchase defendant furnished to plaintiff an abstract of title to the block of land in question, which contained a bond for a deed to said premises, whereby A. E. Horton, then owner thereof, on the 31st day of March, 1874, bound himself to convey the block in controversy to one O. S. Fowler of Boston, state of Massachusetts, for a consideration of $1,400, $27 whereof was paid, and the residue to be paid, $1,000 on or before July 1, 1874, and the balance 15 months from the date of the writing. Horton agreed to convey by good and sufficient deed upon the full performance of all and every condition to be performed by Fowler. No further time limitation appeared in the instrument, which was recorded April 1, 1874. No conveyance under this bond was ever made, and no relinquishment of the rights of Fowler thereunder shown, and on November 5, 1877, Horton conveyed the land to one Babe, who thereafter, on June 10, 1883, reconveyed to Horton, and on August 5, 1884, Horton conveyed to one Hoitt through whom defendant deraigns title. As found by the court, there was attached to the abstract mentioned an opinion of title given by N. H. Conklin, then practicing law in San Diego, to defendant under date of December 7, 1898, wherein it is said: "I consider the title a little questionable until the facts of the Fowler heirship are ascertained and his rights determined, either by an instrument of writing or a decree of court." Also, an opinion given by McDonald & McDonald, a firm practicing law in San Diego at that time, under date of January 8, 1899, certifying the title to be good, and as to the bond in question saying that, "although not released or canceled of record, is nevertheless upon the face of the record no longer a lien or an incumbrance upon the property by reason of being barred by the statute of limitations."

Plaintiff, prior to March 12, 1904, notified defendant that his title to the property was not a good and marketable one, owing to the cloud thereon created by said bond, and stated that he was ready, willing, and able to carry out the option upon the removal by defendant of said cloud, and demanded that defendant either perfect the title to said premises by removing said cloud or repay to plaintiff the amounts paid on the option. Defendant refused to either remove the alleged cloud or repay said amounts; hence this action begun November 12, 1906. In addition to sustaining defendant's contention that the bond mentioned did not prevent him from conveying a good and marketable title to the lands described in the contract, the court found plaintiff's first cause of action to be barred by the statute of limitations.

The contention of appellant that the opinion of the attorney expressing doubt as to the sufficiency of the title to the premises which was attached to the abstract may be considered in determining whether or not he was justified in refusing to accept the title displayed by the abstract is disposed of by the holding of the Supreme Court in Winter v. Stock, 29 Cal. 408, 413, 89 Am. Dec. 57, that the correctness of the advice of counsel is a risk assumed by the party who procures it, and that such an opinion is not evidence admissible upon the issue, Is the title tendered by the vendor marketable? See, also, Montgomery v. Pac. C. L. Bureau, 94 Cal. 290, 29 Pac. 640, 28 Am. St. Rep. 122. The difference between the opinions of the two attorneys hereinabove referred to suggests the views of the respective parties here as to whether or not the title of defendant was so incumbered as to justify a court of equity in refusing to compel specific performance of the contract. While the early cases draw some distinction between the rule to be applied in an action at law to recover back the portion of the purchase price paid and that applied in a suit in equity for specific performance, we take it that the equitable rule is now applicable whether the action be one to recover the money or enforce the contract. Moore v. Williams, 115 N. Y. 586, 22 N. E. 233, 5 L. R. A. 654, 12 Am. St. Rep. 844; Maupin on Marketable Titles, § 286. A covenant or contract for a perfect title requires the tender of a title "free from litigation, palpable defects, and grave doubts, and should consist of both legal and equitable titles and be fairly deducible from the record." Turner v. McDonald, 76 Cal. 177, 18 Pac. 262, 9 Am. St. Rep. 189; Sheehy v. Miles, 93 Cal. 288, 28 Pac. 1046; Gwin v. Calegaris, 139 Cal. 384, 387, 73 Pac. 851. While the option given by defendant to plaintiff contains no covenant for a perfect title, or for record title at all, both parties present the case upon the theory that the rule declared in Turner v. McDonald is applicable, and that plaintiff is entitled to recover unless the title tendered by defendant measures up to the standard fixed by that case.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The cloud here urged is not based upon any question of doubt as to the legal title of defendant. The bond to Fowler must be considered in the light of an incumbrance on the title and as a cause of action vested in Fowler, or his successors in interest, and a right in him or them to call in the aid of a court of equity to enforce any right he or they may have under the bond. While such a defect may be distinguished from those presented by cases in which a link in the chain of title is missing, or there is an entire absence of record evidence connecting the vendor with the paramount source of title, yet, even when tested by the rule applied in such cases in so far as they furnish any aid in determining the question before us, we are of opinion that the finding of the trial court that defendant's title was a marketable one should be sustained. Of the obstacles to the tender of a good title mentioned in Turner v. McDonald, supra, we have to do only with those arising under the clause "free from [probable] litigation." In classifying the cases in which titles are considered doubtful for this reason and those which are not, Maupin distinguishes those cases as doubtful: "Where the probability of litigation ensuing against the purchaser in respect of the matter in doubt is considerable; or where there is a 'reasonably decent probability of litigation.' The court, to use a favorite expression, will not compel the purchaser to buy a lawsuit. If there be any reasonable chance that some third person may raise a question against the owner of the estate after the completion of the contract, the title will be deemed unmarketable." As not doubtful: "Where the probability of litigation ensuing against the purchaser in respect of the doubt is not great, the court, to use Lord Hardwicke's language in one case, 'must govern itself by a moral certainty, for it is impossible in the nature of things there should be a mathematical certainty of a good title.'" Maupin on Marketable Titles, §§ 284, 285. In the same sections this author also distinguishes the rules to be applied where the question of the doubtfulness of the title is to be considered with relation to a title resting upon a presumption of fact. Appellant relies in part upon cases resting upon such a condition of fact. These rules, however, are not applicable to the title of defendant here, and should not be considered in connection with the probability of litigation arising on the Fowler bond, since the distinction drawn by them is between marketable and nonmarketable titles and the marketability of the Fowler equity is not before us. The bond might be a cloud sufficient to destroy the marketability of defendant's title without being itself marketable, and so it might support a cause of action for the recovery of the money advanced by Fowler without being sufficient to sustain an action in equity for its specific performance. The probability of a court of equity entertaining such an action as that last mentioned is extremely remote, but it is only in view of such a contingency that the bond can affect the rights of a purchaser of the property.

It was more than 28 years after the time for the last payment on the Fowler bond, and over 26 years after Horton by conveying the property to another gave constructive notice to Fowler and his successors in interest that he regarded the claim of Fowler as abandoned, that the contract between plaintiff and defendant was entered into. Says the Supreme Court of this state, quoting from Judge Story in Taylor v. Longworth, 14 Pet. 172, 10 L. Ed. 405: "And even when time is not thus either expressly or impliedly of the essence of the contract, if the party seeking a specific performance has been guilty of gross laches, or has been inexcusably negligent in performing the contract on his part, or if there has been, in the intermediate periods, a material change in circumstances affecting the rights, interests, or obligations of the parties, in all such cases courts of equity will refuse to decree any specific performance upon the plain ground that it would be unequitable and unjust." Green v. Covillaud, 10 Cal. 317, 325, 70 Am. Dec. 725. Applying the provision of this declaration of the law relating to the material change of circumstances and rights of the parties, it is difficult to see how a court of equity can enforce the performance of a contract to convey real estate calling for a consideration of $1,400 after a default of 28 years, where, upon the face of the proceedings, the property is valued at more than 10 times that amount. It would be inequitable to entertain a bill upon such a showing whatever the disability under which the vendor or his successors in interest may have labored during so extended a period. Time is material to the specific performance of a contract, whenever from the change of circumstances a specific performance, such as would answer the ends of justice between the parties, has become impossible. Pratt v. Law, 9 Cranch, 456, 494, 3 L. Ed. 791. Says Chief Justice Marshall: "Between a contract which is unreasonable when made, and one which has become so before it can be executed, if the application be made by the person in fault, for the aid of the court against the party who has suffered by his in(dis)ability, no clear distinction is perceived." Garnett v. Macon, 6 Call. (Va.) 303, 371, Fed. Cas. No. 5,245. We are of opinion that there is not a "reasonably decent probability of litigation" on the Fowler bond.

Plaintiff's action, therefore, fails both upon the right to recover the money paid for the option and that sought to be recovered as damages for breach of contract. In respect to the first-mentioned cause of action, we also think the finding of the trial court that it was barred by the statute of limitations is sustained by the evidence. When defendant tendered to plaintiff a good and sufficient deed on March 14, 1904, and plaintiff refused to accept it in execution of the option, and no further time was given within which he might make the payment or accept the deed, the cause of action, if any, accrued and the statute began to run. Plaintiff himself recognized this when he made his demand for the return of his money on March 13, 1904. There being no cloud for defendant to remove from his title, the condition attempted to be made by plaintiff had no existence in fact or in law, and could not serve to toll the statute. This was not a case in which no time was provided for the performance of the contract (Richter v. Union Land Co., 129 Cal. 367, 375, 62 Pac. 39), but one in which there was an express limitation, and time was made of the essence of the contract, and, if the tender of the deed by defendant on the 14th of March can be construed as a waiver of one day, it could not extend the time within which plaintiff might have commenced his action to recover the money paid by him.

The order denying the motion for a new trial is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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11 Cal. App. 101

JACKSON v. SOUTHERN PAC. CO. et al.

(Civ. 679.)

(Court of Appeal, Second District, California. July 21, 1909. Rehearing Denied by Supreme Court, Sept. 18, 1909.)

1. Appeal and Error (§ 909*) — Presumptions—Evidence Not Brought Up—Diagram.

Where a diagram by which an object is located is not brought up in the appeal record, it will be presumed to have located it at the point most favorable to the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3675; Dec. Dig. § 909.*]

2. Master and Servant (§ 265*)—Injuries to Servant—Contributory Negligence.

Where a servant engaged in operating pumps beneath the ground was injured by earth caving into the well, and there was no evidence that it was the custom to cover the manhole leading to the well when the pumper descended, plaintiff was not negligent in failing to do so at the time he was injured, as it would be presumed that he acted in accordance with the custom or under instructions.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877–908; Dec. Dig. § 265.*]

3. Master and Servant (§ 236*)—Injuries to Servant—Contributory Negligence.

Where a pumper was injured while operating pumps in a well beneath the ground by a cave-in, and there was no evidence that the caving was due to vibration of the regular pump, plaintiff was not negligent in not stopping the regular pump before descending to start a relief pump which he was about to do when he was struck by falling material causing him to fall and be injured.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 681, 723–742; Dec. Dig. § 236.*]

4. Master and Servant (§ 296*)—Injuries to Servant—Instructions—Intoxication.

In an action for injuries to a servant, defendants requested the court to charge that, if plaintiff by reason of carelessness or intoxication voluntarily acquired did not exercise reasonable care under the circumstances, he could not recover. *Held*, that such instruction made the matter of intoxication alone sufficient to support the defense of contributory negligence, without regard to its degree or character, and was properly refused, where the only evidence that plaintiff was intoxicated was the opinion of a witness unsupported by any facts that plaintiff was under the influence of liquor at the time he was injured.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1180–1194; Dec. Dig. § 296.*]

5. Trial (§ 234*)—Instructions.

A general instruction to render a certain verdict on finding certain facts is wrong only when it omits facts necessary to the conclusion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 534–538; Dec. Dig. § 234.*]

6. Negligence (§ 141*)—Contributory Negligence—General Instruction.

An instruction that the jury should find for defendant, if they found from the evidence that plaintiff did not exercise that reasonable degree of care which an ordinarily prudent person would have exercised under the circumstances, and if the jury found that, by reason of plaintiff's carelessness, he did not use such care, etc., was proper.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 382-399; Dec. Dig. § 141.*]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by William G. Jackson against the Southern Pacific Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

P. F. Dunne, C. W. Durbrow, and Fred E. Borton, for appellants. J. W. Wiley and E. L. Foster, for respondent.

TAGGART, J. This is an action brought to recover damages for personal injuries by an employé. Verdict and judgment were for plaintiff, and defendant appeals from the judgment and an order denying its motion for a new trial.

Plaintiff was employed by defendant to run a pumping plant consisting of a boiler and two steam pumps, one of the latter being supposed to pump continuously and the other used as a relief. Plaintiff's duties during his shift were to fire the boiler, lookafter the pumps, keep one of them going continuously, and the reservoir full of water. The boiler was 50 to 75 feet from the well, and the pumps were 30 to 40 feet down in the well and reached by ladders, the relief pump being some six feet below the regular one. The well was 8 or 10 feet square, timbered with 6x6 or 8x6 timbers placed about 6 feet apart, and lagging or planks set in behind the timbers to keep the rock and earth from falling in, and was covered on top by a platform in which was a manhole 2x3 feet, covered with a trap, through which descent was made into the well. The well was located between the railroad tracks and the foot of the mountain, and the latter had been excavated to secure a place for the well, so that there was a perpendicular wall of loose rock and earth 18 or 20 feet high at the rear of the well, while in front it was nearly level with the track. A tunnel had been started into the mountain near one side of the well and the formation around the mouth of the latter on that side was broken and loose. In some places the lagging in the well was close together and in some places apart, and, in one place, it lacked 10 or 12 inches of reaching to the platform which covered the well. Through this defective place in the timber rocks and earth had fallen to such an extent that complaint was made to the defendant that the well was unsafe. In response to this complaint, the resident engineer of defendant passing through inquired of plaintiff and the pumper who was on the other shift what was the matter, and was told by the latter that the foot of the tunnel was caving into the well, that it was unsafe to go in, that other men refused to go down, and that the timber was broken beneath the flooring from the weight of the dirt, and that it was all the time caving in and was practically unsafe. The engineer ordered the dirt cleared off, said very little about the broken timbers beneath, but declined to go down into the well to investigate; said he could not stop at that time, but told plaintiff he would send somebody back to fix it. Three or four days later plaintiff was ordered to start the relief pump, went down into the well to do so, but, being unable to get it to run, was coming up the ladder when some dirt and rock fell in and knocked his torch and oil can from his hand. In attempting to get under the footway to protect himself from the falling matter, he slipped and fell, the thumb of his right hand being caught in the pump, which was running, and so injured that it had to be amputated.

Plaintiff rests his case upon the rule declared in Anderson v. Seropian, 147 Cal. 201, 208, 81 Pac. 521, and claims that he continued in his employment after knowledge of the unsafe condition of the well only because of the promise of defendant that this condition would be remedied, and the expectation that this would be done soon. In support of its appeal, appellant urges error of the trial court in denying defendant's motion for a nonsuit, in giving a certain instruction requested by plaintiff, and in modifying another offered by defendant; also, that the evidence is insufficient to support the verdict and that the verdict is against law.

It is contended that the motion for a nonsuit should have been granted because the evidence shows that plaintiff was guilty of contributory negligence, first, in leaving the trapdoor open in the top of the well; and, second, by going down to the lower pump while the upper one was running. The plaintiff testified that he did not know where the rock came from that fell upon him when he was hurt but there is no evidence that any matter ever fell through the trapdoor or could have fallen from that place. There was a diagram of the well introduced in evidence which is not before us, and which, it is true, was a part of defendant's case, but which, if brought up, would be proper for us to consider in determining whether or not any lack of evidence in plaintiff's case had been cured by the evidence given by defendant. Evidence of location of an object dependent upon testimony which locates it by means of a diagram which is not brought up in the record must be assumed to have been most favorable to the view that supports the finding or verdict. Independent of this, we do not think there is anything in the plaintiff's case to show that the leaving open of the trapdoor was necessarily negligence upon his part. Only as it may be argued that it was not necessary to give light in the well because he took a torch can it be said that it was not necessary for that purpose. This would be a matter for the jury. The evidence shows that the manhole was generally covered when the pumper came out, but there is no evidence as to custom when he was in the well, and on this occasion it was thrown aside by plaintiff, and this will be presumed to have been the usual custom and done under instruction in order to support the verdict when the question before us is one of contributory negligence. No question of variance in this respect is suggested in the motion for the nonsuit.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The other ground upon which the nonsuit was asked is, we think, equally untenable. No reason is suggested why the regular pump should be stopped in order to start the relief. There is no evidence that the falling of the rock was due to the vibration of the pump, as suggested by appellant, and, if there were, this would have been a matter of fact for the jury upon the issue of contributory negligence. The same matters are presented in support of the contention that the evidence is insufficient to support the verdict. This is not a case in which it can be said as a matter of law that the employé had an opportunity to choose between two obvious courses of procedure—one comparatively safe and the other plainly dangerous. As to the trapdoor, there is no evidence that there ever was any danger of rock falling through it; and as to the running of the regular pump, there is no evidence that it had anything to do with causing the rock to fall. Cases like Gribben v. Yellow Aster Co., 142 Cal. 248, 75 Pac. 839, and Helling v. Schindler, 145 Cal. 309, 78 Pac. 710, have no application here.

The cases from other jurisdictions relied upon by appellant to sustain its contention with respect to the instruction which it requested upon the matter of intoxication as constituting contributory negligence appear to be in conflict with the case of Robinson v. Pioche, 5 Cal. 461, which is recognized as authority in the recent case of Perkins v. Sunset Co. (Cal.) 103 Pac. 190, and in Holmes v. Oregon, etc. (D. C.) 5 Fed. 523, 539. In a general instruction to the jury that their verdict must be for defendants if they found "from the evidence that plaintiff did not exercise that reasonable degree of care which an ordinarily prudent person would have exercised under the circumstances," requested by the defendants, appeared the following: "If you find from the evidence that by reason of the carelessness or intoxication voluntarily acquired" of plaintiff he did not use such care, etc. The court struck out the words "intoxication voluntarily acquired." There is the opinion of one witness unsupported by facts that plaintiff was under the influence of liquor when he went down into the well, and it may be conceded that, if defendants had asked it, an instruction to the effect that this evidence might be considered in determining whether or not plaintiff used ordinary care should have been given, but the effect of the instruction as requested was to make the matter of intoxication alone sufficient to support the defense of contributory negligence without regard to its degree or character, and under the evidence in this case that would have been improper.

The instruction given at plaintiff's request of which appellant complains was not erroneous. There was no material element of the case lacking in that instruction. This was not true of the instruction cited from Matter of Calef's Estate, 139 Cal. 674, 73 Pac. 539. A general instruction to render a verdict is wrong only when it omits facts necessary to the conclusion. Such a one is the preceding instruction asked by defendants when it is considered in the alternative form relating to intoxication only, but, with the special fact of intoxication eliminated and the general one of "want of care" allowed to stand unmodified, the instruction was proper. We see no prejudicial error in the modification of one or the giving of the other instruction.

Judgment and order affirmed.

We concur: ALLEN, P. J.; SHAW, J.

11 Cal. App. 106

WYCKOFF v. PAJARO VALLEY CONSOL. R. CO. (Civ. 576.)

(Court of Appeal, First District, California. July 28, 1909. Rehearing Denied Aug. 25, 1909; Denied by Supreme Court Sept. 25, 1909.)

1. Appeal and Error (§ 933*)—Presumptions—Matters Not Shown by Record—Grounds of Motion for New Trial.

Where the bill of exceptions in the record was prepared and allowed especially for use upon the motion for a new trial, it will be assumed on appeal that the motion for new trial was made on the grounds stated therein according to the usual practice; the record being silent on the subject.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3773; Dec. Dig. § 933.*]

2. Master and Servant (§ 113*)—Injuries—Negligence.

Defendant operated a narrow-gauge railroad 23 miles long, which principally transported beets loaded in season by farmers, and employed section crews who frequently went over the track to keep it up. The manner of loading beets into the cars was to drive the wagon between the cars and loading posts placed along a siding at intervals and to attach one end of a tackle rope to a chain thrown around the post and the other end to the four corners of the net containing the beets, and pull the beets into the cars by horse power exerted on the tackle. After a farmer had partly loaded a car, defendant put in some empty cars, and shoved the partly loaded car up on the siding past the loading posts, but left it before a telephone pole, and when the farmer brought another load, instead of waiting until the partly loaded car was placed before a loading post, he threw a chain around the telephone pole, extended it under one rail of the main track, attached his tackle to the chain, unloaded his wagon, and returned to the field without moving the chain and leaving the block between the rails. A train passed 15 minutes later, struck the block, and tossed it aside so as to leave the chain across the rails, which derailed the engine, killing intestate, the engineer. The cars were always placed for loading by the farmers, and not by defendant, and the loading had always been done without accident. *Held*, that defendant was not negligent by failing to employ track walkers to patrol the track, nor in pushing up the partly loaded car past the loading post; the use of the telephone pole and track for loading not being warranted by defendant's acts.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 227; Dec. Dig. § 113.*]

3. MASTER AND SERVANT (§ 129*)—INJURIES—PROXIMATE CAUSE.

Even if the method of loading provided was defective, neither that nor defendant's failure to keep a sufficient number of section hands to repair the track or to employ some one to supervise the loading proximately caused the accident; it being solely caused by the farmer's negligence in leaving the chain on the track.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 263; Dec. Dig. § 129.*]

4. MASTER AND SERVANT (§ 295*)—INJURIES—ACTIONS—INSTRUCTIONS — REQUESTS — ASSUMPTION OF RISK.

Where, in an action against the company for a railroad engineer's death by the derailment of his engine by striking a chain placed on the rail by a farmer to assist him in loading beets into a car on the siding, after the car had been pushed away from the loading post provided for attaching the chain to in loading in the usual manner, by the placing of other empties on the track, the evidence showed that decedent had passed along the road several times a day for 10 years, and knew the method of loading at such siding and the resulting dangers from such methods, an instruction that if decedent was employed as an engineer for more than five years before the accident, and passed the siding often enough to familiarize him with the methods of loading, and with the fact that defendant kept no superintendent or loading platform there, and had no track walkers and knew or should have known of the resulting risk, and, continued in the employment as long as two years after having such knowledge, he assumed the risk, embraced all the elements of assumed risk, and should have been given under the evidence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1175; Dec. Dig. § 295.*]

Appeal from Superior Court, Monterey County; B. V. Sargent, Judge.

Action by M. Isabel Wyckoff, as administratrix, against the Pajaro Valley Consolidated Railroad Company. From a judgment for plaintiff, and an order denying a motion for new trial, defendant appeals. Reversed.

Dougherty & Lacey, for appellant. Lindsay & Netherton and Zabala & Wyatt, for respondent.

KERRIGAN, J. This is an appeal from a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial. The action was brought to recover damages for the death of Cyrus N. Wyckoff, which it is alleged was caused by the negligence of the defendant.

The defendant had been engaged for about 15 years in operating a single-track narrow-gauge steam railroad, running from Watsonville to the town of Spreckels, a distance of about 23 miles, and the decedent had been employed by it, at the time of the accident, for about 10 years as a locomotive engineer. For the accommodation of beet growers, the defendant has provided at different places along the line of the railroad 20 sidings or switches; and during the beet season places on these sidings empty cars, into which the farmers load their beets. One of the sidings is known as Gaffey's switch, and it was at this place that the accident happened. Beet growers in this vicinity load cars with beets in the following manner: The beets are thrown from the ground into nets which are spread over the bed of a wagon. The wagon is then hauled to the siding, alongside of which is a stretch of raised earth called a "dump," the purpose of which is to make the loaded wagon level with the car. At Gaffey's switch, between the main track and the siding, there is a line of loading posts, set about eight feet apart. In order to empty a wagon load of beets into a car, a span of horses is driven in between the siding and the main track and hitched to a tackle (consisting of ropes and blocks) which is attached at one end to a chain, the chain is given a turn around one of the aforesaid posts, and the other end of the tackle is attached to the four corners of a rope net. The team is then started, and the net of beets is drawn over and into the car. Whenever it was desired to place a car opposite a loading post, or to separate cars in order to allow passage between them for a team crossing the siding to get between it and the main track, it was the custom of the farmers to move the cars by hand. The defendant never had anything to do with the loading of the beets into the cars. It simply built the siding, and delivered thereon empty cars, and, when they were loaded, hauled them away. The farmers themselves furnished the loading tackle, and also furnished and set the loading posts. On the day of the accident all but three of the 11 or 12 beet farmers who used Gaffey's switch had finished loading and shipping, and James Larkin was one of the 3. Larkin had loaded at Gaffey's switch from 35 to 50 cars of beets each year for eight or nine years. Some two weeks prior to the day of the accident, Larkin had partially filled a car with beets, when, on account of rain, the sugar factory closed down, and the shipment of beets was stopped. A day or two prior to

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

January 22, 1900, Larkin, with two others, was notified that the factory was about to resume operations, and would receive the balance of the beet crops. On the morning of the accident the defendant sent a train of empty cars from the sugar factory to Gaffey's switch. These cars with the engine, completely filled the switch, and shifted the partially loaded car to a point where there was no loading post. At 8 o'clock that morning, and while this train was waiting on the switch for the train, of which the deceased Wyckoff was engineer, to pass by on the main track, Larkin with his son and a hired man arrived at Gaffey's switch with two wagon loads of beets. Larkin desired to load these beets into the half-filled car, opposite to which, as before stated, there was no loading post; but there happened to be a telephone post across the main track, and close enough to be used as a loading post, and Larkin conceived the idea of employing it as such, and proceeded to do so. He first placed a chain around the telephone post, and then extended it to and under the nearer rail of the main track, and in the middle of that track hitched his 10x8 inch block to this chain, unloaded the wagons, returned to his field for more beets, and forgot to remove the chain and block. About 15 minutes later Wyckoff's train came along, the pilot struck the block and tossed it to the left of the track, leaving the chain on the track. The locomotive struck this chain, was thrown from the track, and Wyckoff was instantly killed.

The plaintiff preliminarily objects to the hearing of this appeal upon the merits; that is, the appeal from the order denying defendant's motion for a new trial, upon the ground that there is no bill of exceptions showing what papers were used upon the hearing of that motion. The bill of exceptions was filed July 17, 1907, and the motion was denied December 2, 1907. This very question was decided by the Supreme Court against the contention of plaintiff in the case of General Conference of Free Baptists v. Berkey, on October 16, 1908.[1] A rehearing in that case has been granted, and it is now again under submission. The rehearing doubtless was granted on account of the importance of the constitutional question involved, and not by reason of any doubt in the mind of the court on the point now under discussion. The bill of exceptions in this case was prepared especially to be used on the motion for a new trial; and it would be extraordinary indeed if, after its elaborate preparation and its settlement and allowance, it was abandoned, and the motion made on some other grounds. We do not, of course, understand that this can be done; and, as the record is silent on the subject, we shall assume that the usual practice was followed, and that the motion was based on the bill of exceptions. The accident which caused the death of Wyckoff was due primarily to the negligence of Larkin, an independent third person, for whose act, standing alone, the defendant, it must be conceded, was in no wise liable; but plaintiff claims that certain acts or omissions of the defendant contributed proximately to cause the injury, and and that, therefore, the defendant must be held responsible. Plaintiff insists that the evidence shows that defendant failed to exercise reasonable prudence and care in providing appliances for loading cars, in watching and tending its track to keep it free from obstacles, in the moving of Larkin's partially filled car from the point where it stood when he began loading it to a point away from the loading posts.

A careful reading of the record fails to disclose to us wherein the defendant was remiss or negligent in any of these respects. There is no evidence that the method of loading at the said switch was in any respect improper or dangerous. On the contrary, the record shows that the method was safe and practical. And, even if this mode of loading the cars was, as it is claimed in plaintiff's argument, crude and deficient, it is not shown to have any causal connection with Larkin leaving the chain on the track. Larkin on that morning could have waited until Wyckoff's train passed Gaffey's switch, when the partially filled car could have been moved into position and loaded in the usual mode, or in like manner, without waiting, he could have loaded his beets into one of the empty cars opposite the loading posts, and later in the day have finished loading the half-filled car. In any event, if Larkin had emptied his beets into the half-filled car in the usual and prescribed mode, whether the mode was safe or unsafe, the block and chain would not have been left on the main track, and the accident would not have occurred. There is no legal connection between the method of loading at said switch and Larkin's oversight.

As to track walkers. This is a short narrow-gauge railroad, extending in length about 23 miles, carrying but few passengers, and engaged principally in handling freight. Inasmuch as it employed section crews who were over the road continually, and considering the character and extent of its business, it certainly cannot in reason be said that in failing to employ track walkers the company was negligent, and that such negligence concurred proximately with the negligence of Larkin in causing the accident. This, too, must have been the view of the trial court, for the jury was instructed that the company had no actual notice of the obstruction, and that it had not been on the track long enough to give the company constructive notice of its presence. Plaintiff lays great stress on the fact that defendant moved the partly filled car to the extreme south end of the switch and out of position to be loaded in the usual mode. The moving of the car was the natural physical result of filling the switch with the empty cars and the engine, and the switch was thus filled, so it appears, to clear the main track for Wyckoff's train. During the entire period of the operation of this road no obstruction had ever before been seen on the track at Gaffey's switch, no accident had ever happened anywhere on the line, and no farmer—Larkin or any one else—at this point had ever before resorted to any mode of loading freight other than the prescribed one. We utterly fail to see how in moving this car the defendant was guilty of any negligence. It is true that the car, when moved, was standing near a telephone pole; but it also appears that this was not by design, or for the purpose of having the pole used as a loading post. In short, the use to which the telephone pole was put was wholly unwarranted by any act or conduct of an authorized agent of the defendant company.

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[1] Not yet determined.

The plaintiff suggests that an insufficient number of section hands were employed to keep the track and roadbed in repair, and that the company should have employed someone to supervise the loading of the beets. This accident was not caused by a defective roadbed or track; and, as Larkin was the only person loading beets at Gaffey's switch that morning, and when the general nature and character of the business of the company is remembered, we think it must be concluded that these two points, like those already considered, are too speculative, and that they bear no causal or legal connection with the unfortunate accident. In our judgment the negligence of Larkin was that of an independent, intervening responsible agency, and was in law the sole proximate cause of the accident. But, even if we assume that the defendant was guilty of negligence, this accident was not one of the probable results of such negligence, and between it and the injury we can perceive no immediate and legal connection.

The case of Cole v. German S. & L. Society, 59 C. C. A. 593, 124 Fed. 113, 63 L. R. A. 416, seems in point. There a boy who was a stranger to the plaintiff and not in the employ of the defendant, but who had been seen on one occasion prior to the accident endeavoring to operate the elevator, and riding upon it and visiting the boy in charge of it a dozen times, upon his own initiative opened the sliding door of the elevator shaft in order to admit the plaintiff to the elevator. The elevator was at an upper story, in charge of its regular operator. The plaintiff, supposing that the boy who opened the door was in charge of the elevator, stepped into the shaft and fell to the bottom, and was seriously injured. There was no artificial light maintained in the hall, and it was dark and gloomy. There was no lock provided for the door to prevent any one from opening it from the outside, and the door was permitted at times to stand open from one to ten inches. Upon these facts it was held that while the defendant's omissions constituted negligence, still its negligence was not, and the boy's negligence was, the proximate cause of the injury. The court said: "There is no evidence in this case that any such accident or injury as that from which plaintiff suffers ever followed the defendant's act of negligence before the plaintiff fell into the well. Not only this, but there is no evidence that the accident and injury to the plaintiff resulted from these acts or omissions, but positive and convincing testimony that they were produced by the wrongful act of another. * * * There is nothing in the evidence to the effect that the defendant's acts or omissions ever had produced, or ever would in the natural sequence of events have produced any such injury; while the proof is plenary that it was the act of a stranger which actually caused it. * * * The independent, voluntary act of the strange boy who opened the door of the elevator, and invited the plaintiff to enter the well, was incapable of anticipation. No one could have foreseen it as the probable consequence of the acts or omissions of the defendant. It broke the chain of causation between the prior negligence of defendant and the injury to plaintiff, insulated the defendant's acts and omissions from the plaintiff's hurt, and imposed upon the boy who willed and committed the act which produced the injury the sole liability for the damages which resulted from it. The acts and omissions of the defendant were too remote to legally contribute to the injury, or impose liability for it. They were not a proximate cause of the accident, and mischievous and wrongful act of the strange boy was the sole, moving, efficient, proximate cause that produced it."

In Fredericks v. Northern Railway, 157 Pa. 103, 27 Atl. 689, 22 L. R. A. 306, cars left standing on a side track were moved by a stranger to the main track, and caused a collision in which a passenger was injured. The court in that case says: "If obstructions are placed by strangers upon the road either through accident or design, the company is not responsible for the consequences (even to a passenger) unless its agents have been remiss in not discovering them. There was no time for the defendant's agents to discover the mischief, and they cannot be charged with negligence in that respect." In Latch v. Rumner Ry. Co., 3 Hurlst. & N. 930, cited in the last-mentioned case, the plaintiff claimed that it was negligence on the part of the defendant not to have a person to take care of the points of a siding, who could have prevented the accident in question, which was caused by a stranger placing a stone under one of the levers; but the court said that the siding had been in the same state for months and no accident had happened, and the defendant was not bound to have a person stationed there to prevent such a thing. See, also, Goodlander Mill Co. v. Standard

Oil Co., 63 Fed. 400, 11 C. C. A. 253, 27 L. R. A. 586.

No negligent act or omission of the company set in operation Larkin's careless and thoughtless act. There was nothing about the company's manner of conducting business at Gaffey's switch from which this accident could have been foreseen and reasonably anticipated, and any possible cause therefor set in motion by the defendant was remote and imperceptible, and the independent, intervening, deplorable, negligent act of Larkin was the sole proximate cause of the accident and resulting injury.

The court refused to give the following instruction or its substance: "If you believe from the evidence that for more than five years immediately preceding the accident in question the deceased, Wyckoff, was employed by defendant as a locomotive engineer, and that he passed Gaffey's switch during said time often enough and under such circumstances as to make him familiar with the situation there, and with the methods of loading which were followed there, and with the fact that defendant kept no loading superintendent there, and kept no depot or loading platform, and had no track walker, and he also knew or should have known the danger and risk to which he was exposed by reason of said facts and such situation, and with full knowledge of said facts and such situation and the said danger and risk to him, he voluntarily elected to continue and did continue in his said employment as locomotive engineer for as long as two years after having become acquainted with said facts, dangers, and risks and said situation, then I instruct you that by so continuing in his employment he assumed said danger and risk." The deceased passed up and down the road from two to four times a day for the 10 years he was employed by the defendant, and the method of loading and conditions generally at Gaffey's switch during all this time were substantially the same as at the time of the accident. The defendant pleaded the assumption of risk, and we think under the law in this state that the instruction should have been given; for if the deceased knew, or had the means of knowledge, of the defects in the mode of conducting the freighting business at Gaffey's switch, and the dangers likely to result from that mode, and voluntarily remained in the employ of the defendant for (as the instruction reads) two years thereafter, then he cannot recover. Sanborn v. Madera Flume Co., 70 Cal. 266. 11 Pac. 710. The proposed instruction embraced all of the elements of the doctrine of assumption of risk; and as there was evidence in the case from which the jury could have concluded that, if the defendant was guilty of negligence in the method of conducting its business at Gaffey's switch, the deceased knew of this method and of the risks resulting therefrom. Hence the refusal to give this instruction was in our opinion prejudicial.

Numerous other objections are made to the instructions, but, as they may not arise on another trial of the case, we deem it unnecessary to notice them in detail.

The judgment and order are reversed.

We concur: COOPER, P. J.; HALL, J.

MEMORANDUM DECISIONS.

10 Cal. App. 737

CONSOLIDATED PEOPLE'S DITCH CO. v. CENTRAL CALIFORNIA WATER & IRRIGATION CO. et al. (Civ. 421.) (Court of Appeal. Third District, California. July 9, 1909.) Appeal from Superior Court, Tulare County; W. B. Wallace, Judge. Action by the Consolidated People's Ditch Company against the Central California Water & Irrigation Company, also known as the Central California Water Company, and others. From the judgment, one of the parties appeals. Affirmed as modified. Bradley & Farnsworth and O. E. Larkins, for appellant. Hannah & Miller, for respondent.

PER CURIAM. Pursuant to stipulation, it is ordered: That the portion of the judgment in said action which reads as follows: "First. It is ordered, adjudged, and decreed that the following lands of defendant J. W. C. Pogue are riparian to the Kaweah river, to wit: That part of the west half of section thirty-five, in township seventeen south, range twenty-seven east of the Mount Diablo base and meridian, lying east and south of the mid-channel of the Kaweah river, also the northeast quarter, and the west half of the northwest quarter of the southeast quarter of said section thirty-five, and that portion of section three, in township eighteen south, range twenty-seven east, of the Mount Diablo base and meridian, lying east and south of the mid-channel of said Kaweah river—and that six cubic feet per second, and no more, of the water flowing in said Kaweah river is a reasonable quantity of water for the irrigation of said riparian land and for domestic purposes and the watering of live stock thereon by said defendant J. W. C. Pogue; and it is ordered, adjudged, and decreed that, as between plaintiff and said defendant J. W. C. Pogue, said defendant J. W. C. Pogue has, as a riparian owner and as against plaintiff, the prior and superior right to take and divert from the Kaweah river by means of the Pogue, Wallace & Crocker ditch, or Pogue's lower ditch, six cubic feet of water per second of the water flowing in said Kaweah river, and no more, until said plaintiff is first supplied at the head of its ditch, the Consolidated People's ditch, with three hundred cubic feet of water per second of the water flowing in said Kaweah river during the months of January, February, March, April, May, June, July, November, and December of each year, and with forty cubic feet of water per second of the water flowing in said Kaweah river during the months of August, September, and October of each year, and that said defendant J. W. C. Pogue, in the use of said six cubic feet of water per second of the waters of said Kaweah river, has the right to use the same on said riparian lands and on lands away from and not riparian to said Kaweah river, and that after said defendant J. W. C. Pogue is first supplied, at the head of said Pogue, Wallace & Crocker ditch, or at the head of said Pogue's lower ditch, with said six cubic feet of water per second of the water flowing in said Kaweah river, then said plaintiff is entitled at the head of its said ditch to take and divert from said Kaweah river three hundred cubic feet of water per second of the water flowing in said Kaweah river during the months of January, February, March, April, May, June, July, November, and December of each year, and to so take and divert from said Kaweah river forty cubic feet of water per second of the water flowing in said Kaweah river during the months of August, September, and October of each year, before said defendant J. W. C. Pogue is entitled to take or divert any more water from said Kaweah river by means of said Pogue, Wallace & Crocker ditch, or said Pogue's lower ditch, or otherwise; and it is further ordered, adjudged, and decreed that plaintiff have the injunction of this court perpetually enjoining and restraining the said defendant J. W. C. Pogue, his agents, servants, employés, tenants, and all others acting under him or his authority, or in aid of or on behalf of him, from taking or diverting by means of said Pogue, Wallace & Crocker ditch, or said Pogue's lower ditch, or otherwise, more than six cubic feet of water per second of the water flowing in said Kaweah river, or thereafter in any manner interfering with the free and natural flow of the water of said Kaweah river, until said plaintiff is first supplied at the head of its ditch with three hundred cubic feet of water per second of the water flowing in said Kaweah river during the months of January, February, March, April, May, June, July, November, and December of each year, and forty cubic feet of water per second of the water flowing in said Kaweah river during the months of August, September, and October of each year; and it is further ordered, adjudged, and decreed that, as between said plaintiff and said defendant J. W. C. Pogue, said plaintiff do have and recover judgment against said defendant J. W. C. Pogue one-half of the costs and disbursements incurred by said plaintiff in said action, which one-half of said costs and disbursements amounts to the sum of $——, which said plaintiff is entitled to as its costs of suit"—be and the same is hereby changed and modified, so that said portion of said judgment shall be and read as follows: "First. It is ordered, adjudged, and decreed that as between said plaintiff, the Consolidated People's Ditch Company, a corporation, and said defendants Central California Water & Irrigation Company, a corporation (also known as and called Central California Water Company, a corporation), and the Mercantile Trust Company of San Francisco, a corporation, that said defendants have the prior and superior right to take and divert from the Kaweah river by means of the Pogue, Wallace & Crocker ditch, or Pogue's lower ditch, or both of said ditches together, but not otherwise, six cubic feet of water per second of the water flowing in said Kaweah river, and no more, and that no more than six cubic feet of water per second of the water flowing in said Kaweah river shall be taken or diverted from said Kaweah river by said defendants Central California Water & Irrigation Company, a corporation (also known as and called Central California Water Company, a corporation), and the Mercantile Trust Company of San Francisco, a corporation, by means of said Pogue, Wallace & Crocker ditch, or Pogue's lower ditch, or both of said ditches together, until said plaintiff is first supplied at all times, at the head of its ditch, the Consolidated People's Ditch, with three hundred cubic feet of water per second of the water flowing in said Kaweah river, and that, after said defendants have so taken and diverted said six cubic feet of water per second of the waters of said Kaweah river, said plaintiff has the prior and superior right as against said defendants, and each of them, and their and each of their successors and assigns, to take and divert from said Kaweah river the next three hundred cubic feet of water per second of the water flowing in said Kaweah river at the head of plaintiff's said ditch; and it is further ordered, adjudged, and decreed that plaintiff have and is granted the injunction of the superior court of the county of Tulare, state of California, perpetually enjoining and restraining the defendants Central California Water & Irrigation Company, a corporation (also known as and called Central California Water Company, a corporation), and the Mercantile Trust Company of San Francisco, a corporation, and each of them, and their and each of their agents, officers, servants, employés, tenants, successors, and assigns, and all others acting under them or either of them, or under their or either of their authority, or in aid of them or either of them, or for or on behalf of them or either of them, from taking or diverting any water from said Kaweah river, except as aforesaid, or from in any manner interfering with the free and natural flow of the water of said Kaweah river, except as aforesaid." And the court below is directed to change and modify the judgment as aforesaid, and, as so changed and modified, the judgment is affirmed.

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In re HIGGINS' ESTATE. (L. A. 2,411.)

(Supreme Court of California. Sept. 8, 1909. Rehearing Denied Oct. 8, 1909.)

1. WILLS (§ 324*) — CONTEST — NONSUIT — GROUNDS—STATUTE.

The court has no authority to grant a nonsuit except in the cases specified in Code Civ. Proc. § 581, which does not include the withdrawal from the jury of an issue of undue influence, in a will contest, for alleged lack of sufficient evidence to support it.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 769; Dec. Dig. § 324.*]

2. WILLS (§ 324*)—CONTEST—NONSUIT—ISSUES —WITHDRAWAL FROM JURY.

Withdrawal of an issue of undue influence in a will contest from the jury, at the close of the evidence, was equivalent to an order granting a nonsuit as to one of the causes of action.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 769; Dec. Dig. § 324.*]

3. WILLS (§ 324*)—CONTEST—GROUNDS—WITHDRAWAL FROM JURY.

Where probate of a will was contested on the ground of undue influence and testamentary incapacity, the court, in the absence of a request by the proponent, should not have taken the issue of undue influence from the jury on the theory that the evidence was insufficient to justify its submission.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 769; Dec. Dig. § 324.*]

4. WILLS (§ 324*)—CONTEST—SUBMISSION TO JURY.

Where the evidence in a will contest is so conclusive in favor of the proponent that the court would have been bound to set aside a verdict in favor of the contestant, it could refuse to submit the case to the jury.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 767; Dec. Dig. § 324.*]

5. TRIAL (§ 160*) — NONSUIT — MOTION — GROUNDS.

Plaintiff is ordinarily entitled to a motion specifying the grounds on which a nonsuit is asked, that he may, by amendment or further proof, supply the suggested defect.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 368; Dec. Dig. § 160.*]

6. APPEAL AND ERROR (§ 213*) — QUESTIONS NOT RAISED AT TRIAL.

Where a defect urged to support a nonsuit is one which might have been cured if called to plaintiff's attention, defendant cannot urge it for the first time on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1307; Dec. Dig. § 213.*]

7. APPEAL AND ERROR (§ 1061*)—ERRONEOUS NONSUIT—PREJUDICE.

Where the defect in contestant's case in a will contest is incurable, in so far as the claim of undue influence is concerned, the Supreme Court will not order a reversal because of error in granting a nonsuit without formal motion therefor, merely that the case may be submitted to the jury on that issue.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4210; Dec. Dig. § 1061.*]

8. WILLS (§ 324*)—UNDUE INFLUENCE—EVIDENCE.

Evidence *held* insufficient to justify submission of the issue of undue influence in the will contest to the jury.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 769; Dec. Dig. § 324.*]

9. WILLS (§ 166*)—CONTEST—UNDUE INFLUENCE—PRESUMPTION.

Testator, before executing his will, consulted an attorney who visited him for that purpose. At this interview no member of his family but his wife was present. His wife's community interest was explained to him to consist of one-half of the estate, which he declared would be sufficient for her, and he then, after discussing the matter with the attorney, determined the shares to be given his children. *Held* sufficient to overcome the presumption of undue influence arising from confidential relations between testator and the child receiving the largest share, coupled with activity on his part in preparing the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 424; Dec. Dig. § 166.*]

10. WILLS (§ 155*)—EXECUTION—UNDUE INFLUENCE.

Undue influence, to avoid a will, must destroy testator's free agency at the time and in the very act of making the testament.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 375; Dec. Dig. § 155.*]

11. WITNESSES (§ 198*)—COMPETENCY—ATTORNEY—PRIVILEGE.

In a will contest an attorney testified that he had been requested by proponent to draw a deed to be executed by testator conveying all his property to proponent; that he prepared the paper, but testator refused to sign it, and on the following day witness had another conversation with proponent. *Held*, that there being evidence that the relation of attorney and client existed between proponent and attorney, the details of the last-mentioned conversation and concerning the balance of the first conversation were privileged under Code Civ. Proc.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

§ 1881, subd. 2, relating to confident communications between attorney and client.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 747, 753; Dec. Dig. § 198.*]

12. WILLS (§ 164*)—CONTEST—EVIDENCE—REMOTENESS.

Evidence that testator had expressed his disapproval of contestant's marriage, which occurred in March, 1879, was admissible, its remoteness affecting its weight rather than its admissibility.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 410; Dec. Dig. § 164.*]

13. APPEAL AND ERROR (§ 1056*)—EVIDENCE—EXCLUSION—PREJUDICE.

Exclusion of evidence in a will contest that decedent had stated, from 3 to 5 years before, that he intended to keep certain property, afterwards conveyed to proponent for testator's daughter and another son, was not prejudicial, having no direct bearing on the issues of testamentary incapacity and undue influence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4187; Dec. Dig. § 1056.*]

14. APPEAL AND ERROR (§ 1058*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE—EVIDENCE ALREADY RECEIVED.

Exclusion of evidence already received, when offered a second time, is not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4195; Dec. Dig. § 1058.*]

15. EVIDENCE (§ 558*)—EXPERTS—CROSS-EXAMINATION—LIMITATIONS—DISCRETION.

Since the trial court has a wide range of discretion in fixing the limits of cross-examination, contestants having been allowed a reasonably free opportunity to develop any consideration of reliability of experts as to testator's mental condition, the court did not abuse its discretion in refusing to permit contestants to ask expert alienists on cross-examination whether they would put the management of $50,000 worth of property into the hands of a man of testator's mental and physical condition.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2379; Dec. Dig. § 558.*]

16. EVIDENCE (§ 553*)—HYPOTHETICAL QUESTIONS—FACTS ASSUMED.

A hypothetical question assuming facts of which there is no evidence is objectionable.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2373; Dec. Dig. § 553.*]

17. WILLS (§ 82*) — UNREASONABLE PROVISIONS—EFFECT.

In the absence of defect of testamentary capacity, a will will not be set aside because its provisions are unreasonable, unnatural, foolish, or unjust.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 203; Dec. Dig. § 82.*]

18. WILLS (§ 331*)—CONTEST—INSTRUCTIONS—TESTAMENTARY CAPACITY.

An instruction that every one has the right to dispose of his property according to his own desires, and that, if there is no defect of testamentary capacity, effect must be given to his will irrespective of its provisions or of his reasons or motives for making such disposition, and that the jury were not at liberty to consider the character of the provisions, was not erroneous in that it removed from the jury's consideration the terms of the will itself.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 786; Dec. Dig. § 331.*]

19. WILLS (§ 330*)—CONTEST—TESTAMENTARY CAPACITY—INSTRUCTIONS—"SOUND MIND."

An instruction that if testator has sufficient mentality to recognize those who are the objects of his bounty, or should be, and to recollect the property that he is to bestow, and that he is making his will, the courts have no right to disturb it, and that testators have testamentary capacity if they can recognize to whom their bounty should go, or the fact of to whom they wish it to go, and that they have property of which they wish to dispose, was not error when construed with other instructions properly defining "sound mind" as one capable of rationally thinking, reasoning, acting, and determining for himself, or a person of "sound and disposing mind" as one who is in possession of natural mental faculties of mind capable of rationally thinking and acting for himself.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 779-781; Dec. Dig. § 330.*

For other definitions, see Words and Phrases, vol. 7, pp. 6555-6559; vol. 8, p. 7802.]

20. APPEAL AND ERROR (§ 703*)—RECORDS—BILL OF EXCEPTIONS—INSTRUCTIONS.

Where the only reference to instructions alleged to have been refused was in appellant's specification of errors at the close of the bill of exceptions, and the bill of exceptions failed to show that any instructions were requested or refused, the assignments were unsupported by the bill and could not be considered; the assignments not being evidence that the requests were made or denied.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2931; Dec. Dig. § 703.*]

Department 1. Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Application by Herbert R. Higgins for the probate of the will of Thomas J. Higgins, deceased, to which Albert E. Higgins and another filed objection. The will was admitted to probate, and contestants appeal from an order denying their motion for a new trial. Affirmed.

Rehearing denied; BEATTY, C. J., dissenting.

Edwin H. Lamme, Puterbaugh & Puterbaugh, and H. E. Doolittle, for appellants. Wright, Schoonover & Winnek, for respondent.

SLOSS, J. Thomas J. Higgins, a resident of the county of San Diego, died in said county on the 5th day of September, 1907. He left as his heirs his widow, Phœbe B. Higgins, a daughter, Cornelia B. Chick, and two sons, Albert E. Higgins and Herbert R. Higgins. A paper, purporting to be the will of the decedent, was offered for probate by Herbert R. Higgins, and written opposition thereto filed by Albert E. Higgins and Cornelia B. Chick. Two grounds of contest—unsoundness of mind and undue influence exerted by Herbert R. Higgins—were set up by the contestants. The proponent having filed an answer, the contest proceeded to trial before a jury. After all the evidence on both sides had been produced, the court, of its own motion, withdrew from the jury the issue of undue influence, submitting the single question of the competency of Thomas J. Higgins to make a last will and testament. A verdict in favor of such competency was returned, and an order admitting the alleged will to probate followed. The contestants appeal from an order denying their motion for a new trial.

Great stress is laid by the appellants upon the point that the court erred in refusing to submit to the jury the issue of undue influence. The ruling was, in effect, equivalent to an order granting a nonsuit as to one of the causes of action. The cases in which a judgment of nonsuit may be entered are set forth in section 581 of the Code of Civil Procedure, and the court has authority to grant such judgment only in the cases specified by law. Hanna v. De Garmo, 140 Cal. 172, 73 Pac. 830. There is no provision in our statutes authorizing the court (except under circumstances not appearing here) to grant a nonsuit without any motion to that end by the defendant. It would seem, therefore, that the court below should not, in the absence of any request by the proponent, have taken the issue of undue influence from the jury. But, under the facts disclosed by the bill of exceptions, this error or irregularity was not such as to justify a reversal. The evidence on the issue of undue influence was so conclusive in favor of the proponent that the court would have been bound to set aside a verdict in favor of appellants. When this condition appears the court is "justified in refusing to submit the case to a jury." Estate of Morey, 147 Cal. 495, 82 Pac. 57. A plaintiff is ordinarily entitled to a motion specifying the grounds upon which a nonsuit is asked in order that he may, by amendment or further proof, have an opportunity to supply any defect suggested. Where such defect is one which might have been cured, if called to the attention of the plaintiff, it would obviously be unjust to permit a defendant to urge it for the first time in the appellate court. People v. Banvard, 27 Cal. 474; Miller v. Luco, 80 Cal. 261, 22 Pac. 195; Palmer & Rey v. Marysville, etc., Co., 90 Cal. 168, 27 Pac. 21; Durfee v. Seale, 139 Cal. 604, 73 Pac. 435. But this consideration has no application to a case where the evidence has been fully presented, and the plaintiff has totally failed to make out a case which would support findings in his favor. Where there is no reason to believe that any additional evidence in support of the complaint could be produced, it is difficult to see what substantial benefit would be derived from a formal motion for nonsuit, based on the insufficiency of the evidence. Such is the situation here. The defect in contestants' case is incurable, and the court will not order a reversal for the mere purpose of having submitted to the jury an issue which could not be decided in favor of contestants. "Granting," as was said in Estate of Morey, supra, "that the course pursued in this case was irregular, it does not follow that it is fatal to the judgment, even on appeal."

It is not necessary to set out the evidence at length in order to support our conclusion that a verdict finding that the will had been obtained by undue influence could not have been sustained. The contestants showed that for some months prior to his death the testator, a man of advanced years, had reposed great confidence in his son Herbert, the respondent, and that the latter had from time to time importuned his father to settle his affairs. The deceased was suffering from physical ailments, and, according to the testimony offered by contestants, had become greatly weakened mentally. The will was executed on the day preceding the testator's death. Said will, after recognizing the right of the widow to one-half of the estate (the whole being community property) and bequeathing to her the household furniture, gave to the daughter, Mrs. Chick, one-sixth, to Albert E. Higgins, two-sixths, and to Herbert R. Higgins, three-sixths of the residue. It also confirmed a deed, theretofore made by the testator and his wife, conveying a valuable lot to Herbert R. Higgins. In all the testimony of contestants there was nothing to show the exercise of any actual pressure or influence by the proponent, unless it be found in his efforts, some months prior to the execution of the will, to induce his father to dispose of all his property. But his importunities in this direction were unsuccessful. They were uniformly resisted by the testator. Giving to contestants the full force of the presumption of undue influence arising from the confidential relations between the testator and the proponent, coupled with activity on the part of the latter in the preparation of the will (In re McDevitt, 95 Cal. 17, 33, 30 Pac. 101; Coghill v. Kennedy, 119 Ala. 641, 24 South. 459), this presumption was fully met and overthrown by the uncontradicted evidence showing the actual circumstances surrounding the preparation and execution of the will. Estate of Morey, supra. It was shown that the testator, before executing his will, had consulted with an attorney, who visited him for that purpose. At this interview no member of his family, except his wife, was present. The nature and extent of a surviving wife's interest in community property was explained to the testator, who said that one-half of the estate (all of which he declared to be community property) would be sufficient provision for Mrs. Higgins. Concerning the disposition of the other half, he said he did not desire to give his daughter an equal share. He first spoke of giving her $1,500, but before the close of the interview mentioned the sum of $2,500. He stated that he did not want Mr. Chick, his daughter's husband, to handle any considerable amount of his property. In the afternoon of the same day the attorney, accompanied by his son, returned with a draft of the proposed will. In the absence of the proponent the testator was asked for his decision regarding the gift to his daughter. He expressed a thought of raising it to $3,500. The attorney then suggested a division into shares instead of a cash legacy. This, after some consideration, was approved by the testator, and he fixed upon the proportions of one-sixth to Mrs. Chick, two-sixths to Albert, and three-sixths to Herbert. Blanks which had been left in the draft were filled accordingly and the will was executed. Its other provisions, such as appointment of executor, etc., followed the directions of the testator. In the face of this showing, which we have set forth in mere outline, there is no basis for the claim that the will was procured to be made by the undue influence of the proponent. "Undue influence, however used, must, in order to avoid a will, destroy the free agency of the testator at the time, and in the very act of the making of the testament. It must bear directly upon the testamentary act." Estate of Donovan, 140 Cal. 390, 73 Pac. 1081; Estate of McDevitt, 95 Cal. 17, 30 Pac. 101; Estate of Langford, 108 Cal. 608, 41 Pac. 701; Estate of Calkins, 112 Cal. 296, 44 Pac. 577; In re Wilson's Estate, 117 Cal. 262, 49 Pac. 172, 711. The proof above recited amounted to a demonstration that in determining upon the testamentary disposition of his property the testator was forming his own conclusions and expressing his own intentions. On the issue of unsoundness of mind there was testimony in support of contestants' position, but there is no contention that there was not ample evidence the other way to support the verdict in favor of the testator's competency.

Objection is made to certain rulings on the admissibility of evidence. Will H. Holcomb, an attorney at law, testified that he had been requested by the proponent to draw a deed to be executed by the decedent, conveying all of the latter's property to said proponent. He prepared the paper, and took it to the house of the testator, who refused to sign it. On the following day Holcomb had another conversation with the proponent. The testimony tended to show that the relation of attorney and client existed between Holcomb and the proponent, and the court did not, therefore, err, in refusing to permit the witness to state the details of the last-mentioned conversation. Code Civ. Proc. § 1881, subd. 2. The same may be said of the question asked Holcomb on redirect examination regarding the "balance" of the first conversation between himself and proponent. Such part of this conversation as was shown had been brought out by contestants over the proponent's objection. There was, therefore, no waiver of the point of privileged communication.

The contestant Cornelia B. Chick had been married to Martinez Chick in March, 1879. The proponent was permitted to show that, at that time, the testator had expressed his disapproval of the marriage. The occurrence was so remote in point of time that it could throw but little light on the question of the feelings between father and daughter at the date of the will. The lapse of time, however, affected the weight, rather than the admissibility of the testimony. On similar reasoning, the court might well have admitted, instead of excluding, as it did, the testimony of one Gordon (offered by contestants) to the effect that the decedent had stated, some three or four or five years before, that he intended to keep certain property, afterward conveyed to respondent, for his daughter and his son Albert. But this testimony had no such direct and immediate bearing on any of the ultimate issues that its exclusion could furnish a ground for reversal. A different ruling could not have affected the result.

Albert E. Higgins, one of the contestants, was called in rebuttal, and asked what advances had been made to him by his father. Objection to the question was sustained. It may be conceded that the state of the case was such as to make the inquiry material. But the ruling was not prejudicial, since the witness, when called at an earlier stage of the trial, had already testified that all the advances he had received from his father amounted to about $2,300. Repetition would have added no force to this.

In each of two instances a witness, duly qualified, having given his opinion that the testator was of sound mind, was asked by contestants, on cross-examination, whether he would put the management and disposition of $50,000 worth of property into the hands of a man in the mental and physical condition of the testator. An objection was sustained. It may be said that the inquiry was proper cross-examination for the purpose of testing the value of the opinion given by the witness. Even so, we think the ruling did not constitute prejudicial error. The trial court has a wide range of discretion in fixing the limits of cross-examination (Brumagin v. Bradshaw, 39 Cal. 24; Silvarer v. Hansen, 77 Cal. 579, 20 Pac. 136), and the record does not show any abuse of discretion in the ruling complained of. The contestants were allowed a reasonably free opportunity to develop by cross-examination any consideration affecting the reliability of the opinion given by the witness. Dr. Hulbert was called by contestants as an expert witness. An objection to one of the hypothetical questions asked him was properly sustained. There was no evidence of facts assumed as the basis of the question.

The only remaining points are those relating to instructions. In instruction 8 the court told the jury that "every one has the right to dispose of his property according to his own desires, and if there is no defect of testamentary capacity the law must give effect to his will, irrespective of its provisions, or of his reasons or motives for making such disposition; and the jury are not at liberty to consider the character of its provisions, but are solely to determine whether it was his will." The objection raised to this instruction by appellants is that it removes from the consideration of the jury the terms of the will itself. No doubt the nature of the testamentary provisions may be such as to indicate, in connection with other evidence, a want of capacity to make a will. And where the will makes an irrational or unnatural disposition of property, this is a circumstance to be considered in determining the state of mind of the testator. But, if there be no defect of testamentary capacity, a will is not to be upset because its provisions may seem to the court or the jury to be unreasonable, unnatural, foolish, or unjust. In re Wilson's Estate, 117 Cal. 262, 277, 49 Pac. 172, 711; In re McDevitt, 95 Cal. 33, 30 Pac. 101. We think the instruction complained of went no further than to declare the rule as we have just stated it. The declaration that the jury is not to consider the character of the provisions of the will, and the preceding statements that the law must give effect to the will, "irrespective of its provisions, or of his reasons or motives for making such disposition," are all alike qualified by the preliminary clause, "if there is no defect of testamentary capacity." Such, apparently, was the interpretation given to this very instruction when it was upheld by this court in Estate of Nelson, 132 Cal. 182, 64 Pac. 294.

We see no error in the other instructions criticised. In telling the jury that "if there still remains to him (the testator) a sufficient mentality to recognize those who are the objects of his bounty, or should be, and to recollect the property that he is to bestow, that it is his will he is making, and the courts and jury have no right to disturb it," and that "if they (testators) have what is known as testamentary capacity, if they can recognize to whom their bounty should go, or recognize the fact of to whom they want it to go, and the fact that they have property that they wish to dispose of, it is a sound mind sufficient for them to make a testament," the court was not undertaking to give a complete definition of testamentary capacity, but was merely directing the attention of the jury to the established rule that ideal perfection of mentality regarding all subjects is not required, but only such degree of understanding as will enable the testator to act rationally in the matter of making a testamentary disposition of his property. It may be that the language above quoted does not fulfill all the requirements of technical accuracy, but, when read in connection with other instructions defining a sound mind, it is apparent that the jury could not have been misled to the prejudice of the appellants. Among other things, the court told the jury that "a sound mind is one that is capable of rationally thinking, reasoning, acting, and determining for himself, or in other words, a person of sound and disposing mind, who is in possession of the natural mental faculties of mind free from delusions and capable of rationally thinking, and acting for himself." Certainly the instructions, taken together, imposed upon the proponent as severe a test as could reasonably be asked by respondent. We do not suggest that these instructions, in the precise form in which they were given, should be taken as models for future cases, but are satisfied that they did not deprive the appellants of any substantial right.

Of the instructions said to have been requested by contestants and refused, it is sufficient to say that the bill of exceptions fails to show that any instructions were so requested or refused. The only reference to them is in the specifications of error at the close of the bill of exceptions. Among such specifications are several to the effect that the court erred "in refusing to give to the jury instruction No. ——, asked by the contestants, as follows: (setting forth the alleged requested instruction)." The assignments of error, unsupported by the substantive part of the bill, are not evidence that the alleged requests were made or denied. Goldman v. Bashore, 80 Cal. 146, 22 Pac. 82; Ferrier v. Ferrier, 64 Cal. 23, 27 Pac. 960.

The order denying a new trial is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

11 Cal. App. 62

ZENDA MIN. & MILL. CO. v. TIFFIN

(Civ. 622.)

(Court of Appeal, Second District, California. July 21, 1909.)

1. Judgment (§ 780*)—Lien.

The owner of mining land agreed to convey it to C., part of the consideration to be paid in cash and the balance out of the proceeds of milling the ore from the mine, a mill for which purpose C. agreed to install. As a part of the same transaction C. assigned his contract to B. and others who agreed to perform the covenants thereof. Deeds from the owner to C. and from C. to B. and his associates were signed and deposited in escrow, with instructions to deliver them on performance of the conditions specified to B. and associates. The latter fully complied with the contract, whereupon the deeds were delivered and recorded. *Held*, that C. had no interest in the property to which a judgment against him rendered after the date of the agreement of sale, but prior to the delivery of the deeds, could attach.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1341, 1343–1349; Dec. Dig. § 780.*]

2. Judgment (§ 780*)—Lien.

Civ. Code, § 853, provides that when a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made. *Held*, that assuming that C.'s interest, if any, acquired under the contract did not, prior to the docketing of the judgment, pass to B. and his associates, yet, the latter having paid the entire purchase price, C. acquired on the delivery of the deeds merely a naked legal title to which the lien of the judgment did not attach.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1341, 1343–1349; Dec. Dig. § 780.*]

3. JUDGMENT (§ 785*)—LIEN.

The lien of a judgment creates a preference over subsequently acquired rights, but in equity it does not attach to the mere legal title to the land as existing in the defendant at its rendition to the exclusion of a prior equitable title in a third person.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1358–1362; Dec. Dig. § 785.*]

4. EXECUTION (§ 272*) — SALE — BONA FIDE PURCHASER.

A purchaser at a sale under a judgment who had actual knowledge of the record of documents evidencing a transaction whereby the judgment debtor had sold his interest in the land to a third party, and of the possession of the latter, had notice and means of knowledge equivalent to notice of such third party's ownership, and acquired no title.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 781–788; Dec. Dig. § 272.*]

Appeal from Superior Court, Kern County; Paul W. Bennett, Judge.

Action by the Zenda Mining & Milling Company (a corporation) against W. W. Tiffin. Judgment for plaintiff, and defendant appeals. Affirmed.

Thos. W. Scott and Kemp & Collier, for appellant. Waterman & Wood, for respondent.

SHAW, J. On November 28, 1903, defendant Tiffin had docketed in Kern county a deficiency judgment against George W. Cummings. On September 25, 1905, claiming that Cummings had, after the docketing of the judgment acquired an interest in certain mining property situated in Kern county, the title to which then stood in the name of plaintiff, to which the lien of his judgment had attached, defendant had an execution issued and caused the same to be levied upon said mining property and sold to satisfy said judgment so docketed against Cummings. At the sale defendant became the purchaser thereof, whereupon plaintiff brought this action to quiet title. Judgment went in favor of plaintiff, from which defendant prosecutes an appeal upon the judgment roll.

The case was tried upon an agreed statement of facts, from which it appears that on September 8th, prior to the docketing of said judgment, Benjamin G. Parlow entered into an agreement with Cummings whereby he agreed to sell and convey to the latter an undivided $^{26}/_{48}$ interest in said mining property, together with certain water rights and mill site connected therewith. The consideration for such proposed sale was $8,920, $3,500 of which was payable in cash, and the balance to be paid out of the proceeds of milling the ore from the mine, a mill for which purpose Cummings agreed to install within eight months from September 8th. At the time of entering into this contract Parlow signed and acknowledged two deeds conveying the property to Cummings. On the same day, and as a part of the same transaction, Cummings entered into a contract with H. W. Bryson and associates, which was, in effect, an assignment to Bryson et al. of the contract secured by him from Parlow; Bryson and associates agreeing to perform the covenants made by Cummings in his contract with Parlow. As part of the same transaction, and on the same date, Cummings signed and acknowledged two deeds, wherein Bryson and associates were made grantees, which deeds were of like effect as those wherein he was made grantee in the deeds from Parlow. Bryson and his associates paid to Parlow the cash payment of $3,500, and thereupon the contract made between Parlow and Cummings, together with the deeds from Parlow to Cummings, and the contract between Cummings and Bryson et al., together with the deeds from Cummings to Bryson and associates, were placed in escrow with instructions to the holder, signed by all of said parties, to the effect that if Bryson and associates should, within the time specified, perform the conditions specified in the contracts, all of said papers and deeds were to be delivered to the latter; otherwise, and in case of failure to comply with the conditions, the Parlow agreement and deeds by him made to Cummings should be delivered to Parlow, and the other papers to Cummings. Bryson and associates entered into possession of the property, and thereafter fully complied with the conditions of the escrow and received all of the papers some time in March, 1904, at which time all of them were filed for record, actual notice of which fact defendant had long prior to the sale. Plaintiff was created a corporation by Bryson and associates, and they, by deed dated February 24, 1904, conveyed all of said property so acquired from Parlow to the corporation. Cummings never paid anything on account of the purchase of the property; the entire consideration therefor having been paid by Bryson and associates. After entering into possession of the property on September 8, 1903, Bryson et al., and plaintiff, as their grantee, made improvements, extracted ore from said mine, and milled the same. The judgment must be sustained on several grounds.

Appellant argues at great length that the deed from Parlow to Cummings did not become operative prior to docketing of the judgment, but subsequent thereto. Conceding this to be true, it does not follow that Cummings acquired any interest in the property by virtue of such deed. Under the provisions of section 671, Code Civ. Proc., the judgment when docketed became a lien upon such real property situate in the county and not exempt which Cummings might then own, or such as he might thereafter acquire, until the lien ceased. Appellant does not claim that he owned the property at the time of the docketing of the judgment, but contends that he subsequently acquired the $^{26}/_{48}$ interest. Whatever interest Cummings acquired was by virtue of the Parlow agreement, pursuant to which Parlow signed and acknowledged deeds to the property, making Cummings grantee therein. These deeds, however, were not delivered to Cummings, nor was it contemplated in any event that they should be so delivered. The rights of Cummings of whatever character or value were on September 8th prior to the docketing of the judgment, actually transferred to Bryson and associates. Cannon v. Handley, 72 Cal. 133, 13 Pac. 315. Thereafter Cummings had, and could have, no interest in the property. He had parted with all interest in or control over it. Howell v. Foster, 65 Cal. 173, 3 Pac. 647; People ex rel. Ford v. Irwin, 14 Cal. 428. He could acquire none under the instructions of escrow, because the contracts and deeds, upon compliance with the conditions of the contract by Bryson and associates, were to be delivered, not to Cummings, but to the former, in whom it was intended to vest the title.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It may be admitted that delivery of the deeds conveyed to Cummings an apparent interest in the property, but it was nothing more than a naked legal title. Assuming that his interest, if any, acquired under the Parlow contract did not pass to Bryson and associates on September 8th prior to docketing of the judgment, nevertheless, they, Bryson et al., paid the entire purchase price and "the doctrine is well established that where land is purchased in the name of one person, and the consideration is paid by another, the land will be held by the grantee in trust for the person furnishing the consideration." Riley v. Martinelli, 97 Cal. 575, 32 Pac. 579, 21 L. R. A. 33, 33 Am. St. Rep. 209; Currey v. Allen, 34 Cal. 254; Civ. Code, § 853. "Whenever one is a mere conduit, as where he purchases property in his name as the agent of another, with the latter's funds, and subsequently conveys to him, there is no interest to which a judgment lien can attach." Freeman on Judgments, § 373. A correct statement of the rule is that the lien of a judgment creates a preference over subsequently acquired rights, but in equity it does not attach to the mere legal title to the land as existing in the defendant at its rendition to the exclusion of a prior equitable title in a third person. Wilcoxson v. Miller, 49 Cal. 193; Atkinson v. Hancock, 67 Iowa, 452, 25 N. W. 701; Ransom v. Sargent, 22 Kan. 516; Freeman on Executions, § 335. Moreover, in addition to the fact that Cummings had no interest in the property to which the lien of the judgment attached, defendant by reason of actual knowledge of the record of the documents evidencing the transaction, and possession of the property by plaintiff, had notice and means of knowledge equivalent to notice (Lady Washington C. Co. v. Wood, 113 Cal. 482, 45 Pac. 809; San Diego Land Co. v. La Presa School Dist., 122 Cal. 98, 54 Pac. 528) of the facts showing plaintiff to be the real owner of the property. A voluntary purchaser from Cummings having such notice could acquire no title to the property (Galland v. Jackman, 26 Cal. 79, 85 Am. Dec. 172; Stonesifer v. Kilburn, 122 Cal. 659, 55 Pac. 587), and a purchaser with notice under judicial sale could occupy no better position (O'Rourke v. O'Connor, 39 Cal. 442; Freeman on Judgments, § 366).

The several documents, contracts, and deeds constituting but one transaction antedating the docketing of the judgment, and the purpose and effect of which, upon compliance with the terms thereof, was to vest title to the property in plaintiff's grantors, who had paid the entire purchase price thereof, it would seem clear that Cummings never at any time acquired any interest in the property, and that defendant possessing full knowledge of all the facts constituting the transaction acquired no interest in the property by reason of purchasing the same at a sale under execution issued to enforce payment of the deficiency judgment docketed against Cummings.

Judgment affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

11 Cal. App. 120

PEOPLE v. WYATT. (Cr. 129.)

(Court of Appeal, Second District, California. Aug. 6, 1909.)

1. Witnesses (§ 372*)—Cross-Examination to Show Bias.

While a question on cross-examination to show bias was proper, such a question was improper where it contained a covert insinuation of improper conduct by witness, a young girl, which was not necessary to disclose the bias, especially where the fact testified to by her was positively established by four other witnesses, and no other conclusion than guilt would have been justified if her testimony had been wholly discredited.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1192–1199; Dec. Dig. § 372.*]

2. Witnesses (§ 268*)—Cross-Examination—Scope and Extent.

The desire of a client to satisfy personal ill feeling against a witness can never justify an attorney in asking questions which unnecessarily reflect on the character of such witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931–948; Dec. Dig. § 268.*]

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Birt Wyatt was convicted of arson, and from the judgment, and an order denying a motion for new trial, he appeals. Affirmed.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Chas. Ezra Williams, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

TAGGART, J. Defendant was convicted of the crime of arson, and appeals from a judgment of three years' imprisonment pronounced upon a verdict of guilty, and from an order denying his motion for a new trial.

The only error urged as a ground for a reversal is based upon a ruling of the trial court sustaining an objection to a question addressed to a witness for the prosecution on cross-examination. It is contended that the purpose of the question was to disclose animus upon the part of the witness toward the defendant. To the extent that it was directed to this end, the question was proper; and, if it had been confined to this, should, and no doubt would, have been allowed, but, as it contained a covert insinuation of improper conduct upon the part of the witness to whom addressed, it was not a proper question, unless the part containing such insinuation were necessary to elicit the information respecting the animus. Had this element been omitted from the question, the witness might have admitted her animus, or, if the question had been directed to this purpose alone, and she had refused to answer, the reasons of the animus might have become proper matter of cross-examination. It is apparent, however, that the purpose was to reflect upon the character of the witness (a young girl), and the court was not only justified in sustaining the objection, but might well have instructed the jury to remove from their consideration any suggestion caused by the question. The duty of an attorney appearing for a person charged with crime does not require that he shall introduce, or attempt to introduce, or unnecessarily incorporate in a question claimed to have been asked for some other purpose, matter prejudicial to the honor or reputation of either a party or a witness. In this case the facts alleged in the information were established beyond the shadow of a doubt without the evidence of the witness to whom this question was addressed. Her testimony related only to the identification of defendant, and had it been entirely discredited, no conclusion but that of the guilt of defendant could have been drawn from the evidence. Four other witnesses positively identified the defendant in a way that connected him more closely with the crime than did the testimony of the witness in question, and there is not one fact in the evidence in the case inconsistent with the testimony of these witnesses in this respect. Code Civ. Proc. § 282, subd. 6. It is apparent that the importance of her testimony did not require that this witness should have been singled out for this attack. The form of the question indicates that it was intended to gratify some personal feeling of the client, and we cannot refrain from suggesting to attorneys that such a motive is not sufficient to justify them in asking questions of this character. We think it our duty to not only sustain the ruling of the trial court, but commend it to the attention of attorneys for their future guidance.

Judgment and order affirmed.

We concur: ALLEN, P. J.; SHAW, J.

(156 Cal. 269)

LANE v. WILLIAMS et al. (L. A. 2,280.)

(Supreme Court of California. Sept. 15, 1909.)

1. CONTRACTS (§ 186*)—BREACH OF AGREEMENT—PERSONS ENTITLED TO SUE.

Any breach of a copartnership contract creates a cause of action in favor of the partner injured, not in favor of one whom he may have employed as a representative.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 790–797; Dec. Dig. § 186.*]

2. FRAUD (§ 47*)—ACTIONS—COMPLAINT—SUFFICIENCY.

Allegations that defendants conspired to defraud plaintiff by inducing him, through false representations, to purchase a dairy business, that relying on the representations plaintiff purchased an undivided one-half interest with intent to give it and which he did give to his daughter, causing the bill of sale to be made to and delivered to her, and that neither plaintiff nor his daughter ever received anything from defendants, are demurrable for failure to state clearly a cause of action in plaintiff's favor, as it is not clear just what his interest may be, he having formerly parted with all apparent interest in his daughter's favor, and he should affirmatively show such a cause of action in his favor as will prevent a subsequent judgment in his daughter's favor for the same money.

[Ed. Note.—For other cases, see Fraud, Dec. Dig. § 47.*]

Department 2. Appeal from Superior Court, Santa Barbara County; Walter Bordwell, Judge.

Action by H. P. Lane against Albert C. Williams and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Ralph W. Schoonover, for appellant. W. S. Day and W. C. Day, for respondents.

MELVIN, J. Plaintiff, who is appellant here, filed complaints to which demurrers were successively interposed and sustained. To his fourth amended complaint the demurrer was sustained without leave to amend, and judgment having been entered according to that ruling, he takes this appeal from said judgment. Appellant has endeavored to plead three causes of action in his fourth amended complaint. In the statement of the first one it is alleged that defendants, who were husband and wife, conspired together to cheat and defraud plaintiff, by inducing him, through certain false representations, to purchase from them the whole of, or a half interest in a certain dairy; that some of the property used in the conduct of said dairy was not owned by Williams and his wife, and that the rest of it was mortgaged for nearly, if not quite, its full value; that in pursuance of their conspiracy the defendants communicated to a Mrs. Bense, who, in turn, conveyed information of the supposed facts to appellant, a false statement with reference to the title of defendants to the property, the net profits of the business, and other matters which are enumerated in the pleadings. It is also set forth that, at a later day, Williams and his wife affirmed to Lane the statement that Mrs. Bense had made to him, and added other false representations regarding the value of the dairy, the cattle, and other matters relating to the business, and that they concealed from plaintiff the fact that some of the personalty used in the business was not theirs, and suppressed all information relating to the existing mortgage on the property. It is further averred that, relying on the representations made by Williams and his wife, on March 17, 1904, Lane purchased from them an undivided one-half interest in said dairy for $6,500, with intent to give said interest to his daughter, Mrs. Addie L. Allen; that he did give her the property so purchased, causing the bill of sale to be executed in her favor and delivered to her; and that respondents then and there received for said half interest in the business $4,000 in cash, paid by Lane out of his own funds, and a promissory note for $2,500, payable to respondents in one year, with interest, which said note was executed by Mrs. Allen and secured by a chattel mortgage upon said interest in the property. It is further averred that neither Lane nor his daughter ever received anything from defendants for the $4,000 paid as aforesaid, and judgment for damages in that sum is demanded.

In his second cause of action appellant sets up the matters of fraud charged in the first one, and further alleges that his daughter, Mrs. Allen, and A. C. Williams formed a copartnership and that he was employed by Mrs. Allen to manage her interest in the firm, but was prevented from so doing by the defendants, who neither delivered the property to Allen, or to his daughter, nor permitted them, or either of them, to participate in the management of the business.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

He charges that, as a consequence of the conduct of the respondents, he lost three years' time, and the result of three years' labor, and he asks for damages in the sum of $3,000.

The third cause of action resembles the second, except that it is for $100 damages, alleged to be due as a result of moving plaintiff's family to Santa Barbara from Ventura, when he went to the former place to take charge of his daughter's business.

The demurrer interposed to this complaint was upon the grounds that it did not, in either of its divisions, state facts sufficient to constitute a cause of action; that the first cause of action is uncertain and unintelligible because therefrom it cannot be ascertained whether A. C. or Lilly Le Noir Williams conspired as partners, as joint owners in common, or acting from a common purpose and motive; and that the first cause of action is barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure.

The causes of action which appellant attempted to state in his fourth amended complaint, depending upon the alleged damage occasioned by his removal from Ventura and his loss of time, were stated in some form in the original complaint, as well as in the last one. The demurrer as to these causes of action was properly sustained. The employment of appellant was by Mrs. Allen, and not by respondents. It is not pleaded that there were any contractual relations between defendants and appellant. On the contrary, although they had agreed that Mrs. Allen, in consideration, among other things, of devoting all of her time to the business, was to get a certain percentage of the profits of the copartnership, she was merely given the right to furnish her father's services at any time in lieu of her own. Appellant was not a member of the firm. Any breach of the contract of copartnership creates a cause of action in favor of the copartner who is injured—not in favor of one whom such partner may have employed as a representative.

While there is no demurrer upon the ground of misjoinder of parties plaintiff, we think that the demurrer to the main cause of action must be sustained upon the general ground that plaintiff fails to state clearly a cause of action in his favor. According to the allegations of the complaint Mrs. Allen received a bill of sale for the property. It is true that there is an allegation to the effect that neither she nor the plaintiff received anything for the $4,000, or for the note. Yet, while it appears that defendant did not own some of the property mentioned in the bill of sale, there is no allegation either that Mrs. Allen was not in a position to obtain a portion of the property, that she was not satisfied with such title as she had, or that she was willing to surrender the bill of sale and rescind the contract so far as she was concerned. In other words, it is not clear just what plaintiff's interest in the matter may be, he having formally parted with all apparent interest in favor of his daughter. He should affirmatively show such cause of action in his behalf as would prevent a subsequent judgment in her favor for the same money.

We are therefore of the opinion that the demurrer to this cause of action was properly sustained. This conclusion relieves us of the necessity of determining whether or not the action was barred by the provisions of section 339, subd. 1, Code Civ. Proc.

Judgment affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(156 Cal. 267)

BRADLEY v. DAVIS. (Sac. 1,696.)

(Supreme Court of California. Sept. 14, 1909.)

1. DOMICILE (§ 4*)—DOMICILE OF CHOICE—VOTING.

The mere fact that one is registered in a certain place and has voted therein is not conclusive on the question of his domicile.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. § 19; Dec. Dig. § 4.*]

2. APPEAL AND ERROR (§ 1024*)—REVIEW.

A finding on the question whether defendant resided in a certain county when the action was commenced, and was entitled as a matter of right, under Code Civ. Proc. § 395, to have the action transferred to such county, will not be disturbed on appeal, where the evidence is conflicting.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3836, 4020; Dec. Dig. § 1024.*]

In Bank. Appeal from Superior Court, El Dorado County; N. D. Arnot, Judge.

Action by J. H. Bradley against F. M. Davis. From an order denying a motion for change of place of trial, defendant appeals. Affirmed.

C. E. Peters, for appellant. Hinkson & Elliott, for respondent.

ANGELLOTTI, J. This is an appeal from an order denying defendant's motion for a change of place of trial of the action from the superior court of El Dorado county to the superior court of Sacramento county, made upon the ground that the defendant was a resident of Sacramento county at the time of the commencement of the action. The motion was heard, submitted, and determined solely upon affidavits. These affidavits were conflicting upon the question of the place of residence of defendant at the time of the commencement of the action. The affidavits of plaintiff and G. S. Estey were positive and unequivocal to the effect that the defendant was then a resident of El Dorado county, and there is nothing in either affidavit from which we are authorized to infer that the affiants did not have personal knowledge of the facts as to which they swore positively and without qualification. Under these circumstances, notwithstanding the fact that defendant's counteraffidavit is very clear and specific, it must be held that there was a substantial conflict on the question of residence. It has heretofore been held, and we think correctly, that the mere fact that one is registered in a certain place and has voted therein is not conclusive evidence upon the question of his domicile. Quinn v. Nevills, 7 Cal. App. 231, 93 Pac. 1055.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Under section 395, Code of Civil Procedure, defendant was entitled as a matter of absolute right to have the action transferred to Sacramento county, if he resided therein at the time of the commencement of the action. The question whether he did so reside in Sacramento county was, however, one to be determined primarily by the court in which the action was instituted and to which the motion for the change of place of trial was addressed; and it is well settled that the finding of a trial court upon this question of fact will not be disturbed on appeal, where the evidence in respect to residence is conflicting, even though the whole evidence upon the question is contained in affidavits. Hastings v. Keller, 69 Cal. 606, 11 Pac. 218; Daniels v. Church, 96 Cal. 13, 30 Pac. 798; Ludwig v. Harry, 126 Cal. 377, 58 Pac. 858. Two of the cases just cited were decided subsequently to the case of Tuller v. Arnold, 93 Cal. 166, 28 Pac. 863, wherein, upon an appeal from an order refusing to dissolve an attachment, it was said that the rule that this court will not pass upon the evidence when conflicting does not apply where the evidence is documentary. This statement is not in accord with the other decisions of this court. The rule has been applied on appeals from orders refusing a change of place of trial, where the question of fact presented solely by affidavits was as to where the contract sued upon was made (see Lakeshore Cattle Co. v. Modoc, etc., Co., 108 Cal. 261, 41 Pac. 472; Bowers v. Modoc, etc., Co., 117 Cal. 50, 48 Pac. 979; Brown v. S. F. Sav. Union, 122 Cal. 648, 55 Pac. 598), and also in several cases on appeals from orders granting or denying motions for new trial, made by a judge who did not preside at the trial. In fact, we know of no case in which it has not been held applicable, even where the evidence was entirely documentary, except the case of Tuller v. Arnold, supra; and while there is some force in the contention that the reasons for the rule are not as strong and apparent in cases where the evidence is entirely documentary as in cases where witnesses have testified orally before the lower court, in view of the many decisions on the subject it must be taken as settled in this state that the rule is applicable in both classes of cases.

We perceive no ground upon which the appeal can be properly sustained.

The order is affirmed.

We concur: SHAW, J.; MELVIN, J.; LORIGAN, J.; SLOSS, J.; HENSHAW, J.

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156 Cal. 294

MATTHEWS v. TOWN OF LIVERMORE et al. (S. F. 5,150.)

(Supreme Court of California. Sept. 22, 1909.)

1. STATUTES (§ 205*) — CONSTRUCTION — SECTIONS FORMING PART OF ONE ACT.

Sections which are parts of one act, relating to a particular subject, must be construed together, and harmonized so far as possible.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 282; Dec. Dig. § 205.*]

2. MUNICIPAL CORPORATIONS (§ 283*)—CONSTRUCTION OF SEWERS—POWERS.

The general power given by Municipal Corporation Act (St. 1883, p. 269, c. 49) § 862, as amended by St. 1903, p. 93, c. 86, § 1, empowering the board of trustees of cities of the sixth class to construct sewers, and to perform all other acts necessary or proper to carry out the provisions of the act, is limited by section 874, as amended by St. 1897, p. 89, c. 87, § 1, providing that sewer work, costing more than $100 shall be done by contract, to be let to the lowest bidder, after notice, so that the construction of sewers costing more than $100 must be done by contract, let after notice, and an opportunity for competing bids, but sewers not costing more than $100 may be built in any manner, with or without contracts, or the taking of bids.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 754; Dec. Dig. § 283.*]

3. MUNICIPAL CORPORATIONS (§ 283*)—CONSTRUCTION OF SEWERS—POWERS.

The proviso in City Bond Act (St. 1901, p. 30, c. 32) § 9, providing that contracts for public work shall be let to the lowest bidder, added by St. 1907, p. 611, c. 330, § 4, declaring that nothing therein contained shall prohibit the municipality itself from constructing such work, is not an affirmative grant of power, and a city prohibited by Municipal Corporation Act (St. 1883, p. 274, c. 49) § 874, as amended by St. 1897, p. 89, c. 87, § 1, from constructing sewers costing more than $100, without contract therefor, let after notice and an opportunity for competing bids, cannot itself do the work, employing the labor therefor, but the proviso prevents the taking away of the power to build small works by day labor, reserved by section 862, as amended by St. 1903, p. 93, c. 86, § 1.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 754; Dec. Dig. § 283.*]

4. MUNICIPAL CORPORATIONS (§ 323*)—CONSTRUCTION OF PUBLIC WORKS—INJUNCTION.

Injunction lies, at the suit of a taxpayer, to enjoin a city of the sixth class from constructing a sewer system costing more than $100 by the direct employment of labor and purchases of materials.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 842; Dec. Dig. § 323.*]

Department 1. Appeal from Superior Court, Alameda County; Wm. H. Waste, Judge.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Action by F. L. Matthews against the Town of Livermore and others. From a judgment for defendant on sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

Reed, Black & Reed and E. Nusbaumer, for appellant. H. A. Mason and W. H. Donahue, for respondents.

SHAW, J. The plaintiff appeals from a judgment entered against him by the court below upon sustaining a demurrer to the complaint. The object of the plaintiff's action is to enjoin the town of Livermore, and the other defendants as its trustees, from proceeding to construct a system of sewers for said town, by the direct employment of labor and purchase of material, instead of having it done by contract let to the lowest bidder, as the plaintiff claims they should in order to comply with the law and act within their powers. It appears that the cost of the sewer system would exceed $100. Livermore is a city of the sixth class. Plaintiff was a taxpayer, and sues in that capacity. The court below was of the opinion that a city of the sixth class has power, under statutes in existence, to build sewers costing more than $100, without letting the work by contract, and gave judgment refusing the injunction.

The act of 1883 (St. 1883, p. 93, c. 49) provides for the organization, incorporation, and government of municipal corporations. Section 862 of that act, relating to powers of cities of the sixth class, as amended in 1903, declares that: "The board of trustees of such city shall have power: * * * (5) To construct, establish and maintain drains and sewers. * * * (17) To do and perform all other acts and things necessary or proper to carry out the provisions of this act." St. 1903, p. 93, c. 86, § 1. Section 874, as amended in 1897, provides that "in the erection, improvement, and repair of all public buildings and works, in all street and sewer work, * * * and in furnishing any supplies or materials for the same, when the expenditure required for the same exceeds the sum of one hundred dollars, the same shall be done by contract, and shall be let to the lowest responsible bidder, after notice by publication in a newspaper of general circulation printed and published in such city or town, for at least two weeks." St. 1897, p. 89, c. 87, § 1. These sections are parts of one act relating to a particular subject, and they are to be construed together, and harmonized so far as possible. So construed, it cannot be denied that the general power to construct sewers given by section 862 is limited and modified, with regard to sewers costing more than $100, by the specific provisions of section 874, requiring public works of that magnitude to be done by contractors upon contract let to them after due advertisement and an opportunity for competing bids. Unless there is some other or later statute enlarging their powers, or modifying these provisions, the board of trustees were attempting to exceed their powers, and their action should have been enjoined as prayed for.

The respondents claim that authority for the construction of the sewer system in the mode proposed is found in the amendment of 1907 to section 9 of the City Bond Act of 1901. St. 1901, p. 30, c. 32; St. 1907, p. 611, c. 330, § 4. The material parts of the amended section are as follows: "All contracts for the construction or completion of any public work or improvement or for furnishing labor or materials therefor, as herein provided, shall be let to the lowest responsible bidder. [Then follow provisions requiring advertising for sealed bids and bonds from the contractor.] Provided, however, that nothing herein contained shall be construed as prohibiting the municipality itself from constructing or completing such works or improvements, and employing the necessary labor therefor." The amendment of 1907 consisted of the addition of the proviso. The theory of the respondents is that the purpose and intention of the Legislature in enacting the proviso was to enable cities constructing public works with money obtained by the sale of bonds issued under this act to do it by direct purchase of materials and direct employment of workmen, without letting contracts therefor after competitive bidding. The complaint alleged that the city had issued bonds in the sum of $35,000 for the purpose of constructing a sewer system.

We think the proviso fails to express such intent or purpose. Its language is entirely negative in effect. It does not purport to confer power, or remove restrictions formerly imposed by other laws. It merely declares how the previous restriction in that section shall be understood and construed. The municipal corporation act contained provisions, couched in general terms, giving power to cities of the third, fourth, fifth, and sixth classes to construct various public works in any way they saw fit. By section 874, above quoted, and by sections 536, 628, and 777, these cities were required to do such work by contract let to the lowest bidder, after advertisement for bids duly made, except in the case of works of small extent; in cities of the third and fourth classes where the cost did not exceed $500, in the fifth and sixth classes where it did not exceed $100. In the excepted cases they could proceed in any manner, with or without contracts or the taking of bids. The proviso to section 9 of the bond act was obviously inserted to preserve this power as to the works of small cost, a power which the opening clause of that section, by reason of its general terms, seemed to take away, and to prevent the section from being given an effect which it was plain was not within the scope or purpose of the bond act. Its main purpose was to enable cities to borrow money for the construction of public works of large cost for which the ordinary revenue would be insufficient. It is scarcely conceivable that cities of the classes mentioned would be under the necessity of borrowing money to build works costing less than $500, or $100, as the case might be. The framers of the bond act had no such insignificant enterprises in mind when it was first enacted, and the failure to except them was obviously an inadvertence. By the time the amendment of 1907 came up for consideration, doubtless the seeming inconsistency between the bond act and the municipal corporation act, in that regard, had been discovered, and the proviso was inserted to remove all doubt as to the effect of the bond act upon such small public works. This sufficiently explains the proviso, and accounts for its negative terms. It has no affirmative force as a grant of power. There is therefore no support for the respondents' position. The municipal corporation act clearly forbids the city to construct public works costing over $100, except by letting the work out to contract. The opening clause of section 9 is more prohibitive and forbids any work, small as well as large, except by contract duly let to bidders. The proviso added in 1907 may prevent this from taking away the power to build small works by day's labor, reserved by the municipal corporation act, but it has no affirmative effect to give the larger power here claimed.

It follows that the court below erred in holding that cities of the sixth class have power to build a general sewer system costing thousands of dollars without letting the same to the lowest bidder, as the law prescribes. The complaint, although not as specific as it should be in some respects, concerning which the respondent does not here criticise it, states a cause of action for an injunction, and the demurrer should have been overruled.

The judgment is reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.

(156 Cal. 286)

ALLEN v. GLOBE GRAIN & MILLING CO. et al. (S. F. 5,049.)

(Supreme Court of California. Sept. 20, 1909.)

1. Vendor and Purchaser (§ 133*)—Contracts—Perfect Title.

Where a contract for the sale of real estate calls for a perfect title, the purchaser is entitled to a title free from reasonable doubt and fairly deducible of record.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 234; Dec. Dig. § 133.*]

2. Vendor and Purchaser (§ 133*)—Contracts—Perfect Title.

A contract for the sale of real estate, which calls for a valid title, for a title not defective, for a perfected title in case on examination the title be found defective, and which provides that, if the title is defective and cannot be perfected within the time specified, the contract shall become void, calls for a good title by the record.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 234–237; Dec. Dig. § 133.*]

3. Vendor and Purchaser (§ 141*)—Rejection of Title—Notice.

A notice by a purchaser of his rejection of the title on the ground that there is no official record in the county showing that the vendor is the owner in fee of the property or any part thereof, and nothing to show that the record title is vested in him, is a sufficient specification of the objection of want of record title where the records of the county recorder's office had been destroyed by fire, so as to make it impossible to determine from any public record whether the vendor's title is valid.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 265; Dec. Dig. § 141.*]

4. Principal and Agent (§ 136*)—Liability of Agent—Payment to Agent.

Where the cash partial payment made by a purchaser to the agent of the vendor was paid to and received by the agent solely as agent for the vendor, and the money was accounted for and paid to the vendor by the agent, the vendor was alone liable for the repayment thereof on the happening of the conditions calling for repayment.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 480; Dec. Dig. § 136.*]

5. Appeal and Error (§ 1036*)—Harmless Error—Misjoinder.

Where a defendant was liable to plaintiff on the demand sued on, the judgment against defendant will not be reversed merely because a third person was improperly joined as codefendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4069–4074; Dec. Dig. § 1036.*]

6. Appeal and Error (§ 1040*)—Harmless Error—Misjoinder.

A judgment after trial on the merits will not be reversed because the court improperly overruled a demurrer on the ground of misjoinder of parties; such misjoinder not affecting any substantial right of a party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4098, 4105; Dec. Dig. § 1040.*]

7. Judgment (§ 237*)—Against One or More Co-Parties.

Judgment may be given against such of several defendants jointly charged, as are shown to be liable, and in favor of the others not shown to be liable, subject to the qualification that the defendants held liable must be protected against any material variance between the pleadings and proof.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 415–417; Dec. Dig. § 237.*]

8. Vendor and Purchaser (§ 341*)—Action for Deposit—Pleading, Proof, and Variance.

The variance between the complaint in an action by a purchaser for a cash deposit, stating a joint cause of action against the vendor and his agent in the making of the contract, and alleging that the money had been paid to defendants, and the proof that the purchaser had paid the money to the agent as such, and that the agent had accounted for and paid the same to the vendor, did not defeat a recovery against the vendor alone.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 341.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

9. VENDOR AND PURCHASER (§ 336*)—REJECTION OF TITLE — RECOVERY OF CASH DEPOSIT.

A purchaser in a contract for the sale of real estate, which stipulates that, if the title is not made good within 60 days after notice of a defect therein, the cash deposited by the purchaser shall be returned, does not waive any right by giving to the vendor a 60 days' notice within which to perfect the title, though under the facts it is obvious to both parties that the defect cannot be cured within that period, and, on the defect not being cured, the liability to repay the deposit becomes fixed and absolute on the expiration of the 60 days, and the mere deferring of the demand for the money does not deprive the purchaser of the right to recover the deposit.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 984; Dec. Dig. § 336.*]

10. VENDOR AND PURCHASER (§ 341*)—REJECTION OF TITLE—RECOVERY OF CASH DEPOSIT —INTEREST.

Where the purchaser in a contract for the sale of real estate stipulating that, if the title was not made good within 60 days after notice of a defect therein, the cash deposited by him should be returned, gave a notice rejecting the title on the ground of defects specified and the defects were not cured within the 60 days, the purchaser could only recover interest on the deposit from the date of the subsequent demand for its return.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 1017; Dec. Dig. § 341.*]

11. COSTS (§ 238*)—COSTS ON APPEAL—LIABILITY.

Where an objection to the allowance of interest from a designated date, instead of a subsequent date, was not specifically made prior to the filing in the Supreme Court of appellant's reply brief, and the objection did not constitute a ground on which the appeal was taken to the Supreme Court, the court, though correcting the error, will not permit appellant to recover his costs of the appeal.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 908-912; Dec. Dig. § 238.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by W. G. Allen against the Globe Grain & Milling Company and others. From a judgment for plaintiff, the defendant named appeals. Modified and affirmed.

Page, McCutchen & Knight, for appellant. Walter H. Linforth, for respondent.

ANGELLOTTI, J. This is an appeal by defendant Globe Grain & Milling Company from a judgment in favor of plaintiff, and from an order denying its motion for a new trial, in an action brought to recover the sum of $5,000, a deposit paid by plaintiff, as vendee, to the Globe, etc., Company, as vendor, under a written contract for the sale of certain real property in San Francisco.

The contract was entered into on April 11, 1906, and bore that date. It recited the sale by said company to plaintiff of the property, describing it, for $102,000, $5,000 cash, the receipt of which was acknowledged, and $97,000 payable on or before June 1, 1906. It then provided: "Thirty days (from the date hereof) are to be allowed for the examination of the title. If the title is not found valid, or made so, within 60 days after notice to us of the defect therein, the deposit for which this is a receipt is to be returned upon demand. If the title is found, or made valid within the time herein specified, and the sale is not closed in accordance with the above terms, the sum of $5,000.00, for which this is a receipt, is to be forfeited. * * * The owner hereby binds itself upon receipt of the purchase money, to deliver to said W. G. Allen a valid title to said property. But if the title is defective, and it cannot be perfected within the time above specified, this contract will thereupon become null and void. Due diligence, however, will be exerted by the seller in perfecting the title. Time is of the essence of this contract." Within the time specified in said contract for "the examination of the title," viz., on June 4, 1906 (each and every day from and including April 20, 1906, to and including June 3, 1906, having been a legal holiday duly and regularly declared by the governor of the state), plaintiff served upon said company and its agent, Baldwin & Howell, written notice, directed to each and which read as follows: "I hereby reject the title to the property described in the contract made and entered into between us April 11th, 1906, for the reason that there is no official record in the city and county of San Francisco, showing that you are the owner in fee of said property, or any part thereof, and nothing to show that the record title to the same is vested in you. Please have this defect cured within sixty (60) days from the date hereof, or I will demand the return of the deposit of five thousand dollars ($5,000.00), as per terms of our agreement." At that time and at all times after April 19, 1906, it was alleged and found the vendor "did not have a good, perfect or valid title to the said property or any part thereof" for the reasons stated in said notice already set forth. The evidence in support of this allegation and finding was practically the same as that given in Crim v. Umbsen (Cal.) 103 Pac. 178, showing, as stated in that case, that in the great conflagration of April 18-20, 1906, "the greater part of the records of the county recorder's office, as well as most of the other public and official records of San Francisco, were burned," with the result that it was impossible to determine from any public or official record whether or not the vendor's title was valid or perfect. Nothing was done in the way of perfecting the record title. After the expiration of the 60 days specified in said notice of rejection of title, the plaintiff demanded the return of the $5,000 deposit. Payment thereof being refused, this action was instituted. The date of such demand is not alleged, and we must assume that it was not made prior to the day on which the complaint was verified and the action instituted, December 13, 1906.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Learned counsel for appellant concede that it is established by the decision in Crim v. Umbsen, supra, decided after the taking of this appeal, and after the filing of appellant's opening brief, and as to which a petition for rehearing was denied, that where a contract of sale relating to real property in the city and county of San Francisco made prior to the fire of April 18–20, 1906, the time fixed for the performance of which had not arrived at the time of said fire, was such as to entitle the vendee to a title "fairly deducible of record," the vendee could not be required to take such property in view of such destruction of official records; the theory of the decision being that the title was rendered defective within the meaning of the contract by such destruction of records, and that in determining the vendee's rights we can only consider the title as it existed at the time fixed for the performance of the contract and the delivery of the conveyance. It was further decided in that case that such a vendee was entitled to recover from the vendor the portion of the consideration paid at the time of the execution of the contract, the agreement in that case providing, as does the agreement here, for a return of such consideration if the title was found to be defective. Upon his cross-complaint filed in the action brought against him by the vendor for damages for breach of contract, the vendee in that case was given judgment for the recovery of the portion of the consideration paid by him.

It is urged that the contract in the case at bar did not call for a title "fairly deducible of record." This fact was conceded by counsel for the vendors in Crim v. Umbsen as to the contract there involved, such contract providing that the vendee should have 30 days for examination of the title, that the vendors should have 30 days to "perfect" the title if it was found to be defective, and that, if the title proved to be incurably "defective," the deposit was to be returned. We have no doubt that counsel in that case were amply warranted in making this concession in view of the decisions of this court. It is settled law in this state that, where the provisions of a contract for the sale of real estate are such as to call for a "perfect title," the purchaser is entitled to a title free from reasonable doubt and fairly deducible of record. See Gwin v. Calegaris, 139 Cal. 384, 73 Pac. 851, and cases there cited; Peckham v. Stewart, 97 Cal. 147, 31 Pac. 923. See, also, Title, etc., Co. v. Kerrigan, 150 Cal. 305, 88 Pac. 356, 8 L. R. A. (N. S.) 682, 119 Am. St. Rep. 199. The provisions in the contract in the case at bar were, as we have seen, for a "valid title," for a title that was not "defective," for a "perfected" title in the event that on examination the title was found to be defective. It was expressly provided "that, if the title is defective and it cannot be perfected within the time above specified, this contract will thereupon become null and void." These provisions practically called for a "perfect title" to the same extent as if the precise words "perfect title" had been used. When these provisions are read in connection with the provision for "examination of the title," which clearly referred to an examination of the public records, we cannot doubt that the parties were stipulating for "a good title by the record." See Gwin v. Calegaris, supra.

The notice of rejection of title served on appellant did substantially show that the objection was that appellant did not have a title fairly deducible of record. The reason as specified in the notice was "that there is no official record in the city and county of San Francisco showing that you are the owner in fee of said property or any part thereof, and nothing to show that the record title to the same is vested in you." This was a sufficient specification of the particular objection under the peculiar circumstances of this case. There could not have been uncertainty in the mind of appellant as to the meaning of the objection specified, and the precise nature of the defect on account of which the title was rejected.

No other claim not disposed of by the decision in Crim v. Umbsen, supra, was made in the opening brief of appellant, except the claim that it was either prejudicial error to overrule demurrers interposed to the complaint on the ground of misjoinder of parties defendant or that the judgment rendered against appellant alone and in favor of its codefendant, Baldwin & Howell, constitutes a fatal variance between the pleadings and judgment, in that, if any cause of action was stated against both defendants, it was a joint cause of action, and that a judgment could not be given against one only of two or more persons against whom a joint cause of action is alleged. Defendant Baldwin & Howell, a corporation, was the agent of the appellant in the matter of making this contract, and it was alleged in the complaint that the $5,000 was paid to the "defendants." The trial court, finding that the $5,000 was paid by plaintiff to and received by Baldwin & Howell solely as the agent for the appellant, concluded that plaintiff was not entitled to any judgment against said Baldwin & Howell, and gave judgment accordingly and in favor of Baldwin & Howell for its costs. Appellant's contention for a reversal because of the rulings of the court in this regard is wholly without merit. We shall not discuss the question whether or not there was any misjoinder in making Baldwin & Howell a party defendant. That defendant prevailed in the action and is not appealing. Appellant was undoubtedly solely liable to plaintiff upon the facts found, the money having been paid to and received by Baldwin & Howell solely as the agent of the appellant, and having been accounted for and paid to appellant by it. If we assume that Baldwin & Howell was improperly joined as a party defendant, it is nevertheless impossible to conceive of any reason why appellant could have been prejudiced in the slightest degree by such misjoinder. Under such circumstances, the judgment should not be reversed even if Baldwin & Howell should not have been joined as a defendant. "It seems to be thoroughly settled that a judgment after trial upon the merits will not be reversed because the court improperly overruled a demurrer on the ground of misjoinder of parties, where it is plain that such misjoinder did not affect any substantial right of a party." See Woollacott v. Meekin, 151 Cal. 701, 706, 91 Pac. 612, and cases there cited. It is settled in this state that judgment may be given against such of several defendants jointly charged as are shown to be liable and in favor of the others who are not shown to be liable, subject perhaps to the qualification that the defendants held liable are entitled to be protected against any material variance between the pleadings and the proof. There was no such material variance here. See Redwood City Salt Co. v. Whitney et al., 153 Cal. 421, 423, 95 Pac. 885, and cases there cited; Dobbs v. Purington, 136 Cal. 70, 68 Pac. 323.

As to certain other claims made for the first time in appellant's reply brief: By the express terms of the contract appellant was required to return to plaintiff the $5,000 deposit on demand therefor, if the title was not found valid or was defective, and was not made valid or perfected within sixty days after notice to appellant of the defect, provided, it may be conceded for the purposes of this decision, that plaintiff gave seasonable notice of the defect and rejection on account thereof. In view of the facts found, the notice of June 4, 1906, was seasonably given. This notice was an unqualified and absolute rejection of the title as it then stood, and a notification that plaintiff would insist upon a return of the $5,000 if appellant could not or did not perfect the title within 60 days, the time allowed the appellant by the contract within which to obviate any defect found. If, as claimed by learned counsel, it was obvious to both plaintiff and appellant that the defect was such that it could not be obviated within the stipulated time or within any reasonable time thereafter, appellant would have been entirely warranted in accepting this notice as an absolute rejection, and treating the contract of sale as being no longer effectual. Although it may be that under such circumstances it was not necessary for plaintiff to give appellant 60 days within which to perfect the title, plaintiff cannot be criticised or held to have waived any right for thus conforming to the express provisions of the contract. At the end of the 60 days, the defect not having been obviated, it is clear that, in view of the notice of June 4, 1906, the contract of sale was at an end. The liability of appellant to pay the $5,000 was then fixed and absolute, and the money was payable whenever demanded by plaintiff. The mere deferring of this demand for the money could not operate to deprive plaintiff of the right to recover it, provided the demand was made within such time as would prevent the application of the statute of limitations as a bar. As we have seen, such demand was made prior to the commencement of this action, and must here be assumed to have been made on December 13, 1906, the day on which the action was commenced.

It is further claimed for the first time in appellant's reply brief that the judgment should be modified by deducting a portion of the interest allowed. The trial court allowed interest at the legal rate from April 11, 1906, the day on which the contract was executed and the payment of $5,000 was made. It is obvious that in this respect the judgment is erroneous and unfair to appellant. The money was rightfully received and held by appellant under the terms of the contract until its return was demanded. Such demand was not made until December 13, 1906. Interest should have been allowed only from that date, instead of from April 11, 1906. Under these views, the judgment is excessive by $235. This objection not having been specifically made prior to the filing in this court of appellant's reply brief, and in no degree constituting a ground upon which the appeal was taken to this court, we are satisfied that our ruling thereon should not affect the question of payment of costs of appeal.

The order denying a new trial is affirmed. The judgment is modified by deducting from the amount of $5,527.91 awarded plaintiff against appellant, the amount of $235, so that the same shall stand for the amount of $5,292.91 (instead of $5,527.91), with interest thereon at the rate of 7 per cent. per annum from October 14, 1907, the date thereof, together with plaintiff's costs amounting to $23, and, as so modified, said judgment is affirmed. Appellant shall not recover any costs of this appeal.

We concur: SHAW, J.; SLOSS, J.

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156 Cal. 379

FANNING v. GREEN. (S. F. 5,077.)

(Supreme Court of California. Sept. 20, 1909.)

1. Husband and Wife (§ 262*)—Conveyances—Gifts—Presumptions.

Under Code Civ. Proc. § 1961, providing that a presumption may be controverted, and

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Civ. Code, § 164, providing that, where property is conveyed to a married woman and her husband, the presumption is that she takes the part conveyed to her as tenant in common, etc., a gift to a wife of property purchased with community funds and conveyed to her and her husband pursuant to the directions of the husband will be presumed where a gift is essential to the theory that the property is the separate property of the wife, but the presumption is only prima facie except as to purchasers and incumbrancers in good faith and for a valuable consideration, and, where the controversy is between the husband and the legal representative of the wife, the presumption may be controverted.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 913; Dec. Dig. § 262.*]

2. Appeal and Error (§ 1010*)—Questions of Fact—Review.

Whether the presumption of a gift to a wife by virtue of Civ. Code, § 164, providing that, where a conveyance is to a married woman and her husband, the presumption is that she takes the part conveyed to her as tenant in common, is controverted by other evidence in a controversy between the husband and the legal representative of the wife, is a question of fact for the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3979; Dec. Dig. § 1010.*]

3. Gifts (§ 15*)—Intention of Donor.

There can be no executed gift, in the absence of any intention to give.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 14; Dec. Dig. § 15.*]

4. Gifts (§ 41*)—Revocation.

When the circumstances of a transaction compel the conclusion that a gift was intended by the donor, any subsequent statements of the donor to the contrary are ineffectual.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 20; Dec. Dig. § 41.*]

5. Husband and Wife (§ 266*)—Community—Gifts—Evidence.

The fact that the husband in the purchase of real estate with community funds directed that the deed should be made to himself and wife as grantees did not compel the conclusion that a gift was intended by him to the wife, but the circumstances might show another reason for the conveyance than an intent to make a gift, and authorize a conclusion that no gift was intended, so that there was no executed gift.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 925–928; Dec. Dig. § 266.*]

6. Husband and Wife (§ 254*)—Acquisition of Property—Separate Property of Wife.

Where a husband purchased property with community funds, and directed that the conveyance should be made to his wife with intent to make it her separate property, the conveyance vested the property in her as her separate estate, but the intent to make it her separate property was essential.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 899; Dec. Dig. § 254.*]

7. Husband and Wife (§ 49½*)—Acquisition of Property—Separate Property of Wife—Gift.

A husband purchased real estate with community funds in a savings bank in his and his wife's name, and, pursuant to a suggestion made by his son, he directed that the property should be conveyed to himself and wife. Nothing was said indicating any idea of making any gift or changing the status of any property. The wife knew nothing of the fact that she was named as grantee until subsequently. During the 12 years that elapsed from the conveyance to the wife's death the whole property was treated by the parties as community property. The husband testified that he never intended to make a gift of the property or any interest therein to the wife. *Held* to justify a conclusion that no gift to the wife was intended, and that no gift was in fact made.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 249–255; Dec. Dig. § 49½.*]

8. Appeal and Error (§ 1010*)—Findings—Conclusiveness.

Where different inferences may reasonably be drawn from the evidence, the conclusion of the trial court is binding on the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3979; Dec. Dig. § 1010.*]

9. Evidence (§ 151*)—Relevancy—Intent.

A witness may be examined as to the intent with which he did a certain act, where the intent is material, though the jury or trial judge need not believe the witness; and hence a husband purchasing property with community funds and taking the conveyance in the name of himself and wife may in a controversy between himself and the legal representative of the wife testify that he never intended to make a gift of the property or any interest therein to the wife; his intent being a material factor in determining the question of an executed gift.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 440; Dec. Dig. § 151.*]

10. Evidence (§ 471*)—Conclusion of Witness.

The testimony of a husband that he had not given property to his wife is objectionable as being his conclusion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149, 2170; Dec. Dig. § 471.*]

11. Appeal and Error (§ 1051*)—Harmless Error — Erroneous Admission of Evidence.

Where competent evidence showed that a husband never intended to make a gift to his wife, the error in permitting him to testify that he had never given property to her was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4161; Dec. Dig. § 1051.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by John Fanning against Sinon Green, as administrator of Margaret Fanning, deceased. From a judgment for plaintiff and from an order denying a new trial, defendant appeals. Affirmed.

W. W. Sanderson, for appellant. Tobin & Tobin and George A. Clough, for respondent.

ANGELLOTTI, J. This is an appeal from a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial in an action to quiet title. The plaintiff and defendant's intestate, Margaret Fanning, were husband and wife. They had been married many years when they purchased the lot of land in San Francisco, an undivided one-half of which is in controversy here. They had accumulated some property, the proceeds of the savings from the salary of plaintiff as a police officer, and the profits of a grocery store maintained by him which

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Margaret attended to in his absence. A part of this property was the lot on which was situate their home and grocery store. The remainder was money deposited with the Hibernia Savings & Loan Society in account with "John Fanning or Margaret Fanning." All this was admittedly community property. The lot, a portion of which is in controversy, was purchased from a Mrs. Redington on August 11, 1892, for $6,000, $3,000 of which was paid in cash. A note and mortgage were given by plaintiff and Margaret for the unpaid balance. The 3,000 paid in cash was taken from the moneys on deposit with the Hibernia Savings & Loan Society. Plaintiff and Margaret were named as the grantees in the deed from Mrs. Redington. This was done by the direction of plaintiff. He testified that he gave this instruction at the suggestion of his son, who had asked him: "Father, why don't you put this property in your name and mother's together? You know the other lot is in your name alone." He further testified: "Margaret knew nothing about her name being in the deed until she read it in the newspaper, when she was greatly pleased." Plaintiff always had entire control and management of the property. He collected all the rents therefrom, using the same as a part of his general funds for the support of the family so far as necessary, and depositing the surplus to the credit of the account already referred to. Margaret died in the year 1904, at which time there was a balance in said account of $2,600. Plaintiff testified: "I never intended to make a gift of the property or any interest therein to my wife." Upon this evidence the trial court found that plaintiff never intended to make and never did make a gift to Margaret of any interest in said property, and that the whole thereof constituted community property of the husband and wife from the time of its purchase to the time of Margaret's death. Judgment was given, therefore, in favor of plaintiff, decreeing him to be the owner of all of said property.

If there is sufficient evidence to sustain the findings of the trial court in regard to the question of gift, the conclusion of the trial court as to the ownership of this property is undoubtedly correct. Admittedly the lot was purchased wholly with community funds, and all of it was community property unless an interest therein was given by the husband to the wife. If it was such community property at the time of Margaret's death, it all then belonged to the husband, without administration. Civ. Code, § 1401. We do not see that we would be warranted in holding that the evidence is not sufficient to sustain the findings of the trial court on this material question. The property having been acquired since the amendment of March 19, 1889, to section 164 of the Civil Code, it is true that the presumption arising from the fact that plaintiff and Margaret were both named as the grantees in the deed was that Margaret took an undivided half thereof as her separate property. The amendment provided: "But whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property. And in case the conveyance be to such married woman and her husband * * * the presumption is that the married woman takes the part conveyed to her as tenant in common, unless a different intention is expressed in the instrument, and the presumption in this section mentioned is conclusive in favor of a purchaser or incumbrancer in good faith and for a valuable consideration." It being admitted that the property was purchased with community funds, it was necessary, in order to make any portion of it her separate property, that it should have been given to her by her husband. Such a gift will be presumed under this statutory provision where a gift is essential to the theory that the property is the separate property of the wife. See Alferitz v. Arrivillaga, 143 Cal. 646, 77 Pac. 657. But the presumption so created is only a prima facie one, except in so far as purchasers and incumbrancers in good faith and for a valuable consideration are concerned. This is manifest from a reading of the statute. See, also, section 1961, Code Civ. Proc. Where the controversy is between the husband and the legal representative of the wife, the presumption "may be controverted by other evidence, direct or indirect," and it is only where it is not so controverted that the court or jury is bound to find according to the presumption. Section 1961, Code Civ. Proc. Whether or not it is so controverted is a question of fact for the trial court, and the conclusion of that tribunal is conclusive upon an appellate court unless it be manifestly without sufficient support in the evidence.

It is clear that there can be no executed gift in the absence of any intention to give on the part of the donor. It is true that the facts and circumstances of a transaction may be such as to practically compel the conclusion that a gift was intended, and to render worthless any subsequent statement to the contrary on the part of the donor. But no such effect, we are satisfied, must necessarily be given to the mere fact that, in the case of the purchase of real property with community funds, the husband has directed that the deed shall run to the wife as grantee. There is nothing in the nature of such a fact that renders it consistent only with the theory of gift, and other facts and circumstances may so tend to show another reason than the desire and intent to make a gift as to furnish ample warrant for a conclusion that no gift was intended, and therefore that there has been no "executed gift." The case of Hamilton v. Hubbard, 134 Cal. 603, 65 Pac. 321, 66 Pac. 860, strongly relied on by defendant, cannot reasonably be construed as holding contrary to this. That case was decided upon its own particular facts, which were, according to the opinion, that the deed made by the vendor to the wife by direction of the husband showed on its face that the consideration for the purchase was the conveyance of another lot, and that this lot so given in exchange was the separate property of the husband. According to the opinion, these were the only facts shown material to the question of gift, and it was substantially held that standing alone and admitted they showed a gift from the husband to the wife. We may freely concede for all the purposes of this case that where there is nothing shown but the direction of a husband that a deed from the vendor shall be made to the wife, even where the purchase is made with community funds, a prima facie presumption exists, regardless of the amendment to section 164, Civ. Code, that a gift to the wife was intended, and we do not construe anything in the opinion of Hamilton v. Hubbard, supra, as going further than this. If it did, it would be opposed to the general current of authority in this state. The well-settled rule is, as stated in Nilson v. Sarment, 153 Cal. 524, 530, 96 Pac. 315, 317, 126 Am. St. Rep. 91, "where a husband purchases property with community funds, and directs the conveyance to be made to his wife, with the intent to make it her separate property, the deed will operate to vest the property in her as her separate estate." The "intent" to make it hers, her separate property, is a material factor in such a case, and while such intent may, and possibly must, be inferred where there is no other evidence than that showing the mere direction by the husband, it may also be shown not to have existed by any competent evidence.

In the case at bar there is, in our opinion, other evidence that fairly and reasonably warrants an inference on the part of the trial court to the effect that no gift was intended. The indirect evidence by which the presumption of separate property may be controverted may consist in part of inferences (Code Civ. Proc. § 1957), deductions "which the reason of the jury" (or trial judge) "makes from the facts proved" (section 1958, Code Civ. Proc.). The sole reason for the giving of the direction and the joining of his wife as one of the grantees was the suggestion to plaintiff by his son that he should put the community property to be acquired in the husband and wife's name "together." Nothing was said by anybody indicating any idea of making any gift or changing the status of any property. The community funds from which the purchase was to be made were on deposit in a bank account to the credit of both husband and wife, and it is not unreasonable to infer that the plaintiff attached no greater significance to the placing of the real property to be acquired in the name of both himself and wife than he did to the deposit of community funds to the credit of such an account. There was apparently no express understanding with his wife that she was to acquire or did acquire any interest in the property, other than such interest as a wife has in the community property. She knew nothing of the fact that she was named as a grantee until she read it in the newspaper. During the 12 years that elapsed from the conveyance to her death, the whole property was treated by the parties as community property. The plaintiff had the sole management and control thereof, collected all the rents, and used the same as community property, and deposited all savings therefrom to the credit of the bank account already referred to. Plaintiff testified positively that he never intended to make a gift of the property or any interest therein to his wife. All this afforded sufficient legal basis, in our judgment, notwithstanding the presumption created by the fact that the wife was named as one of the grantees, for a conclusion on the part of the trial court that no gift was intended and that no gift was in fact made. We do not mean to say that a different conclusion on the part of the trial court would have been without sufficient support in the evidence, but simply that the conclusion arrived at is not without such support. Where different inferences may reasonably and properly be drawn from facts legally proved, the conclusion of the trial court thereon is binding on an appellate tribunal, and the question of the weight to be given to the testimony of the plaintiff as to his actual intent was under the circumstances appearing here exclusively for the trial court.

There is nothing in the claim that the evidence of the plaintiff to the effect that he never intended to make a gift of the property or any interest therein to his wife was incompetent. It is well settled that, under our system, a witness may be examined as to the intent with which he did a certain act where that intent is a material thing in the action. A jury or trial judge is not bound, of course, to believe the witness when he says he did not have a certain intent, and may find in the circumstances, actions, and language, an entirely different intent, but the testimony of the witness "is competent and relevant and not immaterial." See Walker v. Chanslor, 153 Cal. 118, 125, 94 Pac. 606, 17 L. R. A. (N. S.) 455, 126 Am. St. Rep. 61; Barnhart v. Fulkerth, 93 Cal. 497, 499, 29 Pac. 50; Kyle v. Craig, 125 Cal. 107, 114, 57 Pac. 791; Bertelsen v. Bertelsen, 7 Cal. App. 258, 261, 94 Pac. 80. It is said by learned counsel for defendant that the admission of such evidence is in effect permitting a party to impair "an executed gift" by his own declaration "made after its consummation." Manifestly this is not so. The question to be determined was whether there was any "executed gift," and, the intent of the alleged donor being a material factor in the determination of that question, his own evidence as to his intent was admissible under the rule already stated. This must be so unless a parol showing that the name of the wife was inserted in such a deed from a stranger by the husband's direction conculsively establishes such intent, which we think we have shown is not the rule.

The objection to the last question asked plaintiff as follows: "Did you give the property or any portion thereof to your wife?"—should have been sustained. It called simply for the conclusion and opinion of the witness as to the effect of the facts already testified to by him. The witness answered that he never did. But we are satisfied that the error must be held harmless in view of his other competent testimony that he never intended to make a gift. The objectionable evidence practically added nothing additional, and could not have affected the result.

The judgment and order denying a new trial are affirmed.

We concur: SHAW, J.; SLOSS, J.

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156 Cal. 273

KIMIC v. SAN JOSE-LOS GATOS INTERURBAN RY. CO. et al. (S. F. 5,020.)

(Supreme Court of California. Sept. 20, 1909. Rehearing Denied Oct. 19, 1909.)

1. DAMAGES (§ 177*)—EVIDENCE—ADMISSIBILITY—"EXPENSES" INCURRED.

In a personal injury action, where plaintiff claimed damages for medical and nurse hire, a question to him as to what expenses he was put to by the injuries for medical attendance, medicines, etc., was not objectionable as requiring testimony of anything but actual expenditures, within the rule forbidding evidence of liability incurred, but not discharged, under an allegation of payment; "expense" meaning the laying out or expending of money or other resources.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 494; Dec. Dig. § 177.*

For other definitions, see Words and Phrases, vol. 3, pp. 2590–2593; vol. 8, p. 7657.]

2. WITNESSES (§ 248*)—EXAMINATION—ANSWERS—RESPONSIVENESS.

An answer by witness that he supposed "somewhere in the neighborhood of $500 or $600" was responsive to a question as to what expenses he was put to by his injuries for medical attendance, medicines, etc.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 861–863; Dec. Dig. § 248.*]

3. TRIAL (§ 89*)—RECEPTION OF EVIDENCE—GROUND FOR STRIKING—INSUFFICIENCY.

That evidence adduced by a single question does not prove what was intended by the offering party is generally not ground for striking it, as sufficient evidence may be supplied by further examination.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 228–234; Dec. Dig. § 89.*]

4. APPEAL AND ERROR (§ 1047*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In a personal injury action in which plaintiff claimed damages for medical attendance, etc., any error in striking an answer to a question as to what expenses plaintiff was put to for medical attendance, etc., that he "supposed somewhere in the neighborhood of $500 or $600," as too indefinite, was not prejudicial, where plaintiff afterward testified that this $500 or $600 included doctor bills, nursing, medicines, and increased household expenses because of the injuries, and that he paid the nurse $35 a week for four weeks, and paid physicians over $100, but had not yet paid some physicians, and the court instructed that plaintiff could only recover for medical expenses actually paid out, and that the elements of damages, consisting of physicians' expenses and nurse hire, were subjects of direct proof, and must be proved by direct evidence, and plaintiff could only recover such actual damages as the evidence showed to a reasonable certainty he had sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4149; Dec. Dig. § 1047.*]

5. APPEAL AND ERROR (§ 930*)—PRESUMPTIONS—CONDUCT OF JURY—ACCEPTANCE OF INSTRUCTIONS.

It must be assumed upon appeal that the jury accepted and acted upon the instructions given.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3757; Dec. Dig. § 930.*]

6. APPEAL AND ERROR (§ 1004*)—QUESTIONS OF FACT—EXCESSIVE DAMAGES.

What is a proper compensation for personal injuries is for the sound discretion of the jury and its verdict will not be disturbed on appeal as excessive, unless the award is obviously disproportionate to the injuries proved, so as to justify the conclusion that the verdict was not the result of dispassionate consideration.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944–3947; Dec. Dig. § 1004.*]

7. APPEAL AND ERROR (§ 932*)—VERDICTS—CONCLUSIVENESS—AMOUNT OF RECOVERY.

In considering on appeal whether damages allowed are excessive, every reasonable inference must be made in support of the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3782; Dec. Dig. § 932.*]

8. DAMAGES (§ 132*)—EVIDENCE—SUFFICIENCY—PERSONAL INJURIES—PERMANENCY OF INJURIES.

In a passenger's action for personal injuries by being thrown from a street car in a collision, evidence *held* to sustain a finding that plaintiff's injuries had permanently affected his nervous system, so as to seriously interfere with his comfort and happiness and affect or destroy his ability to conduct his business, so that a verdict for $6,400 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372–385; Dec. Dig. § 132.*]

9. APPEAL AND ERROR (§§ 995, 996*)—QUESTIONS OF FACT—WEIGHT OF EVIDENCE—INFERENCES.

The weight of the evidence and the inferences to be drawn from it are for the jury in the trial court, and their action thereon cannot be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3907, 3908–3911; Dec. Dig. §§ 995, 996.*]

Department 1. Appeal from Superior Court, Santa Clara County; John E. Richards, Judge.

Action by Charles Kimic against the San Jose-Los Gatos Interurban Railway Company and another. From a judgment for plaintiff and an order denying a new trial, defendant named appeals. Affirmed.

Oneal & Richardson, for appellant. L. B. Archer, for respondent.

SLOSS, J. San Jose-Los Gatos Interurban Railway Company (hereinafter designated as the Interurban Company) is a corporation operating a street railroad over certain streets of the city of San Jose. Its route is, in part, over San Carlos street. At the intersection of San Carlos and Tenth streets its line is crossed by that of the San Jose and Santa Clara County Railway Company (hereinafter designated as the Santa Clara Company), operating a line of street railway along Tenth street. Plaintiff was a passenger on a car of the Interurban Company. This car was proceeding westerly along San Carlos street, and as it crossed Tenth street, it was struck by a car of the Santa Clara Company, running southerly along Tenth street. The force of the impact hurled plaintiff from the car on which he was riding, and he suffered injuries for which he sought, by this action, to recover damages from both corporations. A trial before a jury resulted in a verdict in favor of plaintiff and against both defendants for $7,000. Motions for new trial were denied upon plaintiff's complying with an order of the court requiring him to remit $600 of the amount of the judgment as a condition of the denial of said motions. The defendants present separate appeals, upon different records, from the judgments and orders made against them, respectively. The appeals here to be considered are those of the San Jose-Los Gatos Interurban Railway Company from the judgment and from the order denying its motion for a new trial.

That the evidence was ample to warrant the jury in finding plaintiff's injuries to have been the result of negligence on the part of the Interurban Company is not questioned. Nor does this appellant challenge the correctness of the instructions under which the issues were submitted to the jury.

The complaint averred that: "By reason of said injury plaintiff has been compelled to employ doctors, a nurse, and additional assistance in his home, and to purchase medicine; and the said plaintiff has been compelled to pay therefor the sum of about $1,000." This allegation was denied by the answer. Plaintiff took the stand as a witness in his own behalf, and was asked, "Mr. Kimic, what expenses were you put to for medical attendance, medicines, etc., in consequence of this injury?" The appellant objected to the question on the ground "that it is too indefinite. He might be asked as to what money he actually expended or paid out." The objection was overruled. It is now contended that this ruling was erroneous; the argument being that it contravened the rule that under an allegation of payment alone with no averment that liabilities were incurred, although not paid, evidence of the mere incurring of liability is not admissible. Donnelly v. Hufschmidt, 79 Cal. 74, 79, 21 Pac. 546; McLaughlin v. S. F. & S. M. R. Co., 113 Cal. 590, 45 Pac. 839. But the question did not call for a statement of anything but actual expenditure. The witness was asked to state the "expenses" to which he had been put. "Expense" is defined as "the laying out or expending of money or other resources" (Standard Dict. See, also, 12 Am. & Eng. Ency. L. [2d. Ed.] 394; Cent. Dict.); to "expend" is "to pay out or lay out." (Stand. Dict.) A statement of the expenses to which one has been put is therefore a statement of actual payments made. The question just referred to was answered by plaintiff as follows: "Oh, I suppose somewhere in the neighborhood of $500 or $600." The appellant moved to strike out the answer as not responsive, "and on the further ground that it is too indefinite to afford any evidence of moneys expended." The motion was denied, and an exception noted. The first ground of the motion—i. e., that the answer was not responsive—is plainly without merit. As to the other ground, we may assume that this answer, if standing alone, would not have been sufficiently definite and certain to serve as the foundation of a finding that plaintiff had expended any specific sum. Galveston, etc., Co. v. White (Tex. Civ. App.) 32 S. W. 186; Town of Salida v. McKinna, 16 Colo. 523, 27 Pac. 810. The fact that evidence fails in itself to amount to proof of what was intended by the offering party is generally regarded as no ground for striking it out. Metz v. Willitts, 14 Wyo. 511, 85 Pac. 380; State v. Cardoza, 11 S. C. 195; Walker v. Lee, 51 Fla. 360, 40 South. 881; Maloy v. State, 52 Fla. 101, 41 South. 791. A party is often unable to completely develop a fact material to his case by a single question and answer. If one part of the testimony is not sufficient in itself, its defects may be supplied by further examination.

But whatever view may be taken of the propriety of the ruling it is clear from the record that it resulted in no prejudice to appellant. After giving this answer, the plaintiff went on to testify that: "This $500 or $600 includes doctor, nursing, medicine, and increased expenses of my household. I cannot give a more definite statement of the amount. I paid the nurse $35 a week for four weeks. I have paid the physicians over $100, and I have not paid the physicians all yet." These subsequent statements furnished a basis for a finding that some part, at least, of the $500 or $600 had actually been expended by plaintiff. The jury were instructed that: "Plaintiff cannot recover for the expenses of care and nursing and doctors' bills in this case which he has not paid; that any damages allowed him on these accounts must be for money actually paid out." There were further instructions to the effect that plaintiff could recover "only such actual damages as the evidence shows to a reasonable certainty he has sustained, and that: "The elements of damages consisting of expenses of care and nursing and doctors' bills * * * are subjects of direct proof, and are to be determined by the jury upon the evidence they have before them. These elements of damages cannot be inferred, but must be proved by direct evidence." If the jury accepted and followed these instructions, as we are bound to assume they did, no consideration could have been given by them to any item of alleged expense not shown by direct proof, to a reasonable certainty, to have been actually paid.

The only remaining point made by appellant is that the damages are excessive. The amount allowed to plaintiff, after deducting the $600 remitted, is $6,400. What will be a proper and reasonable compensation for the damages occasioned by injuries to the person is a question committed to the sound discretion of the jury. "Their verdict * * * will never be disturbed unless the amount of the damages is obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate consideration of the jury." Aldrich v. Palmer, 24 Cal. 513; Morgan v. S. P. Co., 95 Cal. 501, 30 Pac. 601; Lee v. S. P. Co., 101 Cal. 118, 35 Pac. 572; Howland v. Oakland C. S. R. Co., 110 Cal. 513, 42 Pac. 983; Clare v. Sac. Elec., etc., Co., 122 Cal. 504, 55 Pac. 328. In considering an attack upon a verdict as excessive, the appellate court must treat every conflict in the evidence as resolved in favor of the respondent, and must give to him the benefit of every inference that can reasonably be drawn in support of his claim.

In this case, it appeared that the plaintiff was, at the time of the accident, over the age of 60 years. He was in the business of selling wall paper. He testified that the collision hurled him from the car upon which he had been riding. He picked himself up from the gutter, where he had fallen, got on his hands and knees, and fell again. There was a terrible pain in his back, "as though a knife was being stuck into it." His hands were lacerated and cut by broken glass. With the aid of two passers-by he walked to his home, a distance of six blocks, and was at once put to bed. A swelling on the left side, over the kidneys, appeared. It was six or seven inches across in one direction, eight or nine inches in the other, and four or five inches deep. After some days, about a quart of black blood was drawn from this by his physicians. He remained in bed four weeks, and during this time was attended by a nurse. The trial took place about six months after the accident. The plaintiff testified that up to the time of the trial, he had not been able to sleep well. He woke up at least every hour. The swelling had not entirely disappeared. "The muscles of my back are still in a painful and weakened condition, and there is a drawing sensation. I can walk with the assistance of a cane; my back pains me and I am tired and fatigued. I feel a pain over my kidney, and am annoyed in my urinating. * * * I am too nervous now to take much interest in my business. I cannot attend to my business. Since the accident I have not been able to carry large bundles of paper up and down a ladder." The gross profits of his business before his injury had been $10 to $12 per day. He had not been able to earn that amount since. Of the physicians called by plaintiff as witnesses, one testified that a shock to the nerous system, producing neurasthenia, might result from an injury similar to the one suffered by plaintiff. He was unable to state whether any permanent effect had been produced in this case. Another expressed the opinion that the injuries would probably be permanent. A third that in his opinion Kimic was, at the time, suffering from neurasthenia, which the witness declared to be a progressive disease, and one that could be caused by the shock of a railway injury. In old age the probabilities, the witness stated, were "rather against a recovery."

In the face of this testimony it cannot be successfully urged that the jury were not warranted in finding that there was a "reasonable certainty" (Cordiner v. L. A. Trac. Co., 5 Cal. App. 400, 91 Pac. 436; Melone v. Sierra Ry. Co., 151 Cal. 113, 117, 91 Pac. 522), that plaintiff's injuries had permanently affected his nervous system to such an extent as to seriously interfere with his comfort and happiness, as well as to restrict or destroy his ability to conduct his business. If this be so, the question of excessive damages is answered. Indeed, appellant virtually concedes that, if injuries of a permanent nature were shown, the amount awarded was not so large as to exceed the limits of the discretion confided to the jury. But the contention that the injuries were not permanent can be sustained only if we read the testimony in the light of inferences less favorable to plaintiff than it can reasonably bear, or if we regard his testimony and that of the physicians above referred to as overcome by the very considerable volume of contrary testimony. By following either course, this court would be invading the province of the jury.

The judgment and order appealed from are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

156 Cal. 309

In re LEARNED'S ESTATE.

LEARNED v. GARDEN et al.

(Sac. 1,698.)

(Supreme Court of California. Sept. 22, 1909.)

1. JUDGMENT (§ 479*)—COLLATERAL ATTACK.

Under Code Civ. Proc. § 1908, declaring the effect of a judgment as to conclusiveness, a decree construing a will and making a distribution having become final, an impeachment thereof by the will itself cannot be thereafter considered.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 479.*]

2. WILLS (§ 718*) — BENEFICIARIES — FORFEITURE OF RIGHT.

A person is not prevented from taking personalty bequeathed to him because he has accepted a decree of distribution with reference to realty inconsistent with the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1717–1721; Dec. Dig. § 718.*]

Department 2. Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

Petition by D. A. Learned, executor of the estate of Gennis H. Learned, deceased, for settlement of his final account and distribution to him of the entire personal property. The petition was opposed by Clara D. Learned Garden and others. From a decree of distribution in accordance with the petition, and from an order denying a new trial, opponents appeal. Affirmed.

Budd & Thompson (E. I. Jones, of counsel), for appellants. J. M. Kile and J. A. Plummer, for respondent.

MELVIN, J. This is an appeal prosecuted by the opponents to D. A. Learned's petition for settlement of his final account as executor of the estate of Gennis H. Learned, deceased, and for the distribution to him of the entire personal property of said estate. There was a judgment and decree of distribution in accordance with the prayer of D. A. Learned's petition, and the appeal is taken therefrom, as well as from the order denying a motion for a new trial.

Gennis H. Learned died testate in 1903, and D. A. Learned was appointed executor of her last will. After due administration the said D. A. Learned took distribution of the entire property of the estate of Gennis H. Learned which had then come into his possession. He was finally discharged, and the estate was fully settled and closed, May 31, 1904. In June, 1908, D. A. Learned petitioned for the reissuance of letters testamentary in the estate of Gennis H. Learned, deceased, alleging that said Gennis H. Learned was at the time of her death an heir of her sister, Deborah H. Lee, who died intestate in March, 1903, and whose estate at the date of D. A. Learned's second petition for letters testamentary was in process of administration in the superior court of this state in and for the county of San Joaquin. The appellants here are not seeking to set aside the decree of distribution in the estate of Gennis H. Learned, made in 1904; but they contend that the interest of Gennis H. Learned's estate in the estate of Deborah H. Lee (which relates to personal property) should not be distributed under the terms of Gennis H. Learned's will, but should be treated as if she had died intestate. This contention is based upon the theory that, by failing to comply with the terms of the mutual will executed by Gennis H. Learned and D. A. Learned, the latter had forfeited his right to take under that will.

By the terms of said will everything owned by D. A. Learned and Gennis H. Learned was declared to be community property, and all personal property was bequeathed to the survivor, who was named as executor or executrix, as the case might be. All realty was devised to the survivor, with remainder in fee to four of their children in severalty; the exact portion of each child being described in the will. By the decree of May 31, 1904, D. A. Learned took distribution of an undivided one-half interest in the real property, to which, by the terms of the will, he was given a life estate, with remainder in fee to his four children. The theory of appellants is that the probate court could not have taken jurisdiction of the property thus distributed, unless either (1) an undivided one-half interest in the realty had become Mrs. Learned's separate property before her death; or (2) the effect of the mutual will was such as to confer jurisdiction upon the court to distribute the devised community land (citing Estate of Rowland, 74 Cal. 523, 16 Pac. 315, 5 Am. St. Rep. 464).

It does not appear upon what theory the probate court made the decree of 1904. The declaration in the will that all the property was community property was not binding upon the court; but that question was by that court to be determined in accordance with the mode whereby the property was acquired. Estate of Granniss, 142 Cal. 4, 75 Pac. 324. There was separate property in the estate of Gennis H. Learned, and of this the probate court undoubtedly had jurisdiction. Having acquired jurisdiction of the estate, the court had the right to make final distribution, and any erroneous judgment might have been corrected on appeal. But, the judgment construing the will and making the first distribution having become final, we cannot now consider an impeachment of the decree by the will itself. Section 1908, Code Civ. Proc. Nor are appellants contending for such impeachment. If the appellants here had felt that the first decree was not in accordance with the terms of the will, they, as interested parties, could have prosecuted an appeal and could have sought its correction. Having failed to do so, they are now bound by the decree. Goad v. Montgomery, 119 Cal. 558, 51 Pac. 681, 63 Am. St. Rep. 145. We cannot say, further, that respondent, by accepting the results of the first decree rendered by the probate court, put himself entirely outside the benefits of the will with reference to personal property clearly bequeathed to him. If the appellants had equities in the land, they could assert them by proper proceedings; but here they are seeking to obtain a part of the separate personal estate of Mrs. Learned, which, by the unequivocal terms of the will, is bequeathed to D. A. Learned. This is fully illustrated by the following provision of the will: "We hereby give, devise and bequeath, each to the other, as the survivor may be, all and singular all the personal estate, wheresoever the same may be found or situated, belonging to either of us, and also a life estate in and to all and singular the real property of which either of us may die seized or possessed." The above provision applies with no ambiguity to the separate property of Gennis H. Learned. Whatever may have been the court's interpretation of the will at the time of the first distribution thereunder, there can be no doubt that this clause was properly construed when the second decree was made. Indeed, appellants do not say that under the terms of the will D. A. Learned was not entitled to all of the interest derived from the estate of Deborah H. Lee; but they are seeking to prevent him from taking personalty bequeathed to him, because he accepted a decree with reference to the realty inconsistent with the will, and, as they allege, dealt with said realty in a manner not warranted by the testamentary provisions.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It will be seen, however, that, although the will executed by the Learneds is mutual in form, it is in effect the separate will of each of them. There is nothing to indicate that it was the result of such mutual agreement, or based upon such consideration as would deprive the survivor of his right of revocation. See section 1279, Civ. Code. The survivor, if, through an erroneous interpretation by the court, he took distribution of an interest different from that intended by the testatrix, would not, after such disposition of the property had become fixed by lapse of time and lack of appeal, be bound to retain such dominion over the property as would permit of its distribution upon his death according to the identical will executed by himself and wife. But, even if there were such compulsion upon him, it would have been asserted with reference to the real property and not as against the personalty. The only interest which Mrs. Learned attempted to devise to these appellants was a remainder in real property. If they attempted to secure that interest, and without fraud on the part of Mr. Learned (and none is alleged) he secured such rights adverse to them as they neglected to question at the proper time, they cannot atone for their neglect, and repair the result of their laches, by obtaining an interest in property of a different character from that left to them by the terms of the will.

All of the rulings of the trial court which were adverse to the appellants were evidently based upon the theory that the decree of 1904 was conclusive as against appellants. We think the court was correct in this idea of the law. Estate of Davis, 151 Cal. 318, 86 Pac. 183, 90 Pac. 711, 121 Am. St. Rep. 105; Code Civ. Proc. § 1333. In their opposition appellants do not allege that they have lost any of their rights. There is no specification of fraud. They simply seek to show that respondent has so acted with reference to a part of his property that he cannot conscientiously accept that which is clearly bequeathed to him. We do not see how, upon reason or authority, such a contention may be upheld.

The judgment and order are affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

(156 Cal. 313)

PRINGLE v. WILSON. (S. F. 5,127.)

(Supreme Court of California. Sept. 23, 1909. Rehearing Denied Oct. 20, 1909.)

1. Landlord and Tenant (§ 39*)—Leases—Construction—"Expiration of Term."

Ordinarily the phrase "expiration of term," in a lease, means end of the term by lapse of the time fixed in the lease for its duration, though it may mean the termination of the lease in any manner, at least in any manner provided for in the lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 39.*

For other definitions, see Words and Phrases, vol. 3, pp. 2596, 2597.]

2. Contracts (§ 147*)—Construction—Meaning of Words.

The court, in determining the sense in which the words in a contract were used by the parties thereto, must look to the contract as a whole.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 743; Dec. Dig. § 147.*]

3. Contracts (§ 152*)—Construction—Meaning of Words.

Words used in one sense in one part of a contract are, as a general rule, deemed to have been used in the same sense in another part of the instrument.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 732, 733, 738; Dec. Dig. § 152.*]

4. Landlord and Tenant (§ 157*)—Lease—Construction.

A lease for a fixed term, with the privilege of extending it for a fixed period, on the lessee so electing a specified time before the "expiration of the original term," stipulated that in the event of the total destruction of the premises the lease should terminate and the parties be freed from all liability "hereunder"; that the lessee should make improvements; that "at the expiration of the original term, * * * viz., the term expiring on" a designated date, the lessor would pay to the lessee the cost of the improvement; that the lessee "at the expiration of said term" should produce the original vouchers for the money expended in the improvements, etc. The premises were totally destroyed before the expiration of the original term. *Held*, that the lessee could not recover the cost of the improvements made by him; the phrase "expiration of the term" meaning the termination of the original term by lapse of time.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 596, 597; Dec. Dig. § 157.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by William B. Pringle against William Wilson. From a judgment for defendant, on sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Pringle & Pringle and W. S. Andrews (Henry E. Monroe, of counsel), for appellant. Jacob Samuels and Oscar Samuels, for respondent.

SLOSS, J. This is an appeal by plaintiff from a judgment entered against him upon an order sustaining defendant's demurrer to his complaint. The facts, as averred by plaintiff, were these:

On March 23, 1905, the defendant was the owner of a lot in the city of San Francisco located on the southerly line of Post street and running through to the northerly line of Union Square avenue. The lot was covered by two separate brick buildings, one of which faced on Post street and the other on Union Square avenue. On the day named said defendant, Wilson, by a written lease, demised and let the said premises to plaintiff for the term of six years and four months, commencing on the 1st day of May, 1905, to and including the 31st day of August, 1911, for a total rental of $76,000, payable monthly in advance in installments of $1,000 each on the 1st day of each month during said term. The agreement between the parties contemplated the making of certain alterations and improvments upon the premises, and for this purpose the lessee was by the lease granted permission to take possession on the 1st day of April, 1905. The lease contains a great many provisions which are not necessary to be set forth here. The main controversy between the parties arises over the construction of clauses thirteenth and fourteenth, which read as follows:

"Thirteenth. That in the event of the partial destruction of the premises hereby demised by fire, earthquake, or any other cause, beyond the control of the party of the first part, this lease shall not be thereby invalidated or voided, but the lessor shall proceed to at once make the necessary repairs to said premises and to complete the same within a reasonable time, and that during the time of said repairs said lessee shall pay a proportional rental for such portion only of the premises as he may use and enjoy; but if said premises be totally destroyed, then and in such event this lease shall terminate, and the parties hereto shall be freed from all liability hereunder.

"Fourteenth. That, as a condition precedent to the taking effect of this lease and the vesting of the leasehold interest hereby created, said party of the second part (lessee) agrees, upon the delivery of the possession of said demised premises as herein provided, to forthwith proceed to make improvements upon and alterations to the said demised premises, in accordance with plans and specifications therefor to be prepared by the said party of the second part, or his architect, and to be acceptable to and approved by the said party of the first part (lessor), or his architect, and thereafter, with due diligence, to prosecute to a completion the improvements and alterations thus mutually agreed upon; and the said party of the first part agrees that at the expiration of the original term hereby created, viz., the term expiring on the 31st day of August, 1911, he will repay unto the said party of the second part the actual cost of said alterations to and improvements upon the demised premises by said party of the second part made, all as aforesaid, provided that if the amount thereof exceed the sum of five thousand ($5,000.00) dollars, said party of the first part will pay unto the said party of the second part the sum of five thousand ($5,000.00) dollars, and no more; and the said party of the second part agrees at the expiration of said term aforesaid, and at the time of said repayment, to produce original vouchers for any and all moneys by him expended as aforesaid, and reimbursement of which is by him sought from the said party of the first part; provided, however, that if said party of the second part shall elect to exercise his option for a renewal of this lease for a further period of five (5) years as in the next specific agreement provided, then and in such event no liability shall rest upon the said party of the first part to reimburse said party of the second part for any part of the money by said party of the second part expended for such improvements or alterations."

It may be well to refer also to clause 15, which provides that the term may be extended for a further period of five years from and after the 1st day of September, 1911, if the lessee shall so desire, "said election of the party of the second part (lessee) to be announced by written notice of the exercise thereof to be given by the said party of the second part at least four months prior to the expiration of the original term herein created." The rental payable during the additional period of five years is fixed at the rate of $1,250 a month.

The complaint alleges that pursuant to

the terms of the lease the plaintiff proceeded diligently to make the contemplated alterations and improvements, all with the approval of the defendant, and in so doing he expended more than the sum of $5,000. On the 1st day of May, 1905, he entered into possession of the property and remained in possession thereof until the 18th day of April, 1906, upon which date there occurred a severe earthquake, followed by a conflagration which totally destroyed the buildings upon the property so leased. It is further alleged that the plaintiff has produced and exhibited to the defendant original vouchers showing that he expended more than $5,000 in making said alterations and has demanded of the defendant said sum, and that the defendant has refused to pay any part thereof. The complaint asks judgment for $5,000, with interest and costs.

The demurrer was on the ground of want of facts sufficient to state a cause of action, and was sustained without leave to the plaintiff to amend. No point is made of the refusal of leave to amend. Plaintiff has in his complaint set out his case as well as it can be stated, and, if the facts set forth do not show any right of action, the court below was justified in entering judgment upon the sustaining of the demurrer. Stated as briefly as it may be, the question is: What is meant by the provision of the lease that "the said party of the first part agrees that at the expiration of the original term hereby created, viz., the term expiring on the 31st day of August, 1911, he will repay unto the said party of the second part the actual cost of said alterations to, and improvements upon the demised premises by said party of the second part * * * "? The contention of the respondent is that the expiration of the term referred to in this language is the ending of the period of time first named in the lease; i. e., the period of time running from the 1st day of May, 1905, to and including the 31st day of August, 1911. The appellant, on the other hand, claims that the expiration of the term is its end or termination in any manner, or, at least, in any manner that may be provided for by the language of the lease itself. Under clause 13 it is provided that the lease shall terminate in the event of the total destruction of the building by fire or earthquake, and such termination, it is claimed, vested in the lessee the right to repayment of such sum, not exceeding $5,000, as he had expended in making the alterations.

We need not enter into a prolonged discussion of the distinction, if there be any, between the phrases "expiration of the term," and "termination of the term." Ordinarily, it appears the former phrase is taken to mean an ending of the term by the lapse of the time provided in the lease for its duration. 18 Cyc. 1506; Stuart v. Hamilton, 66 Ill. 253; Finkelmeier v. Bates, 92 N. Y. 172; Reed v. Snowhill, 51 N. J. Law, 162, 16 Atl. 679. This is the meaning that has been given to the expression as it is used in unlawful detainer statutes giving to the lessor certain rights where the lessee holds over after the expiration of the term. Oakley v. Schoonmaker, 15 Wend. (N. Y.) 226; State v. Burr, 29 Minn. 432, 13 N. W. 676; Stuart v. Hamilton, supra. Such, too, is the construction given by this court to section 1161 of the Code of Civil Procedure, providing that the tenant is guilty of unlawful detainer when he continues in possession "after the expiration of the term for which it is let to him. * * * " Silva v. Campbell, 84 Cal. 420, 24 Pac. 316. There are, on the other hand, cases giving to the words "expiration of the term" the construction contended for by appellant. Wrotesley v. Adams, 1 Plowd. 187; Marshall v. Rugg, 6 Wyo. 270, 44 Pac. 700, 45 Pac. 486, 33 L. R. A. 679.

The question is not, however, what this expression might mean if it stood alone, or if it were used in some connection other than that appearing here. We must determine the sense in which the words were used by the parties to this lease, and to so determine we must look to the instrument as a whole. In the first place, it will be observed that the covenant to repay itself contains words of definition and explanation. The party of the first part agrees to repay the cost of alterations "at the expiration of the original term hereby created, viz., *the term expiring on the 31st day of August, 1911*." The italicised words furnish a strong indication that the parties used the words "expiration of the original term" as meaning its ending by lapse of time. The "expiration" of the term is the time or occasion of its "expiring," and such "expiring" will, as the lease declares, take place on the 31st day of August, 1911. The appellant attempts to explain this additional descriptive phrase by suggesting that it was inserted to distinguish the first term from the optional term to begin on September 1, 1911. But this purpose had already been accomplished by the use of the word "original" to qualify "term."

Again, the obligation to repay is not absolute. It is conditional upon the lessee not electing to take a renewal of the lease. Such election is, under clause 15 of the lease, to be evidenced by written notice to be given at least four months prior to the "expiration of the original term herein created." Here the phrase "expiration of the original term" is undoubtedly intended to mean the termination of the original term by lapse of time. The lessee certainly could not give notice of an election to renew four months before an ending of the term which might occur by destruction of the premises, or in any other manner that could not be foreseen. The parties, accordingly, must have contemplated that the event upon which the obligation to repay depended would not be ascertained until at or near the end of the five year and four month period, and this furnishes strong support for respondent's contention that the term "expiration of the original term" in clause 14 was used in the sense of ending by lapse of time.

The use of the phrase "expiration of the original term" in clause 15 aids in a further manner in the interpretation of clause 14. It is a familiar rule of construction that, other things being equal, words used in a certain sense in one part of an instrument are deemed to have been used in the same sense in another. As we have seen, the language in question, as found in clause 15, was clearly used to mean the end of the period of time first fixed. The words "expiration of the term" occur in two other parts of the lease, and it cannot be said to be clear that in either instance they were intended to convey a different meaning. In the latter part of clause 14 the lessee agrees "at the expiration of said term aforesaid" to produce original vouchers for any and all moneys by him expended as aforesaid. This is immediately followed by the proviso that no repayment should be made in the event of an election by the lessee to exercise his option of renewal, and a reading of the two provisions together would seem to indicate that the agreement to furnish vouchers had reference to the time when the lessee's right of occupation would cease by reason of his failure to notify the lessor of his election to hold the premises for an additional term; i. e., to the end of the first period of five years and four months. Paragraph 7 of the lease requires the lessee "at the expiration of the said term to surrender the premises in the same condition as by him received, reasonable use and wear thereof, etc., excepted." Whether the phrase is here used in the sense of ending by lapse of time, or by termination in some such way as voluntary surrender, may be open to doubt. Two cases dealing with this question are cited, and they are in conflict. Marshall v. Rugg, supra; Reed v. Snowhill, supra. But certainly the clause did not bind the lessee to surrender the premises in good condition in the event of a destruction of the buildings and consequent termination of the lease. No support for appellant's construction can be derived from clause 7.

If, however, the foregoing considerations could leave any doubt as to the meaning of clause 14, we think clause 13 plainly shows that the obligation to repay shall not exist in the event of the total destruction of the premises. That clause provides that, "if said premises be totally destroyed, then and in such event this lease shall terminate, and the parties hereto shall be freed from all liability hereunder." It is probably true, as is in effect conceded by the parties, that this clause was not intended to end liabilities which had accrued before the destruction of the premises. It does, however, by its express terms, end all liability not then accrued under the terms of the lease. Appellant seeks to limit the meaning of this provision by construing its last word "hereunder" as referring only to liability under the particular clause (13). The word "hereunder" may, it is true, refer to an entire instrument, or to only a particular part of the instrument in which it appears. In re Pearsons, 98 Cal. 603, 33 Pac. 451. As here used, however, the word would seem necessarily to refer to the entire lease. The clause releases both parties from all liability. But no liability was cast upon either party by clause 13 itself in the event of a total destruction. The only liabilities mentioned were those existing in the case of a partial destruction, which is not covered by the latter part of the clause. To read the word "hereunder" as contended for by appellant would therefore make it meaningless. Again, the principal, if not the only, liability provided for in the lease as a whole on the part of the lessor (after the lessee shall have gone into possession) is the liability to repay the cost of alterations. Why should it be held that this is not terminated by the occurrence of an event which, under the agreement, is to free both parties from all liability?

It is useless to go into a further analysis of the provisions of the lease. It seems clear to us, upon a reading of the instrument in its entirety, that the court below properly held that the obligation to repay was ended with the total destruction of the buildings. The appellant seeks to overcome this construction by insisting upon the inequitable results that would follow from its adoption. If the language used by the parties is clear and unambiguous, its effect cannot, of course, be varied for the mere reason that it appears to evidence an improvident or unfortunate bargain. But, in fact, the supposed hardship does not inhere in the interpretation we have put upon the lease. It may well be assumed that the rent for the original term was fixed at a lower rate than it would otherwise have been because of the fact that the lessee was improving the premises at his own cost. During that term the lessee, and he alone, would have the benefit of the improvements. At the end of that term they would pass into the possession of the lessor, who would then pay for them. But if the building, with these improvements, should cease to exist, where is the injustice in saying that the landlord shall not pay for what he cannot enjoy? If it be a hardship to compel the lessee to forego reimbursement for alterations to another's building, it must be remembered that the lessor would suffer in equal measure if compelled to pay the cost of improvements which could never come into his possession. The appellant supposes a destruction of the premises on the day preceding the expiration of the term, and asks whether this extreme case would not, on respondent's construction, subject the lessee to a burden which he could not have intended

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to assume. But the hardship is no greater than that which would, on the opposite construction, have been suffered by the lessor if the buildings had been destroyed at the very beginning of the first term. In that event the landlord would have been called on to pay an amount far exceeding the rent received by him under the lease.

The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

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156 Cal. 298

SPENCER v. COLLINS et al. (S. F. 5,074.)

(Supreme Court of California. Sept. 22, 1909. Rehearing Denied Oct. 20, 1909.)

1. INFANTS (§ 58*)—CONTRACTS—DISAFFIRMANCE.

Under Civ. Code, § 35, providing that if a contract be made by a minor whilst over 18 years old, it may be disaffirmed by him, except in immaterial cases, upon restoring the consideration to the person from whom received, or paying its equivalent, if a minor over 18 years old had paid the full value of services rendered him under a contract, and before his majority disaffirmed it, the other parties could recover nothing.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 159; Dec. Dig. § 58.*]

2. INFANTS (§ 58*)—CONTRACTS—DISAFFIRMANCE—SUFFICIENCY.

Where an infant, who had contracted with attorneys to represent him in a certain matter, and subsequently hired another lawyer to do the work, met one of the former attorneys while with the lawyer he had later hired, and the former attorney asked the other lawyer what he was doing, and he answered that he was representing his client, the infant, and the former attorney asked the infant what he intended to do about the contracts, and the infant stated, according to one version, that he denied them, and that he did not intend to fulfill them, and according to another version that he disaffirmed the contracts, a disaffirmance as to the attorney present was sufficiently shown.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 153; Dec. Dig. § 58.*]

3. INFANTS (§ 58*)—CONTRACTS—DISAFFIRMANCE—NOTICE TO ASSIGNEE.

Notice of an infant's rescission of his contract, should be given to the party with whom he contracted, and not to an assignee.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 153; Dec. Dig. § 58.*]

4. INFANTS (§ 58*)—CONTRACTS—DISAFFIRMANCE—EFFECT ON ASSIGNEES.

Where a firm of attorneys who had contracted with a minor to render services in securing his share of an estate for a certain portion of it, in turn procured a loan through another person in payment of which they assigned him an interest in the contract, the third person took the interest subject to the possibility of its being repudiated by the infant.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 149; Dec. Dig. § 58.*]

5. PARTNERSHIP (§ 159*)—CONTRACTS—DISAFFIRMANCE—NOTICE TO PARTNER.

A partner is an agent of a partnership in the transaction of its business under the express provisions of Civ. Code, § 2429; and, as notice to an agent is notice to the principal, under the direct provisions of section 2332, notice of an infant's disaffirmance of his contract with a firm of attorneys, given to one of them, was sufficient notice to the other partner.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 293-295; Dec. Dig. § 159.*]

6. INFANTS (§ 58*)—CONTRACTS—DISAFFIRMANCE—RETURN OF EQUIVALENT OF CONSIDERATION—EVIDENCE.

Evidence *held* to sustain a finding that an infant before disaffirming a contract had paid the other parties thereto the equivalent of the consideration which he had received.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 160; Dec. Dig. § 58.*]

7. EVIDENCE (§ 571*) — OPINION EVIDENCE — SERVICES OF ATTORNEY.

While the testimony of experts is admissible to prove the value of attorney's services, their opinions are not essential, and are not binding upon the jury, who may apply to the testimony their own experience and knowledge of the character of such services, and are especially not binding upon the court in cases tried without a jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2397; Dec. Dig. § 571.*]

8. INFANTS (§ 58*)—CONTRACTS—DISAFFIRMANCE—WORK DONE AFTER NOTICE.

A person who has notice that his contract with an infant for services has been disaffirmed cannot recover for services performed thereunder after the notice.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 159; Dec. Dig. § 58.*]

9. INFANTS (§ 58*)—CONTRACTS—DISAFFIRMANCE—RETURN OF EQUIVALENT OF SERVICES RENDERED.

Under Civ. Code, § 35, providing that, if a contract be made by a minor whilst over 18 years old, it may be disaffirmed by him, except in immaterial cases, upon restoring the consideration to the person from whom received, or paying its equivalent, a minor who has received only attorneys' services under a contract could disaffirm by returning the reasonable value of the services.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 157; Dec. Dig. § 58.*]

Department 1. Appeal from Superior Court, Alameda County; Henry A. Melvin, Judge.

Action by William Crane Spencer against M. C. Hassett and others. From the judgment, and an order denying a new trial, plaintiff and certain defendants appeal. Affirmed.

Walter H. Robinson, M. C. Hassett, and F. J. Hambly (Henry V. Morehouse, of counsel), for appellants. Chickering & Gregory and Howell C. Moore, for respondents.

SLOSS, J. In 1884 Abner Coburn, a resident of the state of Maine, died in that state, leaving a will whereby he disposed of an estate valued at $11,000,000. By this will the residue of the estate, consisting of stocks, bonds, and other personal property, as well as real property in Maine, North Dakota, and elsewhere, was given to various relatives of the decedent. Among those named in the residuary clause were Alonzo C. Marston, a nephew of the testator, and Abner Paul Marston, son of Alonzo. The will gave to Abner Paul Marston, who is one of the defendants in this action, three fifty-fifths of said residue. Whether this share was to come into the possession of Abner Paul on his attaining his majority, or at a later period, was a question in dispute between Abner Paul and Alonzo.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Abner Paul Marston was born on October 4, 1878. In July, 1898, he was therefore of the age of 19 years and 9 months. At that time he was residing at San Jose in this state. H. V. Morehouse and F. J. Hambly were engaged as partners in the practice of the law at San Jose. On July 8, 1898, a written agreement was entered into whereby Abner Paul Marston employed Morehouse & Hambly as his attorneys, authorizing and empowering them to attend to all legal matters necessary to protect his rights, and to settle his estate upon his arriving at the age of 21 years. By this writing he agreed, upon the turning over of said estate to him and the settlement of the accounts of the trustees appointed to carry out the terms of the will, to pay to said Morehouse & Hambly the sum of 10 per centum of the appraised value of his said estate, and further agreed to advance to said Morehouse & Hambly, on or before the 24th day of July, 1898, the sum of $1,250, to be used by them in making a trip to North Dakota and Maine and examining the condition of his property. By this writing he assigned to said Morehouse & Hambly, out of the estate devised and bequeathed to him, 10 per centum of its appraised value. The instrument was also executed by Morehouse & Hambly, who agreed therein to take charge of the aforesaid business of said Marston, and to take all steps necessary to preserve his property and estate, and fully inquire into and investigate its condition, and make a full and correct report thereof to him.

On July 18th the parties executed a second writing, similar in its main features to the one just described, with the exception that the proportion assigned or to be paid to Morehouse & Hambly was fixed at 15 per centum, instead of 10 per centum as in the earlier agreement. Prior to the execution of either of these writings one S. W. Boring had been appointed guardian of the person and estate of the minor, and the guardian joined in this second agreement. After Abner Paul Marston came of age, he compromised with his father the differences between them. The courts of Maine construed the will in accordance with the contention of the son, who thereupon, through the defendant George H. Collins, received from the trustees acting under the will of Abner Coburn the interest bequeathed to him, consisting of property worth at that time something over $230,000. He had theretofore conveyed all of this property to Collins, who took the same as trustee to pay the debts of the younger Marston, to make certain payments to Alonzo C. pursuant to the compromise above mentioned, and to turn over the residue to Abner Paul Marston. Collins refused to recognize the claim of Morehouse & Hambly to any share of the estate.

The partnership agreement between Morehouse and Hambly provided that the former should have a two-thirds and the latter a one-third interest in the business of the firm, and this agreement applied to the contracts just mentioned. After various partial assignments by Morehouse and Hambly, Morehouse assigned his remaining interest to the plaintiff, William Crane Spencer, who brought two actions against Abner Paul Marston, and Collins as his trustee, to recover Morehouse's share of the 10 and 15 per cent. proportions of the estate provided for by the respective writings. In these actions M. C. Hassett, Hambly, Jettora W. Hyde, and George E. Whitaker were made parties defendant, under an allegation that they claimed an interest in the subject of the litigation. Jettora W. Hyde was an assignee of Hambly's interest. Hassett and Whitaker had each received an assignment of a portion of the interest claimed by Morehouse & Hambly. By cross-complaints, which were substantially similar to the original complaints in the two actions, these defendants sought to recover the shares claimed by them under the contracts in question. The actions were, by consent of the parties, consolidated and tried together, and the court made findings, from which it drew the conclusions of law "that the plaintiff is not, nor are any of the defendants who have cross-complained against the defendants George H. Collins or Abner Paul Marston, the owner of any interest in any of the property conveyed to the defendant Collins, nor entitled to recover anything from either of said defendants Marston or Collins, but that said defendants Marston and Collins are entitled to recover costs against said plaintiff and against said cross-complainants." Judgment was entered accordingly. The plaintiff and the unsuccessful defendants, with the exception of the defendant George E. Whitaker, appeal from the judgment and from an order denying their motion for a new trial.

Among the findings was one to the effect that the contract of July 8th was canceled by the contract of July 18th, and that no services were rendered under the first-named contract by Morehouse & Hambly. The appellants acquiesce in the correctness of this finding, and limit their claims on these appeals to such rights as they may have under the agreement of July 18th, i. e., the 15 per cent. contract.

At the time this agreement was made Marston was a minor over the age of 18 years. The court found: "That on or about the 2d day of October, 1899, said defendant Abner Paul Marston, having theretofore employed other counsel, disaffirmed the said contract bearing date July 18, 1898, and discharged the said Morehouse and Hambly from his employ." It was further found that said Morehouse and Hambly had, prior to the 2d day of October, 1899, received from Marston sums aggregating $5,062.55, and that "the sums thus received were the full value and equivalent for all services rendered by them under said contract of July 18, 1898, up to the time of the disaffirmance of said contract by the said minor." Section 35 of the Civil Code reads as follows: "In all cases other than those specified in sections thirty-six and thirty-seven, the contract of a minor, if made whilst he is under the age of eighteen, may be disaffirmed by the minor himself, either before his majority or within a reasonable time afterwards; or in case of his death within that period, by his heirs or personal representatives; and if the contract be made by the minor whilst he is over the age of eighteen, it may be disaffirmed in like manner upon restoring the consideration to the party from whom it was received, or paying its equivalent." Sections 36 and 37 deal with matters not material here. Under the finding of the court that Marston had on October 2d, two days before attaining his majority, disaffirmed the contract, and the further finding that he had theretofore paid to Morehouse and Hambly the full value and equivalent of all services rendered by them up to the time of the disaffirmance, the only possible conclusion of law was, therefore, that drawn by the trial court, namely, that Morehouse and Hambly, or those claiming under them, were not entitled to any recovery as against the minor or his trustee.

Both findings, i. e., that of disaffirmance and that declaring the receipt by Morehouse and Hambly of the full value and equivalent of all services rendered, are attacked by the appellants. On the issue of disaffirmance there was evidence which the trial court was entitled to accept, to the effect that on October 2, 1899, Abner Paul Marston, who had theretofore retained Howell C. Moore as his attorney, met Morehouse in a saloon in San Francisco. He came out of the saloon with Morehouse, and on the sidewalk met Moore. Morehouse stated to Moore that he had heard some strange reports, and asked Moore what he was doing. Moore said he was representing his client, Marston. Morehouse then asked Marston what he intended to do about the contracts, and, according to Marston's account, the latter said "that he denied them; that he did not intend to fulfill them; answered to that effect." Moore's testimony was that in answer to Morehouse's reference to the contract Marston had said: "Well, I disaffirm that contract." That the declaration of Marston, whether we accept his own version, or that given by Moore, constituted a sufficient disaffirmance so far as Morehouse is concerned is not open to question. (We are not at this point, of course, considering the necessity of restoring the consideration as a condition of complete disaffirmance.) A contract (or conveyance) of a minor may be avoided by any act or declaration disclosing an unequivocal intent to repudiate its binding force and effect. Page on Contracts, 86; Hastings v. Dollarhide, 24 Cal. 195; Drake's Lessee v. Ramsay, 5 Ohio, 251; Singer Mfg. Co. v. Lamb, 81 Mo. 221. Under this rule, which is thoroughly well settled, it may be questioned whether express notice of disaffirmance to the adverse party is required, provided the act or declaration of repudiation is in its nature public and unequivocal. Thus it has been held that the deed of a minor, at all events of a minor remaining in possession, may be disaffirmed by his subsequent conveyance to a third party. 22 Cyc. 556, and cases cited. But if we assume that the party contracting with the minor, and every such party, is entitled to some form of notice of the election to disaffirm, we are satisfied that notice to Morehouse was all that was required to terminate the rights of all the appellants.

In Downing v. Stone, 47 Mo. App. 144, the court held that notice of rescission should be given to the party with whom the infant contracted, not to an assignee. This, we are satisfied, is the true rule, and the one that is necessary for the full protection of the minor in his right of disaffirmance. Applied to the facts of the case at bar, it disposes of the contention that the disaffirmance was ineffectual for want of notice to the plaintiff, to Jettora W. Hyde, to Whitaker, or to Hassett. With reference to the last named, a somewhat fuller statement of the facts may be required. By the original agreement, that of July 8, 1898, Marston undertook to advance to Morehouse & Hambly $1,250 to be used by them as expenses in traveling to North Dakota and Maine. The court found that Marston was unable to raise this sum of money, and enlisted the assistance of Morehouse in securing it. After several unsuccessful efforts Morehouse and Marston applied to Hassett, who arranged to secure a loan of $1,250 from one Costello. Marston, having decided that he wished to accompany Morehouse on the trip, requested Hassett to secure $2,500, and Hassett did obtain a loan of this sum from Costello. As a condition of the making of the loan, it was required that a promissory note be given signed by Morehouse, Marston, Boring as guardian, and Hassett, and further that Hassett "should receive a five per cent. interest in a fifteen per cent. contract to be drawn running to said Morehouse and Hambly, and that said Morehouse & Hambly simultaneously therewith should assign to said Hassett a five per cent. interest therein; that in the event that Morehouse & Hambly could not make a trip East or attend to the matters pertaining to the estate of said minor, that said Hassett should make such trip and attend to the interests of said minor." In accordance with this agreement the instrument of July 18th was drawn and signed by Abner Paul Marston, Boring, his guardian, Morehouse and Hambly. Attached to it was an assignment from Morehouse and Hambly to Hassett of one-third of their interest in the "foregoing contract" in consideration of services and other accommodations to be given to said Morehouse and Hambly. The Costello note was ultimately paid by Marston. It is now argued that, inasmuch as the transfer to Hassett of a 5 per cent. interest in the estate of the minor was made pursuant to an agreement with the minor himself, the resulting writings are to be construed as defining an agreement between the minor and Hassett, and that this agreement could not be disaffirmed without notice to the latter. The argument, however, overlooks the fact that in compliance with Hassett's own wishes a definite agreement for the rendition of services by Hassett to the minor, or payment for such services by the minor to Hassett, was not made. The transaction, as finally reduced to writing, must under familiar principles be deemed to express the actual intent of the parties, and that intent was that Marston should make an agreement for 15 per cent. with Morehouse & Hambly, and that Morehouse & Hambly should assign a portion of that interest to Hassett. Hassett accordingly took whatever interest he had in the agreement, not directly from the minor, but from Morehouse & Hambly, to whom the minor granted it by his contract. Hassett, therefore, stands in the same position as any of the parties claiming an interest by assignment from Morehouse and Hambly. Each of such parties, accepting a transfer of an interest in a contract made with a minor, took that interest subject to the possibility of its being repudiated by the minor.

The position of Hambly is different. But he and Morehouse were partners; and, while that fact is not recited in the agreements, it is clearly shown by the evidence that the contracts in question were partnership transactions. Morehouse testified that he and Hambly became partners on January 1, 1898, and, that under the terms of their association, Morehouse's interest was two-thirds and Hambly's one-third. Upon the dissolution of the partnership in August, 1900, their interests in these contracts were divided in this proportion: As a partner, Morehouse was an agent of the partnership in the transaction of its business (Civ. Code, § 2429; Krasky v. Wollpert, 134 Cal. 338, 66 Pac. 309), and, accordingly, upon the principle that notice to an agent is notice to the principal (Civ. Code, § 2332), notice of disaffirmance to Morehouse was sufficient notice to his partner Hambly.

The only matter that remains to be considered is whether the minor, before the time of disaffirmance, had paid Morehouse & Hambly the equivalent of the consideration which he had received. The only consideration which was to pass to the minor under the agreement of July 8, 1898, was the performance of professional services by the attorneys with whom he was contracting. The services performed under the contract are fully detailed in the testimony of Mr. Morehouse, and may be briefly summarized as follows: Shortly after the execution of the agreement Mr. Morehouse went with Marston to Fargo, N. D., and there made investigations into the status of Marston's property rights in that state. This occupied three days. From there he went to Maine, and was similarly engaged for five days. Upon his return there were frequent interviews between Marston and Morehouse concerning the former's property rights. In addition to these services Morehouse & Hambly assisted the minor in obtaining loans of money from various persons. It appears that Marston was a young man of improvident and somewhat dissipated habits, and that he was constantly pressed for funds. Each of the loans which he succeeded in getting was obtained only upon the condition of paying very heavy commissions, and in most, if not in all, instances the net proceeds, after the deduction of all expenses, were equally divided between the minor and his attorneys. In this way Morehouse & Hambly received from the minor, prior to his declaration of disaffirmance, over $6,000. The testimony of Hambly himself was that this amount was credited, or might be credited, upon the claims of Morehouse & Hambly against Marston for services. The finding of the court that $5,062.55 had been received by Morehouse & Hambly is therefore fully sustained by the evidence. The court found, as has been stated, that this amount was the full equivalent for all the services rendered by the attorneys under their agreement. The court was fully authorized to so find. It is argued that the finding is unsupported because there was no testimony of the value of the services. The position of the appellants is, apparently, that, before a court can find the value of professional services, it must have before it the testimony of experts to the effect that certain services are of a certain value. But this is not the law. The testimony of experts is of course admissible to prove the value of attorneys' services. Forsyth v. Doolittle, 120 U. S. 73, 7 Sup. Ct. 408, 30 L. Ed. 586; Louisville, etc., Co. v. Wallace, 136 Ill. 87, 26 N. E. 493, 11 L. R. A. 787. But the opinions of the experts in such cases are not binding upon the jury, who may apply to the testimony "their own experience and knowledge of the character of such services." Head v. Hargrave, 105 U. S. 45, 26 L. Ed. 1028; Forsyth v. Doolittle, supra; Estate of Dorland, 63 Cal. 281; Schlesinger v. Dunne, 36 Misc. Rep. 529, 73 N. Y. Supp. 1014. "Expert evidence, after all," it is said in the case last cited, "is merely the opinion of the witnesses offered, and the court or jury may exercise an independent judgment in determining how far it will follow the opinions expressed." If the jury may form a judgment as to the value of services in opposition to the opinions of experts, it necessarily follows that the testimony of experts is not essential. And so it has been held in cases tried before a jury (Bourke v. Whiting, 19 Colo. 1, 34 Pac. 172; Gibbons v. Missouri Pac. R. R. Co., 40 Mo. App. 146), as well as with respect to issues determined by a court or referee (Noftzger v. Moffett, 63 Kan. 354, 65 Pac. 670; Dempsey v. Schawacker, 140 Mo. 680, 38 S. W. 954, 41 S. W. 1100). If this doctrine is applicable to jury trials, there is much more reason for applying the doctrine in cases tried before a court. The value of attorney's services is a matter with which a judge must necessarily be familiar. When the court is informed of the extent and nature of such services, its own experience furnishes it with every element necessary to fix their value.

No time need be spent in giving reasons for our conclusion that the evidence of the character and amount of the services here rendered fully supported the finding that they had been adequately recompensed. The court may have well concluded that time and labor expended in obtaining for a minor large loans, on the terms and under the circumstances here shown, was not a service calling for compensation under the terms of the contract. The amount received by the attorneys was sufficient to allow them a liberal payment for all other services rendered.

After the notice of disaffirmance Morehouse went to Maine again, and did some work there in connection with Marston's estate. Whether this trip was intended primarily in his own interest or for the benefit of the minor, he was not, of course, entitled to payment for work done after he had received notice that the minor repudiated the agreement.

The appellants take the position that a payment of the value of what the minor had received is not a restoration of the consideration received by him or a payment of its equivalent within the meaning of section 35 of the Civil Code. The argument is that, where there is an express contract between the parties for personal services, the only consideration that a court can look to is the consideration agreed to be paid, and that, therefore, the minor's right of disaffirmance was conditional upon his paying to Morehouse and Hambly what he had agreed to pay them, viz., 15 per cent. of his estate. This argument is obviously unsound. Carried to its logical conclusion, it means that a minor can disaffirm a contract wholly executory only by performing it. The right of disaffirmance, if the position be well taken, would be absolutely worthless. The fallacy of the argument lies in the assumption that the consideration to be restored is what the minor had agreed to do, i. e., the consideration received by the adverse party. All the minor is obliged to restore is what he received from the other side. That, in this case, consisted of services. The services themselves not being capable of restoration, the minor was required to return their equivalent, which consisted of the reasonable value of such services.

The foregoing discussion is sufficient to dispose of the case. It will not be necessary to refer to the additional facts shown by the record, although the respondent bases upon them further reasons for sustaining the action of the court below.

The judgment and order appealed from are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

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11 Cal. App. 122

BLOOM v. MICHIGAN SALMON MINING CO. et al. (Civ. 496.)

(Court of Appeal, First District, California. Aug. 16, 1909.)

1. Appeal and Error (§ 781*)—Dismissal of Appeal — Settlement with One Defendant.

Where, in a suit against two defendants, the venue is changed on the motion of one of them, from which order plaintiff appealed, the fact that plaintiff had agreed to release one defendant on receiving $375, no part of which was shown to have been paid, did not entitle the other to a dismissal of the appeal, on the ground that a moot question only was presented.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3122; Dec. Dig. § 781.*]

2. Venue (§ 41*)—Residence of Parties—Codefendants.

Where an action is brought against two defendants residing in different counties, one of them, whose residence was in a county other than that in which the suit was brought, in order to procure a change of venue to the county of his residence, must show that none of the defendants were residents of the county where the venue was laid.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 62; Dec. Dig. § 41.*]

3. Corporations (§ 503*) — Venue — "Residence"—Corporation.

For the purpose of determining the venue of an action, a corporation defendant's principal place of business is its place of "residence."

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1935; Dec. Dig. § 503.*

For other definitions, see Words and Phrases, vol. 7, pp. 6151-6161; vol. 8, p. 7788.]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by S. Bloom against the Michigan Salmon Mining Company and another. From an order changing the place of trial from San Francisco to Sonoma county, plaintiff appeals, and defendant Michigan Salmon Mining Company moves to dismiss. Motion denied. Order reversed.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

S. Bloom, in pro. per., and L. W. Juilliard, for appellant. James M. Allen and James C. Sims, for respondents.

COOPER, P. J. This action was brought for the purpose of dissolving a copartnership alleged to exist between the plaintiff and the defendant Grant, said partnership being in regard to the ownership, working, and development of the Red Hill and Cash hyraulic placer mines, situated in Siskiyou county, and to have it adjudged that the contract made by said Grant with the defendant corporation (under which the corporation is alleged to be in possession of the mining property, and claiming to own the same, and is alleged to be working same) is void as to this plaintiff, and that the said corporation be required to account for the value of all the minerals extracted by it from the said mine. The complaint prays that a receiver be appointed, and that it be decreed that the contract made between defendant Grant and the defendant corporation is void. On motion of defendant Grant, accompanied by a demand and affidavit of merits as to Grant, the place of trial of the action was ordered changed from the city and county of San Francisco to the county of Sonoma; that being the county in which said Grant resides, and in which he resided at the time of the commencement of the action. This appeal is from the order changing the place of trial to Sonoma county.

Defendant Michigan Salmon Mining Company moved to dismiss the appeal, on the ground that the appeal now presents only a moot question, because the plaintiff has settled with defendant Grant. The notice is accompanied by a copy of an agreement made between plaintiff and defendant Grant, dated December 10, 1906, by the terms of which it appears that upon the payment of the sum of $375 to plaintiff by defendant Grant, at the times and in the manner specified by said contract, the plaintiff will release defendant Grant from all claims and demands of every kind, including the matters embraced in said litigation. It is not made to appear, by affidavit or otherwise, that defendant Grant has ever paid to the plaintiff the said $375, or any part thereof. It is further expressly stated in said agreement that the plaintiff reserves all rights against the defendant corporation. If the complaint is true, the plaintiff is entitled to relief against the corporation. But be this as it may, we cannot decide the merits of the controversy, nor as to whether or not the settlement with Grant would of itself release the defendant corporation, on this motion to dismiss the appeal. The plaintiff is seeking relief against both defendants. The allegations in regard to the agreement of settlement are as to one defendant. The motion is therefore denied.

As to the order changing the place of trial, the record does not show anything as to the place of residence or the principal place of business of the defendant corporation; nor is there any affidavit of merits made by or on behalf of said corporation. So far as the record shows, the defendant corporation may have no defense to the said action on its merits. The burden was upon the moving party to show that none of the defendants are residents of the county in which the action was brought. Hearne v. De Young, 111 Cal. 376, 43 Pac. 1108. The principal place of business of a corporation is its residence within the meaning of the Code as to the change of place of trial. Jenkins v. Cal. Stage Co., 22 Cal. 538; Cohn v. Central Pacific R. R. Co., 71 Cal. 489, 12 Pac. 498; McSherry v. Penn. C. G. M. Co., 97 Cal. 641, 32 Pac. 711.

The order is therefore reversed.

We concur: KERRIGAN, J.; HALL, J.

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11 Cal. App. 138

SCALLY v. W. T. GARRATT & CO.

(Civ. 586.)

(Court of Appeal, Third District, California. Aug. 21, 1909. Rehearing Denied by Supreme Court Oct. 15, 1909.)

1. Damages (§ 38*)—Personal Injuries—Elements of Damages.

The fact that a child 12 years old was so injured as to destroy his ability to pursue musical studies, on lines for which he possessed peculiar talent, may be considered in fixing the damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 237–241; Dec. Dig. § 38.*]

2. Appeal and Error (§ 1004*)—Excessive Damages.

A reviewing court may not invade the province of the jury as to damages in a personal injury action, unless it clearly appears from the face of the record evidence that the sum assessed could not have been given except under the influence of passion or prejudice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944–3947; Dec. Dig. § 1004.*]

3. Damages (§ 185*)—Personal Injuries—Evidence of Damages.

In a personal injury action, there can be no direct evidence of the amount of damages sustained, or the amount of money which will compensate for the injury, so that it is sufficient to show the jury the extent of the injury, and the amount of the verdict is to be determined by the exercise of intelligent discretion.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 503–508; Dec. Dig. § 185.*]

4. Damages (§ 132*)—Personal Injuries—Excessive Damages.

A child 12 years old was so injured as to permanently impair his ability to pursue in the future an occupation requiring the exercise of his natural physical power. His right arm and hand grew smaller from atrophy, and physicians did not believe that the difficulty could ever be remedied. For two years after the accident he suffered from the effects of his injuries, and physicians testified that he would probably continue to suffer pain. The disability prevented him from pursuing his musical studies, on lines for which he possessed peculiar talent. *Held*, that a verdict for $7,500 was not excessive.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372–385; Dec. Dig. § 132.*]

5. DAMAGES (§ 215*)—ASSESSMENT OF DAMAGES—INSTRUCTIONS.

An instruction, in an action for personal injuries, that the jury, if believing that plaintiff "sustained the injuries complained of" through the negligence of defendant, without negligence on his part, should find for plaintiff, and assess his damages in such sum as under the circumstances he ought to recover, etc., must be construed as allowing compensatory damages only, for one sustains such damages only as amount to an actual loss to him, and, when so construed, it correctly states the rule declared in Civ. Code, § 3333, providing that the measure of damages for breach of an obligation not arising on contract is the amount which will compensate for all detriment proximately caused thereby, etc.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 215.*]

6. MASTER AND SERVANT (§ 96*)—INJURY TO SERVANT—NEGLIGENCE.

The proximate cause of an injury to a child 12 years old, while at work under an employment prohibited by St. 1905, p. 11, c. 18, is the negligence of the master in employing the child; the injury having been received through no fault of the child.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 96.*]

7. DAMAGES (§ 215*)—ASSESSMENT OF DAMAGES—INSTRUCTIONS.

An instruction, in an action for injuries to a child 12 years old, while at work under an employment prohibited by St. 1905, p. 11, c. 18, that the proximate cause of the injury was the negligence of the master, and an instruction directing the jury to assess plaintiff's damages in such sum as under the circumstances he ought to recover for the damages sustained, etc., did not authorize the jury to consider punitive damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 543; Dec. Dig. § 215.*]

8. DAMAGES (§§ 26, 32*)—PERSONAL INJURIES—ASSESSMENT OF DAMAGES.

One suing for a personal injury may recover for the suffering he has endured from the injury, and for such suffering in the future as the evidence with reasonable certainty discloses he will endure therefrom.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 40, 41, 69, 71; Dec. Dig. §§ 26, 32.*]

9. DAMAGES (§ 216*)—ASSESSMENT OF DAMAGES—INSTRUCTIONS—"WILL"—"MAY."

An instruction in a personal injury action that the jury in assessing the damages may consider the character of the injury, if any, sustained by plaintiff, the pain and suffering, if any, endured, and "which will be endured," if any, as the result of the injuries, if any, etc., properly limits a recovery for the suffering endured, and for such suffering as the evidence discloses he will endure in the future, since the word "will" as employed in the instruction must have been understood in its proper sense as referring to the unconditional existence of the fact, and not in the sense of "may," which imports a mere possibility.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548–555; Dec. Dig. § 216.*

For other definitions, see Words and Phrases, vol. 8, pp. 7462–7463; vol. 5, pp. 4418–4447; vol. 8, p. 7719.]

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Donald Scally by Mary Scally, his guardian ad litem, against W. T. Garratt & Co. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Naphtaly & Freidenrich, for appellant. Sullivan & Sullivan and Theo. J. Roche, for respondent.

HART, J. This is an action for damages for personal injuries. The prayer of the complaint demands a judgment for $15,000, and the jury returned a verdict for $7,500. Judgment was thereupon entered in favor of the plaintiff for the sum so awarded. The defendant presents this appeal from said judgment, and from the order denying it a new trial. The appellant claims to be entitled to a reversal of the judgment and order for the reasons: (1) that the damages assessed by the jury are so excessive as to justify the conclusion that the verdict was reached through passion or prejudice; (2) that the court erred to the prejudice of the appellant in the giving of certain instructions.

1. The evidence discloses these facts: The defendant, at the time of the accident through which the plaintiff sustained his injuries, owned and operated a foundry in the city of San Francisco, and was engaged in the manufacture of machines, nuts, bolts, tools, and other mechanical appliances. The plaintiff, a lad then under the age of 12 years, was employed to work in said foundry by the defendant in either the latter part of the month of June or the first part of the month of July, 1905. At that time the plaintiff measured about 4 feet and 8 inches in height and weighed approximately 80 pounds. Prior to his employment by the defendant the plaintiff was without any experience with machinery of any character. At first he was placed by Mr. Griffin, a foreman of defendant, in charge of a machine, the operation of which involved no particular danger of accidents to the operator. On this machine he worked for about two weeks, when he was put to the operation of a machine used for the purpose of "squaring off the tops of faucets." This machine consisted, among other contrivances, of a very small cutter, and the plaintiff testified that, in its manipulation, he was not required to place his hands anywhere near the knife or cutter. After working on this machine for little less than a week, he was "put to wrapping," at which, with other odd jobs in the nature of errand work around the foundry, he was employed for about three weeks, when he was put to work on the machine, in the operation of which he received the injuries complained of. This machine was used for cutting, squaring, and finishing

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

nuts, tools, and other mechanical appliances. It contained cutters, circular in form, about 2½ inches in diameter, and were necessarily very sharp.

The plaintiff testified: "There were two of these cutters on each side, and they were forced together, and the material which was to be squared was cut as it run between them; it cut both sides at the same time. Those knives were located, I guess, about 6 inches above the bed of the machine." The machine was run by electricity. There were belts connected with each of the wheels attached to the machine, and they extended up to a wheel where there was a revolving shaft. The power was turned on by means of a "shifter," which was located above the machine, and at a point to the front of the operator, from the point at which he stood when operating the machine. The plaintiff was not of sufficient height to operate the machine without a platform upon which to stand, and this platform was placed in front of the machine; it having been built for the special purpose of enabling the plaintiff to operate the machine on which he was at first put to work. The plaintiff further testified: "When I was put to work on this machine, Mr. Griffin showed me how to run the material through. The material that was cut was stuffing nut and fusible plug. They were run in between the knives on a kind of a platform that they screwed them down to. That is the appliance or projection appearing in the middle or center of this machine. Then they were forced into the knives. All that Mr. Griffin said to me at the time he placed me to work on this machine, for the first time, was to show me how to operate it. He said, whenever you are going to cut a screw down on this projection, to be careful and screw it down tight, because he said you would spoil the material if you did not; it would leave the sides crooked, and they would not mill straight. That was practically all that was said during that conversation when I was first placed at work upon that machine. * * * Mr. Griffin told me to put all the defective plugs or nuts on the lid or shelf connected with the rear of the machine; he told me not to mill the defective material. I put it over on this shelf or lid. He did not tell me how to put it over there. And then I started to operate the machine. In operating it I came in contact with defective material, which I placed on the lid or shelf just as he told me. placed it there by reaching over the machine; right over the cutters like that [showing] with my right hand. * * * During the first two days that I was put to work on that machine, I discovered quite often material which could not be used, and which I was instructed not to use. That material I placed upon that lid in the manner which I have indicated, by putting my right hand over the knife or cutter. * * * I was never told by Mr. Griffin, or anybody else connected with the establishment, to get off that platform in front of my machine, and go round to the rear of the machine and place the material on the shelf or lid in that manner, and then go around to the front again. To do it in that way would occupy some considerable time. I was never told to do it in that way. The clothes in which I worked was a pair of overalls and a dark shirt. When I went there to be employed by W. T. Garratt, I told my parents I was going there to wrap. The shirt I wore while working in that factory was a dark shirt with white stripes. It was calico, I guess. The sleeves were not very loose. The accident happened this way: I had just finished my lunch, and went to work on the machine. I was told to fix some stuffing nuts at the side, and was working on them for a while, when I found a defective nut, and reached over the top of the knives to put it on this lid or shelf as I was told to do, and my arm got caught. I don't know whether it was the sleeve or the arm itself; it happened so quickly. The cutters tore into my arm, and then I was taken down to the Receiving Hospital, to the Harbor Emergency down near the water front."

With reference to the effect of the injuries he sustained, the plaintiff testified: "The arm and hand is smaller than the other arm and hand which was not injured. I have no power at all in the thumb or forefinger—no sensation—can't feel anything in those fingers, and can't use them at all; can't bend them except as indicated. There is no sensation at all in the middle finger." He said that prior to the accident he had been "taking music lessons upon the violin" but that since his arm and hand were injured, "it is impossible for me to further manipulate the violin"; that it is with great difficulty that he can now handle a pen so as to write; that in cold weather he still suffers "terrible pain in that arm."

The mother of plaintiff saw the injured arm and hand the day following that upon which the accident happened, when the attending physician was dressing the wounds, and she declared that "the arm was in an awful condition; that the flesh was all chopped away, just like it had been chopped off with a knife or something." She said that the boy had been unable to take lessons on the violin after the accident, and that, after some practice, he got so that he could write by holding a pen between his thumb and little finger. For about a year after he was hurt, she continued, he suffered from occasional fainting spells when the weather was cold.

Dr. Stoney, who was called in and attended the plaintiff immediately after the accident occurred, had died before the trial of this action, and Drs. Haber and Buckley, at the request of plaintiff, made an examination of the injured arm and hand and the muscles of that member. Dr. Haber testified, in part, as follows: "When I refer to the arm which I say was slightly smaller, I mean the arm between the shoulder and the elbow. The forearm, between the elbow and the wrist was considerably smaller. The muscles were atrophied, and some of them in a degenerated condition. By atrophy I mean the muscles, due to the injury to the nerve supply [ing] them, degenerate, and do not perform the functions that they should. They cannot perform those functions because the nerve supply is shut off. There is a nerve located in the arm, part of the brachial system which supplied the forefinger and the thumb. That nerve originates in the plexus; that is, in the brachial plexus. Those are the nerves which originate just above the shoulder in the neck. That nerve supplies the muscles in the upper arm, in the forearm, the muscles of the hand, and also the sensation of some parts of the skin. It supplies or controls the muscles which bend the finger or flex the finger—all of the fingers in part and entirely of the index and middle fingers. It supplies some of the muscles of the thumb. * * * From my examination of this arm, and hand and fingers, and from the test that I have made of the hand and fingers, I will state that the nerve has been injured, but not entirely destroyed. Some of the muscles supplied by that nerve are active; others are not. From my experience as a doctor, I do not think it will be possible for the boy at any time to recover the use of the thumb and finger. I have observed weakness in that finger and hand. There are other signs of an injury to the nerve and to the artery. Those signs are the hand has not developed as the other hand is; it is smaller, two of the fingers are shorter, and not as large in circumference. * * * I do not think it will ever be possible for plaintiff to perform any manual labor in that arm or hand. I do not think it would be possible for him to play upon the violin with any degree of success with his hand and arm in its present condition."

Dr. Buckley corroborated generally Dr. Haber as to the condition in which the lad's arm, hand, and the muscles of the injured member had been left by the injuries sustained by the accident. He said that it was his opinion that the plaintiff would never be able to use the injured hand again to any advantage; that it would be impossible for him to play on any musical instrument such as a violin; that "the boy is suffering from wasting of the inner side of the forearm, and also suffering from a general defect of the arm." Dr. Buckley said that the atrophied condition of the arm was due to the injury to the whole nerve. This witness declared that "from my experience as a physician and surgeon, the injuries received by plaintiff, as indicated by his present condition, must have caused him great suffering. Whenever you have an injury to the nerve, you are sure to have a great deal in the track of that ever afterwards, and the slightest cold or changes of temperature are very apt to produce it."

The plaintiff and his mother and father testified that for two years previously to the time he was injured, he had been a pupil of a teacher of violin music, and had acquired such proficiency as a performer on that instrument as that he was able to, and did on several occasions, play in public.

The foregoing statement embraces, in substance, all the important facts established by the evidence. There are, as stated, but two points urged on this appeal. The sufficiency of the evidence to justify a verdict in favor of the plaintiff is not challenged, the only claim with regard to the evidence being, as seen, that the damages awarded by the jury are so excessive as to compel the conclusion that they were given under the influence of passion or prejudice. Section 657, subd. 5, Code Civ. Proc.

We see nothing in the record from which this court would be warranted in declaring that the jury, in the rendition of their verdict and in arriving at a conclusion as to the amount at which they assessed the damages, were influenced by any other motive than a conscientious consideration of the facts which were adduced before them. The testimony discloses and establishes beyond all peradventure that the boy was so seriously injured as to permanently impair his ability to pursue, during the balance of his life, an occupation requiring the exercise of his full, natural physical power, that for two years after the accident he suffered from the effect of his injuries, and that his condition at the time of the trial, which took place over two years after the accident, was such as to justify Drs. Haber and Buckley in testifying, by way of a professional prognosis of his injuries, that, during the remainder of his life, he would in all probability continue to suffer pain from said injuries. The fact that the plaintiff will forever be prevented, by reason of the impairment, or, in truth, complete destruction, of his ability to pursue the musical studies, on lines for which, evidently, he possesses peculiar talent, is a matter of no little importance, and was a proper item for the consideration of the jury in the fixing of such compensation for the great loss he has sustained through the negligence of the defendant as would be fair and just. As a result of his injuries, his right arm and hand have grown smaller from atrophy than his left arm and hand, and the doctors hold out no hope that the difficulty can ever be remedied or corrected in any perceptible degree. The necessary result is that the plaintiff is not only seriously handicapped permanently in the great struggle for existence, but a laudable ambition to acquire proficiency in the particular musical line to which his genius in that respect directed him is absolutely destroyed and thwarted when he is yet far removed from the threshold of man's estate. As is well suggested by counsel for the respondent, in replying to cases cited by appellant where damages were held to be excessive for the loss of two fingers or some like injury, "the injuries here complained of were vastly more serious than would have resulted from a mere fracture of the arm or a fracture or amputation of the fingers." No reviewing court has any right to invade the province of a jury in cases of the nature of the one here by cutting down or diminishing the amount of damages awarded, unless it clearly and distinctly appears from the face of the record evidence itself that the sum assessed as the compensation for the injuries sustained is so far beyond a reasonable and just admeasurement of damages, under all the circumstances appearing, as to imperatively force upon the court the fact that such damages could not have been given except under the influence of passion or prejudice.

All the cases say, as is said in Clare v. Sacramento Electric Power & Light Co., 122 Cal. 506, 55 Pac. 327, that: "In cases of this character, there can be no direct evidence of the amount of damage sustained, or the amount of money which will be a compensation for the injury, but it is sufficient to show to the jury the extent of the injury, and the amount of their verdict thereon is to be determined by the exercise of an intelligent discretion; and, unless the amount of the verdict is such as to indicate that it was given under passion or prejudice, it will be sustained." In other words, as is well said in Graham & Waterman on New Trials: "The court may set aside a verdict as excessive, in a proper case, where it appears that the amount could only have been arrived at through passion or prejudice. But it cannot, on the mere opinion, judgment, or feeling of the judges, fix the sum the plaintiff ought to have. It is no part of its duty to assess damages in cases of this kind. This duty the law confers upon juries. Nor is this court any better qualified than a jury to determine such amount. Attainments in the law do not aid at all in the discharge of such a duty; there is no reason to suppose the judges possess such experience in matters of this kind, or are so peculiarly endowed by nature that their judgments upon such questions are more unerring than those of juries." Again, the same authors, at page 451 of their work, say: "It is clear that the reason for holding the parties so tenaciously to the damages found by the jury in personal torts is that in cases of this class there is no scale by which the damages are to be graduated with certainty. They admit of no other test than the intelligence of a jury, governed by a sense of justice. It is, indeed, one of the principal causes in which the trial by jury has originated. From the prolific fountain of litigation numerous cases must daily spring up, calling for adjudication for alleged injuries, accompanied with facts and circumstances affording no definite standard by which these alleged wrongs can be measured, and which, from the necessity of the case, must be judged of and appreciated by the view that may be taken of them by impartial men. To the jury, therefore, as a favorite and almost sacred tribunal, is committed by unanimous consent the exclusive task of examining those facts and circumstances, and valuing the injury, and awarding compensation in the shape of damages. The law that confers on them this power, and exacts of them the performance of the solemn trust, favors the presumption that they are actuated by pure motives. It therefore makes every allowance for different dispositions, capacities, views, and even frailties in the examination of heterogeneous matters of fact, where no criterion can be supplied; and it is not until the result of the deliberations of the jury appears in a form calculated to shock the understanding, and impress no dubious conviction of their prejudice and passion, that courts have found themselves compelled to interpose." See, also, Bonneau v. North Shore R. R. Co., 152 Cal. 406, 93 Pac. 106, 125 Am. St. Rep. 68; Lee v. S. P. R. R. Co., 101 Cal. 118, 35 Pac. 572; Wilson v. Fitch, 41 Cal. 368; Wheaton v. N. B. & R. Co., 36 Cal. 590; Aldrich v. Palmer, 24 Cal. 513.

The records in the cases referred to and relied upon by the appellant were no doubt such as to justify the appeal courts in reducing the amount of damages returned by the juries upon the facts established therein, but we perceive nothing in said cases which requires or would justify the cutting down of the damages here awarded upon evidence disclosing a much different state of facts from that upon which the higher courts felt constrained in those cases to hold the damages to be so excessive as "to shock the understanding and impress no dubious conviction" that they were the result of passion or prejudice. As was said by the late learned Justice McFarland, in the case of Morgan v. S. P. Co., 95 Cal. 501, 508, 509, 30 Pac. 601, 602, 17 L. R. A. 71, 29 Am. St. Rep. 143: "Cases are cited where verdicts for less than the amount awarded in the case at bar have been set aside; but there are many cases where verdicts for larger amounts have been allowed to stand. Two cases exactly alike are not to be found." See the following cases where the appeal courts refused to interfere with the damages awarded for the loss of limbs, either one or both: Galveston Ry. Co. v. Abbey, 29 Tex. Civ. App. 211, 68 S. W. 293; Kalfur v. Broadway Ferry, 34 App. Div. 267, 54 N. Y. Supp. 503; Williamson v. Brooklyn Heights Ry. Co., 53 App. Div. 399, 65 N. Y. Supp. 1054; Robinson v. C. P. R. R., 48 Cal. 410—$10,000 for loss of an arm: Union Pacific Ry. Co. v. Connolly (Neb.) 109 N. W. 378. In Stewart v. Long Island Ry. Co., 54 App. Div. 623, 66 N. Y. Supp. 436, where the plaintiff obtained a verdict for $18,000, for an injury to his arm by which the member was permanently disabled, the court, refusing to disturb the verdict, says: "Further, I give much weight to the fact that the learned and acute trial justice refused to disturb the verdict." See, to same effect, Harrison v. Sutter St. Ry. Co., 116 Cal. 156, 47 Pac. 1019; Doolin v. Omnibus Cable Co., 125 Cal. 141, 57 Pac. 774; Reeve v. Colusa Gas Co., 152 Cal. 99, 92 Pac. 89; Smith v. Whittier, supra. In Reeve v. Colusa Gas & Elec. Co., 152 Cal. 110, 92 Pac. 94, Mr. Justice Shaw, who wrote the opinion, very aptly says: "It is impossible adequately to describe the suffering and misery—past, present, and future—inflicted upon the plaintiff as a consequence of the injury. The verdict is large, the amount of damage was a question for the jury, subject to the supervision and correction of the trial court, and, having been passed by the latter without disapproval, it is not for us to say, under the circumstances, that it is excessive." See Perkins v. Sunset Tel. & Tel. Co. (Cal.) 103 Pac. 190.

We think that common experience justifies the observation that either the loss of, or an injury to, an arm in such manner as to permanently disable it, thus rendering it practically useless to one compelled to earn a livelihood by manual labor, is worse and of infinitely greater disadvantage to the person so injured than would be the loss of a leg. In this case, if the testimony of the witnesses for the plaintiff be true, and it must, in view of the verdict, be so accepted by this court, the consequence of the injury inflicted upon the plaintiff by the defendant's negligence is, as we have before said, to permanently incapacitate him, to a great extent, for the performance of manual labor, or for the exercise of any other employment in which the full normal power of both arms and hands is required. And, as the New York court says, in Vredenburgh v. N. Y. Cen. & H. R. R. Co., 58 Hun, 607, 12 N. Y. Supp. 18, where the plaintiff was given damages in the sum of $6,500 for an injury to her right arm, so it is true here, "If the jury believed the testimony introduced by the plaintiff respecting the extent and permanency of her injuries, we can very well see how the verdict was made as it was"; the judgment therein being affirmed.

2. The instructions given by the court, which it is claimed misstate the rules by which the jury were authorized to be guided in considering the evidence and assessing the damages, read as follows: "If you believe from the evidence that plaintiff sustained the injuries complained of in his complaint, as amended, through the carelessness and negligence of the defendant, without negligence on his part, then you should find for the plaintiff, Donald Scally, and assess his damages in such sum as you believe, under all the circumstances of this case in evidence, the plaintiff *ought to recover*, not exceeding the amount claimed in his complaint, as amended, to wit, $15,000." "If you believe from the evidence that the plaintiff, Donald Scally, is entitled to a verdict against said defendant, you must assess the amount of damages at a sum not to exceed the amount prayed for in his complaint, as amended, and in so doing you have a right to consider the character of the injuries, if any, sustained by plaintiff; the pain and suffering, if any, endured, and *which will be endured*, if any, as the result of said injuries, if any, sustained by him; the effect of such injuries, if any, upon said plaintiff; the permanent character of said injuries, if any, if such injuries are permanent; and what, before the injuries complained of, was the health and physical condition of the plaintiff. From all those elements you will resolve what amount will fairly compensate the plaintiff for the injuries sustained by him, if any, provided you find in favor of the plaintiff."

Counsel for the appellant call our attention to several California cases in which it is held that instructions, phrased in language in some respects similar to that of the instructions complained of here, were erroneous. In illustration of the pertinency of this contention, and for the purpose of showing the similarity of the two instructions, counsel in their brief, parallel certain language of an instruction given in the case of Trabing v. Cal. Nav. Co., 121 Cal. 143, 53 Pac. 646, which they intimate was condemned by the Supreme Court as not containing a correct statement of the law, with the italicized portion of the first quoted of the foregoing instructions given in the present case. In the case cited, the instruction, among other declarations, contained the following: "* * * Then I charge you your verdict will be in favor of plaintiff for such damages as under all the circumstances of the case disclosed by the evidence *appearing* to be just, not exceeding," etc. But the court in that case does not, in its criticism of said instruction, go to the extent which the intimation of counsel would indicate. In fact, the court approved the instruction as involving a correct declaration of the law in abstract form. What the court did hold, however, was that in that particular case, where there was an entire absence of any ground upon which the infliction of punitive or exemplary damages, claimed by the plaintiff, could be justified, there having been no evidence introduced showing that the corporation defendant itself committed the tort, and none showing that it ratified the act of its agent resulting in the tort, the instruction was too general, and therefore misleading. The court said: "The instruction would apply to almost any conceivable case, whether the action was against the principal or the agent who actually committed the tort, and whether the facts did or did not justify exemplary damages." If the trial court in that case had clearly instructed the jury that, under the facts as established by the evidence, they should not consider the question of exemplary damages, as such question was not involved there, the instruction which appellant declares that the court condemned would have been proper in that case, for then, from the whole charge, it would clearly appear that the jury were properly restricted by the court in the matter of the assessment of damages to the consideration of the single question what amount, "under all the circumstances of the case disclosed by the evidence," appeared to constitute just compensation for the damages sustained.

In the case at bar, no such negligence was imputed to the defendant as would warrant the infliction of a punishment by way of damages in excess of the amount which would, in the judgment of the jury, constitute just compensatory damages. Nor was any claim made by the plaintiff that punitive or exemplary damages should be imposed. Besides, the court in plain and perspicuous language instructed the jury that if the negligence of the defendant was the proximate cause of the injuries, if any, sustained by plaintiff, their verdict must be in favor of plaintiff "for such damages as you shall find from the evidence he has sustained, not exceeding the amount claimed in plaintiff's complaint." Thus it clearly appears that the court distinctly told the jury that they were, in case they found the plaintiff's injuries were proximately due to defendant's negligence, to return only such amount as would in the estimation of the jury adequately compensate plaintiff for whatever damages he had thus sustained, and if the language of the instruction is susceptible of being understood at all it must necessarily be understood as expressly limiting the jury to the consideration of the proposition of what, if any, actual damages the plaintiff had suffered by reason of the accident, or in other words, as excluding from consideration by the jury any question of "damages" in the nature of punishment. The fact is, in strictness, it would seem in cases of personal tort that characterizing as "damages" the sum which may be allowed in certain cases in excess of that which may be awarded as compensation for the damages actually sustained is rather misleading, if not involving altogether a misnomer, for such "damages," so called, amount only to a punishment or a fine which the law says ought to be imposed in cases where the negligence is the result of wanton carelessness; such fine, somewhat in analogy to the action of qui tam, to go to the party who has been injured and brought the suit. As applied to the defendant, the phrase "exemplary damages" is appropriate enough; but as to the injured party, it could not be said that he could sustain "exemplary damages." It would obviously be absurd to so say. He could manifestly sustain such damages only as amounted to an actual loss to him; and, when the court explained that the plaintiff was entitled to such damages as the jury might find from the evidence that he had sustained, it must have thus been made clear to the jury that what the court meant, when it subsequently told them that they should "assess the damages in such sum as they believe from the circumstances of this case in evidence the plaintiff ought to recover," was that they were at liberty to allow actual damages only. As so understood, the instruction correctly states the law, and conforms to the rule as declared in section 3333 of the Civil Code, which reads: "For the breach of an obligation not arising upon contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all detriment proximately caused thereby, whether it could have been anticipated or not."

But counsel for appellant contend that the instructions upon the subject of the employment by a person, firm, or corporation of a child under the age of 12 years in manufacturing establishments, etc., contrary to the law of this state (St. 1905, p. 11, c. 18), of necessity submitted to the jury the question of exemplary damages, and that therefore the instruction of which we are speaking, considered in the light of the former, was erroneous, in that, necessarily, among the "circumstances" which the jury were therein told that they could consider in fixing the damages was the fact, if they found it to be a fact, that the plaintiff in this case, when employed by the defendant, was under the age of 12 years. The instructions with regard to the employment of a child under the age of 12 years, in violation of the statute, in substance declare that the proximate cause of an injury sustained by such child, while performing the duties required by his employment in one of the establishments mentioned by the statute, such injury having been received through no fault of the child, would be the negligence of the defendant, or, in other words, such negligence would be negligence per se. This is a correct statement of the law, and, when considered with the rest of the charge of the court, cannot be construed to mean that the question of punitive damages was thus opened up for investigation and determination by the jury.

The instruction given by the trial court and condemned by the Supreme Court in Fries v. Am. Lead Pencil Co., 141 Cal. 613, 75 Pac. 165, is radically different from the one assailed here. It reads in part: "* * * Then it would be your duty to give the child such amount of damages as you feel it is entitled to, not exceeding the amount prayed for in the complaint." In its criticism of this instruction the Supreme Court says: "To say that the jury may award such damages as they feel the plaintiff is entitled to is the equivalent to telling them that they may give play to their emotions of sympathy for the injured child, emotions which, eminently proper in themselves, can have no just place in fixing an award of actual damage." In the instruction in the case at bar the court said to the jury, as we have seen, that the negligence of the defendant being shown, and no fault of the plaintiff appearing, they should "assess the damages in such sum as you believe, under all the circumstances of this case in evidence, the plaintiff ought to recover, not exceeding," etc. In other words, the jury were not here told, as in the Fries Case, that they could give expression or full vent to their feelings, which in effect meant their sympathies, or at least could easily be so interpreted, in fixing the damages, but that they were to arrive at a sum which they believed, from all the circumstances in evidence, the plaintiff ought to receive as a fair and just compensation for the loss or damages sustained by him by reason of the injuries received through the negligence of the defendant.

The specific objection to the second instruction complained of is that the court, in setting forth the elements which the jury should take into account in assessing the damages, declared that, in addition to the immediate effect of the injuries sustained by plaintiff, they should consider "the pain and suffering which will be endured, if any, as the result of said injuries," etc. The vice of the instruction, it is insisted, is involved in that portion thereof in which the jury were thus told that any pain and suffering, if any, which the plaintiff will endure in the future as the result of his injuries constitute a proper element to be considered in fixing the damages; the argument being that this language authorized the jury to fix the damages, so far as the future effect of plaintiff's injuries was concerned, not alone upon what the evidence might show, with reasonable certainty, would be his future suffering, etc., but also upon what the jury might, by means of mere speculation or conjecture, conclude that the extent of his future pain and suffering might be. We do not so understand the language of the instruction. That plaintiff was entitled, not only to such damages as the evidence established that he had suffered, but also to such further damages as the evidence disclosed that he would suffer in the future, is a proposition no one will dispute. If, therefore, the evidence here disclosed with reasonable certainty the extent of the suffering, if any, plaintiff would endure in the future as the result of his injuries, the plain duty of the jury was to consider such evidence in fixing the amount of the damages. And, all that the instruction in effect declares is that, if the evidence was such as to enable them to ascertain and determine what the future pain and suffering of the plaintiff will be, then they should consider the same as one of the basic elements upon which they should assess the damages.

The instruction here is not like that condemned in the case of Melone v. Sierra Railway Co., 151 Cal. 113, 91 Pac. 522, et seq. In that case the trial court instructed the jury that an element of damages "was the pain and anxiety that he suffered or may suffer by reason of his injuries." This instruction was declared to be erroneous because the auxiliary verb as therein employed necessarily expressed the idea that the jury could indulge in speculation or conjecture as to whether and to what extent the complaining party would suffer in the future as the result of his injuries. Counsel for the appellant see no distinction between the two instructions, contending that the words "may" and "will" are used interchangeably, and are commonly so understood. Colloquially these auxiliary verbs may be so used and understood, but in grammatical construction they perform entirely distinct offices, and therefore convey essentially different meanings, the one importing a mere possibility or vague or indefinite speculation as to the existence of some fact or thing, the other the unqualified or unconditional existence of some fact or thing; or, in other words, the one meaning an existence in possibility, and the other an existence in actuality. A sick patient, for illustration, would much prefer to have his physician say, "You will recover," to the expression of the doubtful prognosis, "You may recover." Nor can it be assumed that the word "will" as employed in the instruction under review was so used by the court and understood by the jury as an auxiliary verb in any other than its true grammatical sense. The instruction here and the one in the Melone Case are therefore totally dissimilar, and obviously, as stated, convey entirely different meanings.

The cause seems to have been carefully and fairly tried; and, as before declared, the evidence abundantly supports the verdict and the amount of damages returned. In fact, when the youth of the plaintiff, and the dangerous machine upon which he was put to work without previous experience in its manipulation, and without having been specially warned with regard to the danger involved in its operation, are considered, we think, in view of the seriousness and permanency of the effect of plaintiff's injuries, the defendant was very considerately and liberally treated by the jury.

The negligence of the defendant is not disputed on this appeal, nor is there any claim here of contributory negligence on the part of the plaintiff.

No reason has been disclosed why the judgment and order appealed from should not be allowed to stand. They are, therefore, for the reasons herein given, affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

11 Cal. App. 202

WHITE v. MITCHELL. (Civ. 584.)

(Court of Appeal, Third District, California. Aug. 24, 1909. Rehearing Denied by Supreme Court Oct. 15, 1909.)

1. Municipal Coporations (§ 177*)—Equalization Board—Limitation of Sessions.

Notwithstanding Municipal Corporation Act (Deering's Gen. Laws 1906, p. 880) § 774, providing with reference to cities of the fifth and sixth class that the board of equalization shall continue in session until the returns of the assessors shall have been rectified, and an ordinance of the city of Woodland that members of the board shall receive the sum of $5 per day, an ordinance of the trustees of such city, requiring the work of equalization to be completed within two weeks, was authorized by Municipal Corporation Act, § 773, providing that such trustees shall provide by ordinance a system for the assessment, levy and collection of all city taxes not inconsistent with the provisions of the chapter.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 420; Dec. Dig. § 177.*]

2. Municipal Corporations (§ 177*)—Equalization Board—Compensation of Equalization Board.

An ordinance of the trustees of a city, limiting the meetings of the board of equalization to two weeks, was valid as an exercise of the power of the trustees to fix the compensation of the members of the board.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 420; Dec. Dig. § 177.*]

3. Municipal Corporations (§ 1015*) — Claims—Passage by Board—Effect.

Where the board of trustees of a city approved a claim, and ordered a warrant drawn in favor of a member of the equalization board for 15 days' services, in violation of an ordinance of the city limiting the sessions of such board to two weeks, and the excessiveness of the claim appeared on the face of the proceedings, the allowance of the board was not conclusive on the auditor, but it was his duty to refuse to issue a warrant therefor.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 2187; Dec. Dig. § 1015.*]

4. Appeal and Error (§ 1050*)—Admission of Evidence—Harmless Error.

Where a member of the city's board of equalization was erroneously allowed pay for more than two weeks' services on the board in violation of an ordinance limiting the sessions of the board to two weeks, and applied for mandamus to compel the issuance of a warrant for the amount of the claim as allowed, he was not prejudiced by admission of evidence that members of the board were dilatory, and could have completed it in 12 days or less, where he was allowed compensation for 12 days.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4153; Dec. Dig. § 1050.*]

Appeal from Superior Court, Yolo County; N. A. Hawkins, Judge.

Application by W. S. White for a writ of mandate to compel J. R. Mitchell, as president of the board of trustees of the city of Woodland, to draw a warrant for 15 days' service by relator on the said board of equalization, at the rate of $5 a day. From an order denying the writ, relator appeals. Affirmed.

W. A. Anderson and M. S. Ish, for appellant. E. B. Mering, for respondent.

BURNETT, J. The board of trustees of the city of Woodland approved a claim and ordered a warrant drawn in favor of appellant for 15 days' service as a member of the board of equalization of said city at $5 per day, and respondent refused to issue the warrant, claiming that under an ordinance of said city the work of equalization must be completed within the limit of two weeks. Application was made to the superior court of Yolo county for a writ of mandate to compel respondent to draw said warrant. The appeal is from the order denying the writ.

The basis for appellant's contention is found in section 774 of the general municipal corporation act (Deering's Gen. Laws 1906, p. 880) and an ordinance of the said city of Woodland adopted in 1907, fixing the compensation of the members of the board of equalization. The former provides that the board "shall continue in session from day to day until all of the returns of the assessor have been rectified," and the latter, that each member "while in actual attendance upon the meetings of the board of equalization" shall receive "the sum of $5.00 per day." Since appellant was in actual attendance as a member of said board for 15 days, it is admitted that he would be entitled to the writ were it not for an ordinance in force adopted by the board of trustees in 1890, providing "that said meetings may be held from time to time, as in such notice specified, for the period of two weeks, if necessary, and no longer." While the Legislature in the said municipal corporation act provided for cities of the fourth class that the "sessions of the board shall be held from time to time, as in its notice specified, for the period of two weeks, and no longer," there is no such limitation prescribed as to cities of the fifth and the sixth class. The direction as to these, already noted, is that the board shall remain in session until all the returns are rectified, but that necessarily implies that the sessions should continue only so long as is necessary to accomplish this purpose. It was certainly not intended that this work should be indefinitely prolonged, and thereby the city be put to unnecessary expense. In the absence of any other legislation on the subject the board of equalization would probably be authorized to determine the length of time necessary to rectify the returns, and their determination, in the absence of fraud, would be conclusive. But there is certainly nothing unreasonable in the view that such regulation has been committed to the said members of the board of equalization, but acting in the capacity of the board of trustees, and thereby constituting the local legislative body. They have the necessary knowledge, and the question is one of legislative control within the restriction, of course, that any limitation should not be unreasonable. There is nothing before us to show that two weeks was not ample time in which to rectify all the returns, and we think that the ordinance in question is not inconsistent with the grant of power by the Legislature to the board of equalization, and is authorized by the general law found in section 773 of the said municipal corporation act, providing that "The board of trustees shall have the power and it shall be their duty to provide by ordinance a system for the assessment, levy and collection of all city taxes not inconsistent with the provisions of this chapter."

But, again, appellant concedes that the board of trustees have authority to limit the number of days for which the members of the board of equalization shall receive compensation for their services. This concession necessarily leads to an affirmance of the judgment, because the practical effect of the ordinance is to limit the compensation of the members, and the only question before us is its validity to that extent. The situation is entirely the same as though the trustees had enacted one ordinance providing that "each member of the board of equalization while in attendance upon the meetings of said board shall receive five dollars per day but the sessions shall continue two weeks, if necessary, but no longer." This method of limiting the period of compensation is just as effective as though it had been expressly provided that the members should be paid for a period no longer than two weeks.

Since we are really concerned with the validity of said ordinance only as it relates to and affects the compensation of the said members of the board of equalization, we need not discuss the difficulties that may arise, as suggested by appellant, if said ordinance should be held operative for all purposes. In response, however, to the criticism of appellant that the ordinance is impracticable and unreasonable because it extends "the time two weeks for the taxpayer to make his first appearance, and thus making it possible for all the work to fall on the last day of the two weeks, and thereby making it impossible for the work to be completed in two weeks, and it deprives the taxpayer of the right to know with certainty the date he must appear, for it gives the assessor authority to notify him that he has the whole of two weeks in which to appear, at the same time it compels the board to adjourn as soon as their work is completed. and this even though only a day is found necessary in order to complete it," it is sufficient to say that there is nothing in the ordinance to prevent the assessor from giving notice that the board will remain in session for two weeks, if necessary, but that each taxpayer who desires to be heard must be present on the first day, and from day to day, if required, until the returns are rectified. It is presumed that this course is pursued by the assessor, and thus, as admitted by appellant, two weeks is ample time in which to complete the work.

It might be conceded, as claimed by appellant, that the acts of the board while in session beyond the two weeks' limit are not void, and that the ordinance is subject to the provisions of section 3885 of the Political Code, declaring that "No act relating to assessment * * * is illegal * * * because the same was not completed within the time required by law," and it would not disturb the conclusion we have reached that the members of the board are bound by the terms of the ordinance as to their compensation. Third parties, not injured by the failure of the board to comply with the requirement of said ordinance, could not thereby be excused from a public duty, nor be relieved of a public burden. There is a great difference between the case of a taxpayer seeking to avoid the payment of his just taxes by reason of the technical violation of the law on the part of the revenue officers and the case of the latter trying to profit by their own remissness. Payne v. San Francisco, 3 Cal. 122; Buswell v. Supervisors, 116 Cal. 351, 48 Pac. 226.

Cases are cited by appellant to the point that "when the board passed upon the claim of the petitioner, and ordered a warrant drawn for $75, it was within the scope of their powers to decide, and they did decide, the necessity and quantity and quality of the service, and their judgment was final and cannot be set aside, except upon proper allegations and proof of fraud." But in the case at bar it appeared upon the face of the proceedings that the board had allowed compensation in excess of that authorized by the law, and therefore the finding was not conclusive. The rule is as stated in Walton v. McPhetridge, 120 Cal. 443, 52 Pac. 733, that "If illegal claims are allowed by the board, it will be the duty of the auditor to refuse to draw warrants therefor, and the auditor ought not to draw his warrant for an illegal demand, even though allowed by the board; and, if he does so knowingly and willfully, he is personally responsible, and may be made to refund the money thus illegally paid."

Objection was made by appellant to certain evidence tending to show that the members of the board were dilatory in their work, and that they could have completed it in 12 days or less, but, conceding the ruling of the court to be erroneous, it was without prejudice, as under the ordinance they were entitled to compensation for only 12 days, and it is found that petitioner is entitled to the sum of $60, and that said sum is due him from said city of Woodland. It may be said, though, that if such evidence is to be regarded, it appears that petitioner had expressed his determination to coerce the municipality into the payment of a sum of money for services unnecessarily prolonged, and therefore an added reason is shown for looking with disfavor upon his application.

At any rate, we think the court was justified in denying the writ, and the order is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

156 Cal. 322

J. S. POTTS DRUG CO. v. BENEDICT et al.

(S. F. 4,980.)

(Supreme Court of California. Sept. 23, 1909.)

1. Landlord and Tenant (§ 80½*)—Assignment—Evidence.

In an action for the balance of the consideration for the assignment of a leasehold, evidence *held* to show prima facie the execution of the lease by the owner to plaintiff, and the subsequent existence of the leasehold estate which was assigned, as well as the lessor's consent to the assignment.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 231; Dec. Dig. § 80½.*]

2. Corporations (§ 432*)—Contracts—Authority—Evidence.

The execution of a lease and its assignment by the proper officers of a corporation under the corporate seal was prima facie evidence that the instruments were executed under proper authority.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1729; Dec. Dig. § 432.*]

3. Landlord and Tenant (§ 76*)—Assignment of Lease—Assignment Contrary to Lease—Effect.

The assignment of a lease, which provides that it shall not be assigned without the lessor's consent, is not void; such unauthorized assignment being merely a breach of covenant, giving the lessor the right to forfeit the lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 225, 228; Dec. Dig. § 76.*]

4. Landlord and Tenant (§ 79*)—Term of Years—Nature of Interest.

A leasehold of a term is a chattel real, and is personal property, so that its assignment would be governed by the rules applicable to the sale of personal property.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 247; Dec. Dig. § 79.*]

5. Sales (§ 201*)—Transfer of Title—Delivery—Necessity.

Delivery is not essential to the consummation of a contract of sale and the passing of title, if the chattel is identified, unless the contract specifically makes delivery essential.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 529; Dec. Dig. § 201.*]

6. Sales (§ 199*)—Construction of Contract—Delivery—Intention of Parties.

Whether the parties intended to make delivery essential to the passing of title is to be determined from their intention as expressed in the written contract of sale; and, if the contract shows a manifest intention, either way, it controls.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 517; Dec. Dig. § 199.*]

7. Sales (§ 215*)—Contract—Construction—Time Title Passes.

Words of assignment or sale in the present are not conclusive on the question as to whether there was a present passing of title, but must be construed with the whole contract, though, unless, when so construed, the contract as a whole is inconsistent with a present sale, present words of transfer necessarily import a present transfer of title.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 574, 575; Dec. Dig. § 215.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

8. Property (§ 7*)—Ownership.

The ownership of property may be in one person, and the right to its use and possession be in another; the owner holding the property subject to the rights of the other.

[Ed. Note.—For other cases, see Property, Cent. Dig. § 9; Dec. Dig. § 7.*]

9. Landlord and Tenant (§ 79*)—Terms—Assignment—Construction—Time Title Passes.

Plaintiff was lessee of certain premises for a term of five years extending from 1904, with privilege of renewal, and on April 17, 1906, executed a written assignment thereof, which provided that plaintiff "does by these presents, sell, convey, assign, transfer and set over" to defendants "a certain indenture of lease [describing the lease], to have and to hold the same * * * from April 12, 1906, and for all the remainder yet to come of said term of said lease, to wit, ten years from the 15th of September, 1904, provided, however, that" plaintiff "may occupy said premises pursuant to said lease, notwithstanding said assignment, until June 15, 1906, and shall in any event pay the rent reserved * * * to the lessor to said 15th day of June, 1906," at which time plaintiff shall deliver up possession to defendants who will thereupon take possession and thereafter pay the rent. A memorandum of agreement made the same day recited the execution of the assignment, and provided that defendants thereby agreed to pay plaintiff on July 15, 1906, a further sum, and plaintiff agreed to pay the rent up to June 15, 1906, and deliver possession to defendants on that date. *Held*, that the assignment transferred plaintiff's leasehold absolutely and unconditionally as of the date of the transaction, subject merely to its right to occupy the premises until June 15th, and title thereto vested in defendants as of that date, under Civ. Code, § 1140, providing that title to personalty passes to the buyer whenever the parties agree upon a present transfer and the subject-matter is identified.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 247, 249; Dec. Dig. § 79.*]

10. Landlord and Tenant (§ 79*)—Assignment of Lease—Discharge by Impossibility of Performance—Destruction of Subject-Matter.

Absolute impossibility of performance such as results from the destruction, without the promisor's fault, of the subject-matter of the contract excuses performance, where it appears that the parties contracted on the basis of its continued existence; so that, where an assignment of a lease transferred the assignor's interest unconditionally as of its date, but provided that he might occupy the premises and pay rent until a certain date, when he should deliver the premises to the assignee, the contract was upon the basis of the continued existence of the premises, and the assignor could recover the price though the premises were destroyed before time for delivery of possession, and though delivery of possession is treated as a condition precedent to payment.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 247, 249; Dec. Dig. § 79.*]

11. Sales (§ 150*)—Rights of Parties—Loss of Property.

In the absence of agreement to the contrary, after title passes the property is at the risk of the buyer, though possession has not been delivered; but, where there is a mere agreement to sell, loss of the property falls upon the seller.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 354; Dec. Dig. § 150.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by the J. S. Potts Drug Company against C. S. Benedict and another. From a judgment for defendants, and from an order denying a new trial, plaintiff appeals. Reversed.

Gavin McNab, F. H. Gould, and R. P. Henshall, for appellant. Seth Mann and Bishop & Hoefler (Alfred J. Harwood, of counsel), for respondents.

ANGELLOTTI, J. This is an appeal by plaintiff from a judgment for defendants, given upon granting defendants' motion for a nonsuit, and from an order denying its motion for a new trial. The action was bought to recover the sum of $15,000, as a balance due fom defendants, on account of the sale, assignment, and delivery by plaintiff to defendants of a certain lease.

The evidence showed the following facts: On April 17, 1906, plaintiff was the lessee of the premises numbered 815 Market street, being a store and basement in the building of the California Academy of Sciences (a corporation), under a lease executed to plaintiff by the owner of said building, said Academy of Sciences, in the year 1904, for the term of five years, with the privilege of five more, at the rent of $350 a month for the first five years, and $400 a month for the second five years. One of the terms of the lease was that there should be no transfer thereof except with the approval of the board of trustees of the lessor. Nothing further appears as to the terms of the lease. It had been executed in duplicate, and one copy was in the possession of plaintiff. Plaintiff and defendants had apparently been negotiating for the sale by plaintiff to defendants of plaintiff's leasehold interest in these premises, and the necessary papers had been prepared. On the day named, April 17, 1906, defendant Scott came to the premises for the express purpose of closing up the transaction. He then had in his possession and produced these papers. One of such papers was a formal assignment, bearing date April 12, 1906, and signed "J. S. Potts Drug Company, by J. S. Potts, President, by J. A. Logan, Secretary," with the seal of the corporation attached. It stated that the J. S. Potts Drug Company, for and in consideration of $5, and other valuable considerations to it passing and received, "do by these presents, sell, convey, assign, transfer and set over unto the said C. S. Scott and C. S. Benedict a certain indenture of lease [describing the lease already referred to], to have and to hold the same unto the said C. S. Scott and C. S. Benedict, their successors and assigns, from the 12th day of April, 1906, and for and during all the remainder yet to come of said term of said lease, to wit, ten (10) years from the 15th day of September, 1904; provided, however, that the said J. S. Potts Drug Company may occupy said premises pursuant to said lease, notwithstanding said assignment, until June 15, 1906, and shall in any event, pay the rent in said lease reserved to the lessor up to the said 15th day of June, 1906, and that at the said date the said J. S. Potts Drug Company will deliver up possession to the said C. S. Scott and C. S. Benedict, or their assigns, who will thereupon take possession and thereafter pay said rent." Attached to this assignment was what purported to be the written consent of the California Academy of Sciences, bearing date April 17, 1906, signed by its president and secretary, with its seal attached. In this it was stated that the Academy of Sciences "hereby gives its written consent to the foregoing assignment, and accepts C. S. Scott and C. S. Benedict, described in said assignment, as tenant and lessee under the said lease described in said assignment, in place and stead of the J. S. Potts Drug Company." It was further stated therein that said lease should be modified in several respects, in that Scott and Benedict may assign the lease to a bank, and that the premises may be used for banking, trust, safe deposit, or mercantile purposes; that Scott and Benedict may sublet the premises, or any part of such premises; that they may make alterations in the premises to fit them for banking purposes, providing the same be done under the supervision and to the satisfaction of the lessor's agent; and that they may at any time before the termination of the lease remove certain fixtures.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

There was also a memorandum of agreement reading as follows:

"Memorandum of agreement, made this 12th day of April, 1906, between the J. S. Potts Drug Company, a corporation organized and existing under the laws of the state of California, the party of the first part, and C. S. Scott and C. S. Benedict, the parties of the second part;

"Witnesseth: That for and in consideration of a certain assignment of lease, this day executed by the party of the first part to the parties of the second part, the parties of the second part have paid to the party of the first part the sum of one thousand five hundred (1500) dollars, the receipt whereof is hereby acknowledged, and the parties of the second part hereby promise and agree to pay to the party of the first part, on the 15th day of July, 1906, the further sum of fifteen thousand (15,000) dollars, and in consideration of the premises, the party of the first part agrees to pay the rent of said premises up to the 15th day of June, 1906, and to deliver possession thereof to the parties of the second part, or their assigns, on said 15th day of June, 1906.

"In witness whereof the parties hereto have hereunto set their hands and seals, in duplicate, the day and year first above written, the party of the first part executing the same by its president and secretary, thereunto duly authorized.

"J. S. Potts Drug Co.
"J. S. Potts, Pres.
"J. A. Logan, Secty.
"C. S. Benedict,
"C. S. Scott."

The signatures to this paper were proved to be genuine, and there was attached the seal of the plaintiff corporation, the president and secretary of which had been duly authorized to execute both assignment and agreement. The transaction was then and there completed between the parties, by Mr. Logan, secretary of plaintiff, acting for plaintiff, and Mr. Scott, acting for himself and Mr. Benedict. The papers already referred to were mutually examined by Mr. Logan and Mr. Scott; Mr. Scott gave to Mr. Logan a check for $1,500 (which was subsequently cashed by plaintiff); Mr. Logan delivered to Mr. Scott the assignment, and also the duplicate of the agreement, retaining the original thereof, and, according to his evidence, also delivered to him the indenture of lease executed by the Academy of Sciences to the plaintiff. On the next day, April 18, 1906, the demised premises were entirely destroyed by fire, the building of which they constituted a part being entirely destroyed, with the exception that some portion of the rear was left standing, and this portion was subsequently removed with the aid of dynamite. Actual possession of the premises by plaintiff was thus terminated, and defendants never went into actual occupancy. No part of the $15,000 has even been paid by defendants.

No point is made here in support of two of the grounds upon which the motion for nonsuit was based, and it is clear that neither finds any support in the record. The evidence did make a prima facie case both on the question of the execution of the lease by the Academy of Sciences to plaintiff, and the consequent existence of the leasehold estate which was the subject of the transaction, and on the question of the assent of the lessor to the making of the assignment. Each instrument was signed by the proper officers, and had the seal of the corporation attached, and this afforded prima facie evidence that they were executed under the proper authority. Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 596, 99 Am. Dec. 300; Underhill v. Santa Barbara, etc., Co., 93 Cal. 300, 314, 28 Pac. 1049; Purser v. Eagle Lake, etc., Co., 111 Cal. 139, 142, 43 Pac. 523. Nor would the assignment of the lease have been void if such consent had not been obtained from the lessor. "It seems to be the law that where there is a clause in a lease that it shall not be assigned without the previous consent of the lessor, and there is a breach of the covenant not to assign, the lessor has only the option to forfeit the lease for the breach of the condition, and that the assignment is not void, but passes the term, and the only remedy is for breach of the covenant; and it has been held that the assignment is voidable only at the option of the lessor or his representatives." Garcia v. Gunn, 119 Cal. 315, 319, 51 Pac. 684.

The remaining grounds of the motion for nonsuit were: First, that there was a fatal variance between the allegations in the complaint and the proof, in that plaintiff alleged an unconditional, completed, executed assignment of the lease, while the proof showed that the sale or assignment of the lease was a conditional one, uncompleted and unfulfilled; and, second, that under the terms of the contract the delivery of the demised premises on June 15, 1906, was a condition precedent to plaintiff's right to recover the $15,000. Upon the facts stated it appears plain to us that the transaction of April 17, 1906, was an absolute, unconditional contract of sale of plaintiff's leasehold interest in the demised premises, and that the title thereto then vested in defendants, subject only to the right of plaintiff to occupy such premises until June 15, 1906, if it so desired. The subject of the transaction between the parties in this case was the estate of plaintiff in the demised premises created by the lease from the Academy of Sciences to it. Jones on Landlord and Tenant, § 436. Such estate, being one for years, was not real property, but was a chattel real, and, under the law, must be regarded as having been part of the personal estate of plaintiff. "An assignment of a term for years is therefore governed generally by the rules applicable to the sale of personal property." Jones on Landlord and Tenant, § 435; Jeffers v. Easton, Eldridge & Co., 113 Cal. 345, 353, 45 Pac. 680. The important thing to bear in mind in this connection is that it was this estate in the demised premises that was being negotiated about, with a view to its sale by plaintiff to defendants. Our Civil Code provides that "the title to personal property sold or exchanged, passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not." Section 1140. There is nothing new or startling in this; it being in full accord with the settled law independent of statute. Benjamin on Sales, § 3. A delivery of possession of property sold is not essential to the consummation of the contract of sale, and the consequent passing of title, in the case of a specific identified chattel (Benjamin on Sales, §§ 308, 315; Tyson v. Wells, 2 Cal. 122; 24 Am. & Eng. Ency. of Law [2d Ed.] p. 1045), unless the parties by their contract have made such delivery essential.

The question here is whether the parties agreed upon a present unconditional transfer of plaintiff's leasehold interest—its estate in the demised premises. Their intention in this regard is to be here ascertained from the written instruments duly executed and delivered. "The agreement is just what the parties intended to make it. If that intention is clearly and unequivocally manifested, cadit quæstio." Benjamin on Sales, § 309. In Elgee Cotton Cases, 22 Wall. 180, 187, 22 L. Ed. 863, it was said by the United States Supreme Court: "It must be admitted there is often great difficulty in determining whether a contract is itself a sale of personal property so as to pass the ownership to the vendee, or whether it is a sale on condition, to take effect or be consummated only when the condition shall be performed, or whether it is a mere agreement to sell. It is doubtless true that whether the property passes or not is dependent upon the intention of the parties to the contract, and that intention must be gathered from the language of the instrument." Defendants' position in this regard necessarily must be that the executed writings show that it was intended by the parties that delivery of actual possession of the demised premises on or before June 15, 1906, should be a condition precedent to the consummation of the actual sale of the leasehold interest, and the consequent passing of title, or, as put by learned counsel for defendants, "that there was to be no transfer of the leasehold interest until the time specified for the delivery of possession." It seems impossible to us to find any such intention expressed in the writing.

It must be conceded that the actual words of assignment used show an intention to effect a present transfer of the leasehold interest as clearly and emphatically as any words the parties could have adopted. As we have seen, the language used in the assignment is that the plaintiff company "do by these presents, sell, convey, assign, transfer and set over unto the said C. S. Scott and C. S. Benedict, a certain indenture of lease," describing it and describing the premises thereby let. The words "indenture of lease" must of course be taken as meaning the estate created by the lease referred to. It is true that the mere fact that words of assignment in præsenti are used is not necessarily conclusive on the question of consummated sale. The words "must be construed in connection with the rest of the contract, which must be taken as a whole and such construction placed on it as the language used in the entire instrument calls for." Anderson v. Read, 106 N. Y. 333, 344, 13 N. E. 292. Notwithstanding the use of such words, therefore it may appear that the idea of a present transfer is utterly inconsistent with other controlling features of the transaction evidenced by other provisions, in which event they will be construed, in connection with such other provisions, as not importing a present transfer. See McLaughlin v. Piatti, 27 Cal. 461, 462; Blackwood v. Cutting Packing Co., 76 Cal. 212, 18 Pac. 248, 9 Am. St. Rep. 199; Anderson v. Read, supra. But unless affected by other provisions, such language necessarily imports what it says, viz., a present transfer. It is simply, as said in Blackwood v. Cutting Packing Co., supra, "not conclusive" where other features of the transaction show that it cannot be taken as meaning a present transfer, or, as said in Anderson v. Read, supra, where this is shown by "the whole of the language used in the contract and the circumstances of the transaction."

In the case at bar, the words importing a present transfer of the leasehold interest are followed, in the habendum and tenendum clause, by this language: "To have and to hold the same" [the leasehold interest in said premises under said lease] unto the said C. S. Scott and C. S. Benedict, their successors and assigns, *from the 12th day of April, 1906*, and for and during all the remainder yet to come of said term of said lease mentioned therein, to wit, ten (10) years from the 15th day of September, 1904." (The italics are ours.) This confirms and emphasizes the previous words of present assignment of the leasehold interest, and negatives any theory of reservation by the assignor of any right of property as to any portion of the term. It states as clearly as it can be put in the English language that the assignees and their successors and assigns are to have and hold the assigned property from the 12th day of April, 1906, "during all the remainder yet to come of said term."

We fail to find anything in the other language of either the assignment or memorandum of agreement, or in any of the circumstances of the transaction, that is necessarily inconsistent with the theory of a present transfer of the leasehold interest. The proviso in the assignment in no way refers to the property assigned, the leasehold interest, but is carefully confined by its terms to the mere occupancy of the demised premises for a limited period, the payment by the assignor of the rent for such time, and the subsequent delivery up of possession of such premises to the assignee. The proviso is: "Provided, however, that the said J. S. Potts Drug Company may occupy said premises pursuant to said lease, notwithstanding said assignment, until June 15, 1906, and shall in any event pay the rent in said lease reserved to the lessor up to said 15th day of June, 1906, and that at said date the said J. S. Potts Drug Company will deliver up possession to the said C. S. Scott and C. S. Benedict, or their assigns who will thereupon take possession and thereafter pay said rent." Learned counsel for defendants say that "the property in the term of years could not pass to the defendants while the 'use and possession' were retained by the plaintiff," but we cannot perceive that this is so, or that there is any difference in this regard favorable to defendants' theory between the case of the assignment of a leasehold interest and the case of the sale of a horse, in which latter case counsel say the vendor may retain the use and possession, and the proprietary interest be vested in the vendee. In either case the right to the use and possession of the thing sold is most important to the vendee who acquires the title, and if by the contract of the parties such right is retained by or given to the vendor for a considerable period of time, the value of the vendee's property may be much impaired, but he may nevertheless be the legal owner of the thing itself, even though the right to the possession is postponed for a time. It cannot be the law as to any kind of property that parties may not agree that the ownership of the property shall be in one, and that the right to the use and possession for a time shall be in another. In such a case the legal owner simply holds the property subject to such right in the other party. The question in any such case is simply whether they have so agreed. Now, as we have said, the proviso in this regard is carefully limited to a mere right of occupancy of the demised premises for approximately two months, a matter not necessarily inconsistent with the theory of present transfer of the title to the leasehold estate. The fact that it is stipulated that plaintiff may occupy, "pursuant to said lease, notwithstanding such assignment," does not render the provision necessarily inconsistent with such theory. To the contrary, these words imply the understanding of the parties that the title to the leasehold is transferred, but that notwithstanding such transfer the grantor may continue to occupy the demised premises until June 15, 1906, in accord with the provisions of the lease as if no such transfer had been made. Whether this provision be a reservation, or, as claimed by plaintiff's counsel, a grant of a privilege by defendants to plaintiff, is immaterial in this connection. If a reservation, it was clearly intended only as a reservation of the mere right of occupancy of the demised premises for a limited time, and not as a reservation of the title to the estate for any portion of the term. Of course, there is nothing in conflict with the theory of present transfer in the fact that the assignor, retaining or being granted the privilege of occupancy to June 15th, agreed to pay the rent to that date, and, at the end of the stipulated time, to "deliver up possession" to the owners, who will thereupon enter into possession and thereafter pay the rent. We are satisfied that the language used by the parties in this instrument is not reasonably susceptible of any other construction than that the parties intended to effect thereby a present transfer of the title to the leasehold interest, and there is nothing in the memorandum of agreement executed at the same time to indicate otherwise. It follows that by the execution and delivery of the assignment, defendants became the owners of such leasehold interest.

As we have stated heretofore, this is an action to recover the balance of the agreed purchase price of said leasehold interest.

Learned counsel insist that even if there was a completed sale and passing of the title to defendants, plaintiff cannot recover, because the delivery of possession of the demised premises was made by the parties a condition precedent to the payment of this balance of the purchase price. We have already stated the language of the agreement in this behalf. While it is earnestly insisted by counsel for plaintiff that the provision for delivery of such possession was not a condition precedent to the payment of the price, but was a mere personal covenant on the part of plaintiff, it may be assumed, for the purposes of this decision, that it was such a condition precedent. So assuming, it must nevertheless be held that, by reason of the destruction of the demised premises, without fault on the part of plaintiff, performance of this condition on its part was excused, and the money was payable. The general rule applicable is the one stated in the quotation from 9 Cyc. 631, contained in defendants' brief, as follows: "Where from the nature of the contract it is evident that the parties contracted on the basis of the continued existence of the person or thing to which it relates, the subsequent perishing of the person or thing will excuse the performance. Thus where the contract relates to the use or possession or any dealing with specific things in which the performance necessarily depends on the existence of the particular thing, the condition is implied by the law that the impossibility arising from the perishing or destruction of the thing, without default in the party, shall excuse the performance, because, from the nature of the contract, it is apparent that the parties contracted on the basis of the continued existence of the subject of the contract." This rule is fully discussed in Benjamin on Sales (7th Ed.) § 570, and in 1 Beach on Modern Law of Contracts, §§ 217, 234, 237. The cases cited by learned counsel for defendants are not in conflict with this rule, which appears to be universally accepted. It is based, as stated in the authorities, upon the proposition that in such cases a condition is implied that the impossibility arising from the perishing of the person or thing shall excuse the performance. Where, as was the case in Wilmington, etc., Co. v. O'Neil, 98 Cal. 1, 32 Pac. 705, cited by counsel, the party has expressly agreed to pay to the owner the sum of $3,500, in the event that a lighter rented to him is "lost" while in his possession and cannot be redelivered, and the loss occurs, and the owner sues to recover the $3,500, it is obvious that the stipulation was not entered into on the basis of a continued existence of the lighter, and that the rule has no application. It does not apply, either, where performance of the contract is possible, "although the obligor himself may have become wholly unable to perform." Wilson v. Alcatraz, etc., Co., 142 Cal. 182, 188, 75 Pac. 787. "If a thing is possible in itself to be done—possible in the nature of things to be done—a positive contract to do it is binding, though some unforeseen contingency, accident, or calamity may prevent its performance by the promisor." American Note. Benjamin on Sales (7th Ed.) p. 598. "The impossibility must consist in the nature of the thing to be done, and not in the inability of the party to do it." Wilson v. Alcatraz, etc., Co., supra. But absolute and inherent impossibility of performance, such as an impossibility caused by the destruction without fault on the part of the promisor of the thing to which the promise relates, is always an excuse where it is evident that the parties contracted on the basis of the continued existence of the thing. As applied to a stipulation for the mere delivery to the vendee of a specific article sold, the situation under this rule is clear. As stated in Benjamin on Sales (7th Ed.) § 570, quoting Blackburn, J., in Taylor v. Caldwell, 3 B. & S. 826, 32 L. J. Q. B. 164: "Where a contract of sale is made, amounting to a bargain and sale, transferring presently the property in specific chattels, which are to be delivered by the vendor at a future day, there, if the chattels without the fault of the vendor perish in the interval, the purchaser must pay the price, and the vendor is excused from performing his contract to deliver, which has thus become impossible." The liability to pay the price in such a case, notwithstanding failure to deliver possession, rests upon the fact that the purchaser was the owner of the property at the time of its destruction. It is elementary in the law of sales that, in the absence of special agreement to the contrary, the risk accompanies the title, and that when a present unconditional sale is actually consummated, and the title has passed, the property is thenceforth at the risk of the buyer, so far as accidental destruction by fire, etc., is concerned, even though possession thereof has not been delivered. See Benjamin on Sales (7th Ed.) § 308; Tyson v. Wells, 2 Cal. 122, 124; Girdner v. Beswick, 69 Cal. 112, 116, 10 Pac. 278; 24 Am. & Eng. Ency. Law (2d Ed.) p. 1045, note; Rail v. Little Falls, etc., Co., 47 Minn. 422, 50 N. W. 471; 1 Beach, Modern Law of Contracts, § 207; 3 Page on Contracts, § 1370; 2 Mechem on Sales, § 1413. Where there is a mere agreement to sell, and title therefore has not passed, the loss falls on the vendor for the same reason. In such a case the vendor is excused from the performance of his contract, under the rule we have discussed, by reason of the destruction of the thing, but he cannot retain money already paid on account of the proposed purchase, or recover moneys remaining unpaid. See Wells v. Calnan, 107 Mass. 514, 9 Am. Rep. 65; Gould v. Murch, 70 Me. 288, 35 Am. Rep. 325; Smith v. Phœnix Ins. Co., 91 Cal. 323, 331, 27 Pac. 738, 13 L. R. A. 475, 25 Am. St. Rep. 191.

In the case at bar, it is too plain for discussion that the parties contracted for the delivery of possession of the demised premises on June 15, 1906, on the basis of the continued existence of such demised premises. Under the rule we have discussed the plaintiff was excused from such delivery as a condition precedent to its right to recover the price agreed to be paid for the leasehold interest, the title to which had already passed to defendants at the time of the destruction of the demised premises. The case is doubtless a hard one on the facts, so far as defendants are concerned, if those facts are as shown by the evidence given on behalf of plaintiff. They are compelled to pay a large sum of money for property which was entirely destroyed, without having received any substantial benefit therefrom. It is, however, no harder on them than it would have been had there been no reservation of possession of the demised premises, and they had been given actual possession thereof on April 17, 1906, nor is it harder on them than it would have been on the plaintiff had the sale not been consummated on that day. It is simply the case of an owner of valuable property being deprived thereof by reason of its destruction by fire.

In view of what we have said, it is apparent that there is no force in the contention that there was a fatal variance between the allegations of the complaint and the proof, in that plaintiff alleged an unconditional, completed, executed assignment of the lease, while the proof showed that the sale or assignment of the lease was a conditional one, uncompleted and unfulfilled. The point in this connection appears to be that no delivery of the property sold was shown; the complaint in the first count being in the form of a common count for goods sold and delivered, and in the second count alleging that on April 17, 1906, "plaintiff sold, assigned, and delivered," etc. As we have seen, the subject-matter of the assignment was the leasehold interest, the estate for years. This, we are satisfied, must be held to have been delivered to and accepted by defendants by the execution and delivery by plaintiff and the acceptance by defendants of the assignment of lease. See Jones on Landlord and Tenant, § 438; Canale v. Copello, 137 Cal. 22, 69 Pac. 698.

The judgment and order denying a new trial are reversed.

We concur: SLOSS, J.; SHAW, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

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BURNE v. LEE. (L. A. 2,261.)

(Supreme Court of California. Aug. 28, 1909.)

1. FRAUD (§ 31*) — ACTIONS — ELECTION OF REMEDY.

One induced by fraud to enter into a contract may elect either to rescind by restoring what he has received thereunder, or to affirm without restoring the consideration received, and sue for damages caused by the fraud.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 27; Dec. Dig. § 31.*]

2. FRAUD (§ 35*)—ACTIONS—WAIVER OF RIGHT OF ACTION.

One who, after discovery of the fraud which induced him to make a contract, assents to a new agreement concerning the subject-matter of the contract, thereby waives his claim for damages caused by the fraud.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 30; Dec. Dig. § 35.*]

3. FRAUD (§ 35*)—RIGHT OF ACTION—WAIVER.

Plaintiff purchased from defendant one-half the capital stock of a corporation, upon defendant's agreement to receive plaintiff as a partner in consideration of the transfer of real estate, the stock being deposited with defendant as security, and each party being entitled to receive a sum per week for services. Plaintiff claimed to have discovered that the representations inducing the purchase were false, and demanded the return of the price and rescission of the contract, which defendant refused, but, instead, agreed that all the corporate property be sold, and plaintiff be paid from the proceeds the price of the stock purchased, remainder to go to defendant; plaintiff under the agreement continuing to hold the stock until the sale, with all his rights under the original agreement. After discovering the fraud plaintiff brought an action against defendant, alleging the above facts and praying a decree that, under the agreement, he and defendant are substantially partners, and that the corporation be dissolved and defendant required to account as a copartner, and that the corporate property or the stock be sold pursuant to the second agreement. *Held*, that the new agreement superseded the original agreement of sale, and operated as a waiver of plaintiff's right to damages for fraud in selling the stock, so that he could not subsequently maintain an action therefor.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 30; Dec. Dig. § 35.*]

4. CORPORATIONS (§ 629*) — DISSOLUTION — "CAPITAL STOCK."

Civ. Code, § 309, prohibits corporate directors from dividing, withdrawing, or paying to stockholders any part of the capital stock, but provides that nothing therein shall prevent a division or distribution of capital stock remaining after paying all debts on dissolution of the corporation. *Held* that, while the stockholders could not authorize anything the directors could not do, and the term "capital stock" meant the actual capital or property used in the business, and not the nominal capital, an agreement, made upon plaintiff's alleged discovery of fraud by defendant in inducing plaintiff to purchase half the capital stock of a corporation, and demand for rescission of the contract of sale, by which defendant agreed to sell the corporate property and return to plaintiff the purchase price, keeping the remainder himself, could be legally carried out under the latter part of the section by dissolving the corporation after paying all debts, winding up its affairs, and dividing the proceeds under the agreement; and hence it would be assumed that such method was contemplated by the agreement.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2472; Dec. Dig. § 629.*

For other definitions, see Words and Phrases, vol. 1, pp. 959-967; vol. 8, p. 7595.]

5. CONTRACTS (§ 141*) — VALIDITY—PRESUMPTIONS.

If a contract can be performed in any legal method, it must be assumed that such method was contemplated by the parties and will be followed.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 141.*]

6. CONTRACTS (§ 54*)—CONSIDERATION—WAIVER.

Defendant's agreement to sell all the corporate property, including his own interest, and return to plaintiff, from the proceeds, the price paid for his half interest in the capital stock, upon plaintiff's discovery of alleged fraud in inducing him to buy the stock, was a sufficient consideration for plaintiff's consent thereto, thereby waiving his right to damages for the fraud.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 233; Dec. Dig. § 54.*]

Department 2. Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by Joseph G. Burne against Henry Lee. From a judgment for defendant, plaintiff appeals. Affirmed.

Frank G. Finlayson, for appellant. S. J. Parsons and O. P. Widaman, for respondent.

LORIGAN, J. This is an appeal taken by appellant on the judgment roll. The action was for damages growing out of alleged misrepresentations of defendant to appellant in the sale of corporate stock.

The complaint alleged that on October 8, 1906, the defendant, who was the owner of 60 shares of stock, being the entire amount subscribed for, or issued, of the capital stock of the West Coast Planing Mill Company, a corporation, offered to sell plaintiff 30 shares thereof for $2,500, and with intent to defraud plaintiff and to induce him to purchase said stock, made certain representations as to the value of said shares and the net profits of the corporate business; that, believing said representations, plaintiff purchased said stock; that said representations as made were untrue in this: That the corporation was not on the 8th day of October, 1906, as represented by defendant, or at any other time, making any profits, and that said shares were in fact worthless and valueless; that said plaintiff discovered that said representations were untrue on November 10, 1906; that, if the facts as represented by defendant were true, said shares of stock would have been of the value of $8,000, and plaintiff asked judgment for damages in that amount.

The answer of the defendant consisted of denials and the interposition of an affirmative defense. As to the latter it was alleged that prior to the commencement of the present action, which was brought on December 4, 1906, the plaintiff brought an action on November 23, 1906, against the West Coast Planing Mill Company and the present defendant and others, his complaint being verified; that in said action the plaintiff set forth the written agreement for the purchase by plaintiff from defendant of the 30 shares of stock of the West Coast Planing Mill Company made October 8, 1906, which recited that the plaintiff purchased from defendant a one-half interest in "the business known as the West Coast Planing Mill Company" for $2,500, and defendant agreed to receive plaintiff into partnership as an officer and business manager of the said business; that defendant was to transfer to plaintiff one-half of the stock of the aforesaid company; that in lieu of a cash payment for said 30 shares of stock plaintiff transferred to defendant a house and lot in the city of San Diego, which was to be sold by defendant, and from the proceeds thereof defendant was to take out the purchase price of $2,500, and, in addition, plaintiff deposited the said stock with defendant as additional security for the payment of such purchase price; and that each of the contracting parties should be entitled to draw not to exceed $25 per week for services rendered.

It is then stated that in the complaint in said latter action plaintiff further alleged that subsequent to the 8th day of October, 1906, and prior to November 17, 1906, plaintiff discovered that the representations made by defendant to induce said sale of the interest in said business and said shares of the stock were false; that he then demanded from defendant the return of said $2,500, offering to surrender all interest in said business and in and to said stock, and to rescind said agreement of October 8, 1906, relative to its purchase; that defendant refused to cancel said agreement, or return said $2,500 to plaintiff, but, instead of said cancellation, the defendant offered and proposed to plaintiff that the property belonging to said Pacific Coast Planing Mill Company should be sold at a price satisfactory to defendant, and that out of the proceeds, after paying all expenses, plaintiff should be paid the sum of $2,500, and the remainder of said proceeds should go to the defendant. The answer then proceeds to aver that on said November 17, 1906, an agreement to that end, in writing, was entered into between plaintiff and defendant, which provided as follows: "That the said parties hereby agree, they being the owners of the majority of the stock in the corporation known as the 'West Coast Planing Mill Company' to wit—That the property belonging to said corporation shall be sold at a price satisfactory to the party of the first part, said price to be in excess of the sum of twenty-five hundred (2500) dollars with all expenses of selling said property added; and the proceeds of said sale to be divided as follows: After paying all expenses of sale, then the sum of twenty-five hundred (2500) dollars shall be paid to the party of the second part, and the residue or remainder shall be paid to the party of the first part in full for his interest in said corporation."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It is then averred that in said former action it was further alleged by plaintiff that, until the sale as provided for in the agreement of the 17th day of November, 1906, it was agreed between the plaintiff and defendant that plaintiff should continue to be the owner and holder of said 30 shares of stock; that he is now the owner and holder thereof, and entitled to the interest in said business as provided for in the agreement of the 8th day of October, 1906, and entitled to act as business manager of the corporation as provided in the agreement of the last date, with the right to draw a salary not exceeding the sum of $25 a week, and as a partner with defendant in the said business plaintiff is entitled, under the terms and conditions of the agreement of October 8, 1906, to an equal voice with the said defendant in the management and control of the business of the said corporation. It is then further alleged in the answer that the said action so first begun by plaintiff is still pending and undetermined, and in it the plaintiff prayed that it be decreed that under the agreements of October 8, and November 17, 1906, the plaintiff and defendant are to all intents and purposes copartners in the business conducted in the name of said defendant corporation; that said copartnership is the substantial and beneficial owner of the assets and property of said corporation; that the said corporation be dissolved; that defendant be decreed to render an accounting to plaintiff as copartner; that the property and assets of said copartnership be sold to carry out the terms and provisions of the agreement of November 17, 1906, between plaintiff and defendant, or in lieu thereof it be decreed that all of the issued stock of said corporation be sold for the purpose of carrying out the terms and conditions of the agreement of November 17, 1906. Defendant further averred in said answer that he was willing and ready to carry out the terms and conditions of the contract between himself and plaintiff of November 17, 1906.

The plaintiff demurred to the sufficiency of the answer in as far as it set forth the affirmative matters of defense to which we have referred, which demurrer was overruled. Upon the trial the court found, among other things, in favor of the defendant as to the facts alleged in the affirmative defense, and entered a judgment in his favor based thereon.

This appeal, as we have said, is taken on the judgment roll alone, and the only question presented for determination is as to the validity of the ruling of the court on the demurrer to the affirmative defense interposed by the answer. We do not perceive any error in the ruling of the court in that respect. When the pleadings in this case are crystalized, they amount to this: The plaintiff brings an action for damages against defendant for deceit practiced in the sale of certain corporate stock under an agreement made October 6, 1906. The defendant answers, and asserts that after the discovery of the alleged deceit by plaintiff, and after negotiations looking to a rescission of the agreement of sale of October 6th, and as a result thereof, a new contract was entered into between the parties on November 17, 1906, relative to the subject-matter of such stock and the sale thereof, and the interests of the respective parties in the business represented by it, which operated as a condonation or waiver of the alleged fraud, and that prior to the commencement of the present suit, and after discovery of the alleged deceit and offer of rescission, and subsequent to the making of the contract of November 17, 1906, the plaintiff brought an action, which is still pending and undetermined, in which, relying upon the original contract of October 6th and the subsequent contract of November 17th, he sought in a court of equity a decree for practically a specific performance of the latter contract.

Now, it is well settled that when a party has been induced by fraud to enter into a contract, he may elect either to rescind the contract by restoring whatever he has received under it, or he may affirm the contract retaining whatever advantage he may have acquired, and still have his action for damages for deceit practiced upon him in making the contract. This rule is, however, subject to limitations which apply whether the contract, to which the charge of fraud is addressed, is an executed or executory contract. One of these limitations is that when a party claiming to have been defrauded enters, after discovery of the fraud, into new arrangements or engagements concerning the subject-matter of the contract to which the fraud applies, he is deemed to have waived any claim for damages on account of the fraud. The rule is clearly expressed in Schmidt v. Mesmer, 116 Cal. 267, 48 Pac. 54, where it is said: "If, after his knowledge of what he claims to have been the fraud, he elects not to rescind, but to adopt the contract and sue for damages, he must stand toward the other party at arm's length; he must on his part comply with the terms of the contract; he must not ask favors of the other party, or offer to perform the contract on conditions which he has no right to exact, and must not make any new agreement or engagement respecting it; otherwise he waives the alleged fraud."

This is but a reiteration of the general rule upon the subject, and while some of the limitations there referred to, and which apply more particularly to executory contracts, have no application in our consideration of the sufficiency of the affirmative defense set up by the answer of defendant, because here the contract of sale of the stock is to be treated as executed, others of them do. It is apparent from the matters alleged in the affirmative defense that subsequent to the discovery of the alleged fraudulent representations made by defendant when the original contract of October 6th was entered into for the purchase of the stock, and the acquirement by plaintiff of the other rights connected with the business of the corporation, that the plaintiff did not elect to stand upon the original contract and pursue his legal rights flowing from the assumption of that position, but entered into negotiations with the defendant looking to a rescission of the original contract. Of course, if the mere effort to effect a rescission or compromise had both been ineffectual, it would not have disturbed plaintiff's rights to subsequently stand on the contract and sue for damages for the fraud. But it appears from the answer that, while these negotiations for obtaining a rescission did not eventuate in that exact result, still, as the outgrowth of the efforts of plaintiff to accomplish it, a new, and what may be called a "compromise," agreement was entered into between the parties under which the claim of plaintiff against the defendant was to be settled. By making this new agreement it is quite apparent that plaintiff cannot now stand upon the original contract of October 6th. That contract was abandoned, or rather superseded, by the new contract of November 17th and by voluntarily entering into the latter the plaintiff is deemed to have waived any right for damages which he might otherwise have had, had he stood upon the original contract. The rights of plaintiff upon the discovery of the alleged fraud, and before he opened up any negotiations with the defendant, were clearly defined in law. He might have stood on his original contract and sued for damages for the deceit, or he might have rescinded the contract, and had defendant consented thereto, the plaintiff would then have had no right of action over for the deceit. Neither of these things, however, was done. Plaintiff did not stand on his original contract, and his effort at rescission resulted in a new agreement relating to the corporate stock, in which the defendant obligated himself to make a disposition of the entire business of the corporation and the repayment from the proceeds of the purchase price paid by plaintiff for his shares of the stock. Under this agreement, it was not the sale of the plaintiff's interest in the business represented by his ownership of one-half of the issued stock of the corporation from which repayment of the purchase price of his stock was to be made, but was to be a preferred payment which might necessitate the application of the entire proceeds of sale towards its payment. Obviously, this new agreement, entered into as a result of the ineffectual effort to obtain an actual rescission by consent upon the discovery of a fraud by plaintiff, was open to the claim of defendant that it was a compromise and adjustment of all the rights of plaintiff springing from the contract of October 6th; that it superseded that contract, and resulted in a waiver of any claim for damages for deceit which plaintiff otherwise might have had. This being true, the answer setting up the affirmative defense, based upon the making of the contract of November 17, 1906, with its attendant circumstances, and the pendency of the action in which plaintiff was seeking to enforce this latter contract, was not subject to any valid objection that its allegations did not constitute a defense. The matters alleged were intended to, and sufficiently did, plead the defense of a waiver by plaintiff of a right to maintain any action for damages for deceit by virtue of the agreement of November 17, 1906, made subsequent to the discovery of the alleged fraud, and the validity of which, and his rights under it, the plaintiff was then asserting in an action previously commenced, and then pending, against defendant for that purpose.

It is further insisted by plaintiff that the agreement of November 17, 1906, is not available to defendant as a waiver here and extinguishment of the obligation of defendant to pay any damages for the deceit practiced by the former in the sale of the stock. In that regard it is claimed that the agreement was illegal and void, as being a contract to sell the property of a corporation and divide the proceeds among the stockholders, which is prohibited by section 309 of the Civil Code, as construed in Martin v. Zellerbach, 38 Cal. 300, 99 Am. Dec. 365, and Kohl v. Lilienthal, 81 Cal. 378, 20 Pac. 401, 22 Pac. 689, 6 L. R. A. 520. The Code provision declares that "The directors must not * * * divide, withdraw, or pay to the stockholders, or any of them, any part of the capital stock, * * *" and it is insisted that, as it is the declared purpose of the agreement of November 17th to sell all of the property of the corporation and divide or apply the proceeds between plaintiff and defendant, as stockholders therein, according to the stipulation in the agreement, the contract is brought within the prohibition of the Code section and is void. Of course the inhibition of the section, while directly applying to the directors of a corporation, applies equally to stockholders. What the directors cannot do in that respect the stockholders cannot do or authorize done. Kohl v. Lilienthal, supra. And by the term "capital stock" used in the section is meant the actual capital—the property used in the conduct of the business—as distinguished from the shares or nominal capital of a corporation. Excelsior W. & M. Co. v. Pierce, 90 Cal. 131, 27 Pac. 44.

Now it is not necessary to enter into any particular consideration of the section relied on by appellant, or to discuss the cases cited, because it is quite apparent that there is nothing in this contract which necessarily brings it within the inhibition of the section.

We are not now dealing with an actual sale of corporate property, or any distribution of the capital stock thereof, where from the facts in the concrete case it is to be determined whether or not the law has been violated. We have here simply a contract between the owners of the stock in the corporation (of the whole of it as the pleadings disclose, or, as the contract recites, of a majority of it), whereby it is agreed that all the property belonging to the corporation shall be sold and the proceeds disposed of in a certain manner. The agreement does not provide for a method whereby this shall be accomplished, but if it can be accomplished in any legal method, it must be assumed that that method was in the contemplation of the parties when the contract was made, and will be pursued. The very section of the Civil Code relied on by appellants (section 309) while prohibiting a division or distribution among the stockholders of any part of the capital stock, declares further that "nothing herein prohibits a division or distribution of the capital stock of any corporation which remains after payment of all debts upon its dissolution or the expiration of its term of existence." As the owners of all the capital stock, and hence beneficially interested in all the property of the corporation after satisfaction of the claims of its creditors, the contracting parties may obtain a dissolution of the corporation, wind up all its affairs, dispose of its property, and, being entitled to the proceeds, be able to carry out the terms of the agreement. This would be one method of carrying out their contract; and, as it is a legal one, and one which it is possible to pursue, the contention of the appellant that the contract is in violation of the prohibitory legislation of the Civil Code is disposed of.

It is further claimed that it does not appear that there was any consideration for the asserted waiver of the right of plaintiff to damages for the deceit. We do not think this point well taken. The contract of November 17, 1906, being, as we have seen, a legal contract as far as any prohibitory legislation against it is concerned, the promise of the defendant to sell all the property of the corporation, which included, of course, his own interest in it, for the primary and possibly the sole benefit of plaintiff, was a sufficient consideration.

The judgment appealed from is affirmed.

We concur: MELVIN, J.; HENSHAW, J.

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156 Cal. 230

In re BUDAN'S ESTATE. (L. A. 2,404.)

(Supreme Court of California. Aug. 28, 1909.)

1. WITNESSES (§ 211*)—PRIVILEGED COMMUNICATIONS—PHYSICIAN AND PATIENT.

Under Code Civ. Proc. § 1881, subd. 4, a physician who had attended testator professionally, was incompetent, in the contest of testator's will, to testify as to the nature of the disease from which testator was suffering, its duration, whether testator was rational, and whether he had sufficient mental capacity to make a will; all the information being acquired in attending testator in his professional capacity.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 768, 773; Dec. Dig. § 211.*]

2. APPEAL AND ERROR (§ 970*)—DISCRETION OF COURT—COMPETENCY OF WITNESS—INTIMATE ACQUAINTANCE.

The determination of the question as to who is an "intimate acquaintance," within the meaning of Code Civ. Proc. § 1870, subd. 10, making admissible the opinion of an intimate acquaintance respecting the mental sanity of a person, lies within the discretion of the court, and will not be interfered with when not abused.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 970.*]

3. EVIDENCE (§ 474*) — MENTAL CAPACITY — OPINION EVIDENCE.

Under Code Civ. Proc. § 1870, subd. 10, rendering admissible in evidence the opinion of an intimate acquaintance respecting the mental sanity of a person, a trained nurse who had attended testator for three days prior to his death, whose duty it was to take note of the testator's mental and physical condition, while she had charge of him, and who had favorable opportunities to become, to some extent, intimately acquainted with him, was qualified to give her opinion as to his mental condition.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2198; Dec. Dig. § 474.*]

4. TRIAL (§ 250*)—INSTRUCTIONS.

An instruction not based on the issues in the case, or on the evidence, is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 584–586; Dec. Dig. § 250.*]

5. APPEAL AND ERROR (§ 1066*)—HARMLESS ERROR—INSTRUCTIONS.

An instruction that evidence consisting of mere repetition of oral statements is subject to much imperfection and mistake, etc., if erroneous, as invading the province of the jury, was harmless; it not appearing that there was any testimony whatever of any oral statements made by any one.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

6. EVIDENCE (§ 474*) — OPINION EVIDENCE — "INTIMATE ACQUAINTANCE."

To be an "intimate acquaintance," within Code Civ. Proc. § 1870, subd. 10, making admissible the opinion of an intimate acquaintance, necessarily requires a familiarity with the mental temperament of the person, the soundness of whose mind is in question.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 474.*

For other definitions, see Words and Phrases, vol. 4, p. 3733; vol. 8, p. 7692.]

In Bank. Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Will contest by Annie Budan and others against Edith Budan and others. From a verdict and judgment in favor of the latter, and from an order denying a motion for new trial, contestants appeal. Affirmed.

Lamy & Putnam, for appellants. W. H. Spencer, for respondents.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

LORIGAN, J. This is a contest of a will (after its admission to probate) on the ground of unsoundness of mind of the testator and undue influence. The case was tried before a jury, and from a verdict and judgment in favor of respondents, and from an order denying their motion for a new trial, the contestants appeal.

The points made for reversal are:

1. It is insisted that the court erred in sustaining objections to questions asked by contestants of Dr. W. M. Stover, a witness called in their behalf. The doctor—a physician—had treated the testator professionally at the San Luis sanitarium from November 25, 1907, to December 7, 1907, the date of his death. He testified, preliminarily, that he had made a diagnosis of the testator's case; had treated him continually during the above period, and during that time had observed his actions, conduct and demeanor. He was then asked by the attorney for contestants the nature of the disease from which the testator was suffering, and its duration; whether while under the control of the doctor the testator was rational or irrational; whether in his opinion he was competent to transact business during the period he was treating him; and whether he had mental capacity sufficient, on October 5, 1907 (the date of the making of the will), to have made a will and to have known and understood its tenor and purport. Objections of respondents to all of these inquiries were sustained by the court, and, we think, properly. Dr. Stover was not called as an expert; no questions as such, or hypothetical questions, were put to him. He was the attending physician of the testator; and, while no preliminary inquiries were made by the respondents to show directly, that all the information which the physician could have obtained, on the matters concerning which he was interrogated, was information acquired in attending the testator in his professional capacity as his physician, and was necessary to enable him to prescribe, or act for his patient, still we think this clearly appears to be the fact, upon a fair and reasonable consideration of the testimony of the physician as to his professional relations to, and treatment of, the testator. Under such circumstances the contestants had no right to make the inquiries because "a licensed physician * * * cannot without the consent of his patient be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient." Code Civ. Proc. subd. 4, § 1881. In conformity with this provision of the Code the objections to the inquiries were properly sustained.

2. One of the witnesses for respondents was a trained nurse who commenced to work at the sanitarium under Dr. Stover, and attended the testator as a nurse for three days prior to his death. She was in his room in attendance upon him every hour of the day during that period, sometimes remaining with him a few minutes, and at other times remaining for an hour or so. He talked with her on different subjects, but principally about his physical condition and going to the hospital; of his property matters; of his family, and their conduct towards him. She testified that, as a nurse, it was her duty to observe the symptoms, both physical and mental, of patients committed to her charge, and report them to the attending physician. She was asked and permitted to testify, over the objection of contestants, that she had formed an opinion of the mental soundness of the testator during the period he was under her care, and was of the opinion that he was of sound mind. It is insisted that it was error to permit this testimony because the witness was not an "intimate acquaintance" whose opinion, respecting the mental condition of a person, may be received under subdivision 10, § 1870, Code Civ. Proc. It is often a difficult matter to determine whether a witness, whose opinion is sought to be had of the mental condition of another, is an intimate acquaintance of his, within the purview of the section, or not. What the meaning of the term "intimate acquaintance" is has not been clearly defined. To be such an acquaintance necessarily requires a familiarity with the mental temperament of the person the soundness of whose mind is in question. But this familiarity is not to be measured exclusively by an acquaintanceship for any particular length of time. Time must, of course, enter as an element, but not as the controlling element. One who has known a person for years may not have had sufficient opportunity for observation to be capable of forming an opinion as to his mental condition at any given time. On the other hand, a person may have been so closely connected with another, and his opportunities may have been so favorable for observation of his conduct and demeanor, that he is qualified to speak of his mental condition, though the period of observation may have covered only a short time. So, as the circumstances must vary upon which the question of who is an "intimate acquaintance," within the meaning of the Code section, must be determined, and as no fixed rule on the subject can be laid down, the matter is necessarily left under the authorities to the discretion of the trial court, and when that discretion does not seem to have been abused, the appellate court will not interfere with the ruling of the trial court on the subject. Estate of Carpenter, 94 Cal. 406, 29 Pac. 1101; Wheelock v. Godfrey, 100 Cal. 578, 35 Pac. 317; People v. Suesser, 142 Cal. 360, 75 Pac. 1093; Huyck v. Rennie, 151 Cal. 411, 90 Pac. 929. The witness, whose right to express an opinion is challeng-

ed, was a trained nurse, whose duty it was to take note of the mental and physical condition of the testator during the time she had him in charge, and who did so. She had conversations with him daily on various subjects, and from her relation to him as nurse, had favorable opportunities to become, at least to some extent, intimately acquainted with him. Under these circumstances it cannot be said that the court abused its discretion in holding her to be qualified under the Code provision referred to, and to permit her to give her opinion of the mental condition of the testator.

3. It is insisted that the court erred in refusing to give certain instructions asked by contestants, and in giving certain others requested by respondents. The court did not err in refusing to give contestants' instruction as to the phase of insanity known as senile dementia, because the record does not show any evidence of the testator being affected with that phase of insanity, or that it was an issue in the case. The court instructed the jury at the request of respondents that: "Evidence which consists of mere repetition of oral statements is subject to much inperfection and mistake; that the party giving such testimony may have misunderstood what was said, and it frequently happens that * * * a witness by unintentionally altering a few expressions really used gives an effect to the statement completely at variance with what the party did say." It is claimed that this instruction comes within the ban of Kauffman v. Maier, 94 Cal. 283, 29 Pac. 481, 18 L. R. A. 124, as being an invasion by the court of the province of the jury to determine all matters of fact, the credibility of witnesses, and to pass upon the effect and weight of the evidence. This instruction is not exactly like the one involved in Kauffman v. Maier, and other cases, where the jury were cautioned as to the accuracy of oral testimony as to admissions. No caution is contained in the instruction in question. Conceding, however, without deciding, that the instruction comes within the ban of Kauffman v. Maier, still it would afford no reason on this appeal for reversing the cause because it was given. From the record before us it does not appear that there was any testimony in the case whatever of any oral statements made by any one. Hence the appellant is only complaining of an instruction given as erroneous in the abstract. But this is no ground for reversal. It must appear that giving it was prejudicial to the appellant, and that there was some testimony in the case to which the jury might have applied the erroneous instruction. As the record does not show anything of the kind, the appellant could not be injured because the instruction was given, even if it should be declared erroneous.

There are other points in the case which are of so little merit that we do not discuss them.

The judgment and order are affirmed.

We concur: HENSHAW, J.; SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; MELVIN, J.

7 Cal. Unrep. 371

In re SNOWBALL'S ESTATE. (Sac. 1,708.)

(Supreme Court of California. Aug. 30, 1909. Rehearing Denied Sept. 29, 1909.)

1. Judgment (§ 646*)—Res Judicata—Prior Proceedings.

Determination of an issue as to the fitness of the mother of certain children to act as their guardian in a prior application for appointment is res judicata on a subsequent application between the same persons, except as to evidence of facts occurring since the former order.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 646.*]

2. Appeal and Error (§ 1056*)—Evidence—Exclusion—Prejudice.

Where certain facts offered to prove a mother's alleged abandonment of her children, as a defense to her application for guardianship, were insufficient as a matter of law to establish abandonment, objectors to her appointment were not prejudiced by the exclusion of such evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4189; Dec. Dig. § 1056.*]

3. Parent and Child (§ 17*)—Abandonment by Parent.

In the absence of proof that a mother intended to bring about final separation from her minor children, evidence of mere temporary absences accompanied by statements not indicating an intent to surrender parental rights, and the fact that she placed the children in care of another while she was away, was insufficient to establish abandonment.

[Ed. Note.—For other cases, see Parent and Child, Dec. Dig. § 17.*]

4. Guardian and Ward (§ 11*)—Appointment of Guardian—Validity.

Under Civ. Code, § 241, declaring that a guardian of the person or estate of a child may be appointed by a will or deed if the child be legitimate by the father with the written consent of the mother, or by either parent if the other be dead or incapable of consent, a testamentary appointment by the father of a legitimate child having a surviving mother without the mother's consent is invalid.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 36; Dec. Dig. § 11.*]

5. Guardian and Ward (§ 10*)—Right to Appointment—Priority.

Code Civ. Proc. § 1751, gives to the surviving mother of infants a primary right to be appointed their guardian, which should be recognized in the absence of proof compelling a finding of her unfitness.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 25; Dec. Dig. § 10.*]

Department 1. Appeal from Superior Court, Yolo County; E. E. Gaddis, Judge.

Petition by Leutie C. Snowball to be appointed guardian of the persons and estates of Aldanita Ann Snowball and Carmen Snowball, minors, to which Winnette Squires filed objections, and prayed that she be appointed guardian of their estate. From an order granting the petition of the mother, Leutie C. Snowball appeals. Affirmed.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

See, also, 104 Pac. 446.

R. H. Countryman, for appellant. Arthur C. Huston and Harry L. Huston, for respondent.

SLOSS, J. Aldanita Ann Snowball and Carmen Snowball are minor children of Milton S. Snowball, now deceased, and of the respondent Winnette Squires, who, after having been divorced from Milton S. Snowball, was married to Lowell Squires. Each of the children is under 14 years of age. Milton S. Snowball died in January, 1908, leaving a will, under the terms of which his children were named as beneficiaries. On June 15, 1908, Leutie C. Snowball (sister of Milton S.) filed her petition praying that she be appointed guardian of the persons and estates of the said minors. Mrs. Squires, the mother of the children, filed a petition on her own behalf, in which she asked that she be appointed as guardian of the estate of each of the minors. Both petitions were set for hearing at the same time, and such hearing resulted in an order granting the petition of Winnette Squires and denying that of Leutie C. Snowball. From this order Leutie C. Snowball appeals.

In her pleading the appellant alleged that Winnette Squires was not a fit or proper or competent person to have the care or custody of either of said minor children. The court found this allegation to be untrue. It appeared that on the 17th of February, 1908, some four months prior to the commencement of the present proceeding, Leutie C. Snowball, the petitioner herein, had filed in the superior court a petition asking that she be appointed guardian of the persons of the said minors. Opposition to this application was filed by Winnette Squires. The matter came on for hearing on the 24th day of February, 1908, at which time the petitioner amended her petition by inserting an allegation that "Winnette Squires, the mother of the said minors, is incompetent, and not a fit and proper person to act as their guardian." This allegation was denied by Mrs. Squires, and thereupon, evidence having been introduced, the court made findings to the effect, among other things, that the mother was competent and a fit and proper person to act as guardian of the children, and entered a judgment that the amended petition of Leutie C. Snowball be denied. The proceedings upon this former application having been offered in evidence and shown to the court upon the hearing of the petitions in this proceeding, the court, upon the objection of the respondent, excluded certain testimony offered by the petitioner for the purpose of showing unfitness on the part of the mother. If this ruling had gone so far as to preclude the petitioner from showing, by any character of testimony, the alleged unfitness of Mrs. Squires, it would undoubtedly have been erroneous. The doctrine of res adjudicata cannot apply to successive applications for guardianship of minors to the extent of precluding the court, upon the later application, from a consideration of such circumstances as may have occurred since the rendition of the prior order. If the person appointed guardian should, after appointment, develop or exhibit traits of character indicating an inability to properly perform the functions of guardianship, the changed conditions may, of course, be shown to the court with a view to invoking its power to make new provision for the custody or care of children. See Beyerle v. Beyerle (Cal.) 100 Pac. 702. Here, however, the objection of respondent and the rulings of the court were carefully limited so as to preserve the right of appellant to prove Mrs. Squires' unfitness by any fact or circumstance which had not occurred or existed prior to the hearing of February, 1908. Her fitness to act as guardian at the time of that hearing had there been made an issue. That issue had been found in her favor, and the court had upon such finding denied the application of Miss Snowball for letters of guardianship. This was an adjudication of the rights of the parties (Ex parte Miller, 109 Cal. 643, 42 Pac. 428) at the time of the proceeding. That the order took the form of a denial of relief to petitioner made it none the less a determination, upon the merits, of her claim, and an adjudication, binding in every subsequent litigation between the same parties, as to every fact necessarily found as the basis of the order. Estate of Harrington, 147 Cal. 124, 81 Pac. 546, 109 Am. St. Rep. 118. The order of February, 1908, denying appellant's petition, conclusively determined, therefore, as between the parties, the fitness and competency of the mother at that time. To hold otherwise would mean that a party defeated in an effort to establish a superior right to be appointed guardian of minors could, notwithstanding the adverse finding of the court on material issues, present the same issues and retry them in any number of subsequent proceedings. It may be that, where it is claimed that the circumstances have changed since the making of the first order, evidence of facts antedating that order may be admissible, in connection with later occurrences, as a basis for the contention that all of the facts, taken together, show unfitness. But no such question was presented here. The appellant offered to show on the issue of unfitness only matters which had taken place before the earlier hearing, and, in effect, to relitigate in this proceeding, the very issue which had already been decided against her.

The first application was for guardianship of the persons only, the second for guardianship of persons and estates. The court permitted the appellant to offer any testimony she had on the new issue presented; i. e., the fitness of respondent to act as guardian of the estates of the minors.

The appellant made an offer to prove certain facts which, as she claimed, tended to show that the respondent had abandoned the children, and had thereby forfeited her right to guardianship. Civ. Code, § 246, subd. 4. All of said facts occurred prior to the guardianship proceedings of February, 1908. An objection to the offer was sustained. Regardless of whether the appellant was precluded by the judgment in the earlier proceeding from showing matters which might have been there litigated (Rucker v. Langford, 138 Cal. 611, 71 Pac. 1123), we are satisfied that the appellant was not injured by the ruling for the reason that the facts alleged were not sufficient to show an abandonment. In order to constitute abandonment, "there must be an actual desertion, accompanied with an intention to entirely sever, so far as it is possible to do so, the parental relation and throw off all obligations growing out of the same." Gay v. State, 105 Ga. 599, 31 S. E. 569, 70 Am. St. Rep. 68; Shannon v. People, 5 Mich. 71. There must be more than a mere temporary absence or neglect of parental duty. State v. Davis, 70 Mo. 467. There was nothing in the offer here made which would justify the inference that the respondent ever intended to bring about a final separation from her children. At most, there was an offer to prove temporary absences, accompanied by statements, which do not in any way evidence an intent to surrender parental rights. While respondent was away from her children they were in the care of a Mrs. Chambers. In the absence of proof of the circumstances under which the children were placed with Mrs. Chambers, the fact that the respondent allowed them to remain with her is not enough to establish an intent to throw off the obligations of a mother.

The court properly declined to consider the will of Milton S. Snowball, whereby he undertook to appoint the appellant as guardian of his children. Unsupported, as it was, by the written consent of the mother of the children, the attempted appointment was void. Civ. Code, § 241; In the Matter of Baker, 153 Cal. 537, 96 Pac. 12. In view of what we have said regarding the offer to prove abandonment, we need not discuss the appellant's position regarding the effect of abandonment by the mother on her right to control a testamentary appointment by the father.

The point that the evidence is insufficient to sustain the finding of fitness on the part of the respondent is without merit. There was testimony which fully authorized the conclusion reached. The mother had the primary right to be appointed (Code Civ. Proc. § 1751) and, in the absence of proof compelling a finding that she was not fit to act as guardian, this right was properly recognized. In re Campbell's Estate, 130 Cal. 381, 62 Pac. 613; Guardianship of Salter, 142 Cal. 412, 76 Pac. 51.

There was no substantial error in admitting or rejecting evidence.

The order appealed from is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

156 Cal. 235

In re SNOWBALL'S ESTATE. (Sac. 1,707.)

(Supreme Court of California. Aug. 30, 1909. Supplemental Opinion Sept. 27, 1909. Rehearing Denied Sept. 29, 1909.)

1. Appeal and Error (§ 150*)—Right to Appeal—Interest—Individual or Representative Capacity.

Where testator bequeathed all of his estate to his executrix in trust for minor children, the trust to terminate at majority, the executrix in her individual capacity had no sufficient interest to entitle her to appeal from an order making a family allowance to their guardian for their support, but she was entitled to appeal in her representative capacity because of her duty to protect the estate from depletion by an extravagant family allowance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 941; Dec. Dig. § 150.*]

2. Infants (§ 78*)—Guardian Ad Litem—"Proceeding"—"Case."

An application for a family allowance for infant beneficiaries of an estate is a "proceeding" and a "case" within Code Civ. Proc. § 372, providing that a guardian ad litem may be appointed in any case where it is deemed by the court in which the action or proceeding is prosecuted, or by a judge thereof, expedient to represent the infant in the action or proceeding.

[Ed. Note.—For other cases, see Infants, Dec. Dig. § 78.*

For other definitions, see Words and Phrases, vol. 6, pp. 5631-5638; vol. 1, pp. 985-991.]

3. Infants (§ 78*) — Proceeding — Application for Family Allowance—Guardian Ad Litem.

An application for a family allowance for infant beneficiaries of an estate may be prosecuted without the appointment of a guardian ad litem for the infants.

[Ed. Note.—For other cases, see Infants, Dec. Dig. § 78.*]

4. Executors and Administrators (§ 194*)—Family Allowance.

A family allowance to infant beneficiaries of an estate may be made before exempt property and homestead have been set apart for the use of the family.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 194.*]

5. Witnesses (§ 268*)—Cross-Examination.

Where, on an application for a family allowance to minor children from their father's estate, the mother testified that the children were in her custody, and that $20 a month for each child would be a reasonable sum for their support, questions as to whether the children went to school before they were in her custody, how much her present husband earned, and whether he had not been incapacitated from earning anything, was unable to support the family, and whether he had consented that the children be received in his family, etc., were not proper cross-examination.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931–948; Dec. Dig. § 268.*]

6. EXECUTORS AND ADMINISTRATORS (§ 194*)—FAMILY ALLOWANCE.

Since a family allowance for minor children must be paid to their guardian, or for necessaries, and not to the guardian ad litem, the poverty of the mother having custody of the children is immaterial except as a circumstance justifying an increase of the allowance.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 194.*]

7. EXECUTORS AND ADMINISTRATORS (§ 111*)—IMPROVIDENT APPEAL—ALLOWANCES.

Where an executrix had no personal interest in a proper order granting a family allowance to minor children, which was affirmed, no allowance should be made to her or to her attorneys out of the estate for services or expenses in connection with the appeal.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 448–462; Dec. Dig. § 111.*]

8. COSTS (§ 260*) — IMPROVIDENT APPEAL — DAMAGES.

Where an executrix without personal interest appealed from a proper order granting a family allowance to testator's minor children, which was subsequently affirmed, damages in the sum of $50 would be awarded in favor of the children against the executrix personally, to be paid to their general guardian, because of such appeal.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 260.*]

Department 1. Appeal from Superior Court, Yolo County; E. E. Gaddis, Judge.

Judicial settlement of the estate of Milton S. Snowball, deceased. From an order making family allowance to two minor children of deceased, Leutie C. Snowball, individually and as executrix, appeals. Affirmed with damages.

See, also, 104 Pac. 444.

R. H. Countryman, for appellant. Arthur C. Huston and Harry L. Huston, for respondent.

SHAW, J. This is an appeal by Leutie C. Snowball in her own behalf and also in her capacity as executrix of the estate of Milton S. Snowball, deceased, from an order of the superior court making a family allowance to the two minor children of said deceased. The order in question directed the executrix to pay to said children, or to the guardian of their estates, the sum of $40 per month for their support and maintenance during the administration of the estate, and until further order. The two children, Carmen and Aldanita Snowball, are, respectively, seven and nine years of age. The estate is of the probable value of about $12,000, and by the terms of the will of the deceased it is all given to the two children, but is to be held during their minority in trust for their use by Leutie C. Snowball, who is their aunt. The estate is not indebted except to the amount of $500.

The appellant, in her own behalf, has no sufficient interest in the matter at issue to entitle her to maintain an appeal. She has no personal interest in the estate, and hence she is not a party aggrieved. As executrix she has, abstractly speaking, a duty to perform in protecting the estate from depletion by an extravagant family allowance. She is therefore as executrix technically a party aggrieved, and as such she has a right to maintain the appeal. It is difficult, however, to deduce from this duty a sufficient motive for taking an appeal from an order allowing $40 a month for the support of two small children out of an estate of $12,000, all of which belongs to them. The order was made on the petition of Mrs. Winnette Squires, the mother of the children. Before filing the petition, she obtained an order appointing herself as guardian ad litem of the minors for that purpose. This was alleged in the petition and denied in the answer thereto. Upon the hearing, the order appointing her guardian ad litem was admitted in evidence over the appellant's objection. This is assigned as error, the objection being that there is no legal authority for appointing a guardian ad litem to carry on such proceedings in behalf of minors. The objection is without merit. "A guardian ad litem may be appointed in any case, where it is deemed by the court in which the action or proceeding is prosecuted, or by a judge thereof, expedient to represent the infant * * * in the action or proceeding." Code Civ. Proc. § 372. An application to obtain a family allowance is a "proceeding" and a "case" within the meaning of this provision. Although not necessary to do so, it may be expedient, and it is within the discretion of the court to appoint a guardian ad litem for that purpose. The objection is immaterial for another reason. The court may make such order of its own motion without a petition from any person. Leach v. Pierce, 93 Cal. 619, 29 Pac. 235; Code Civ. Proc. §§ 1465, 1466. It could be made on the petition of any person on behalf of the children. Estate of Garrity, 108 Cal. 468, 38 Pac. 628, 41 Pac. 485. It was therefore immaterial whether a guardian ad litem was appointed or not and the proof of the order was useless and harmless.

Appellant indirectly suggests that a family allowance cannot be made until after the exempt property and a homestead has been set apart for the use of the family. The point is settled to the contrary of this contention. Estate of Garrity, supra, 103 Cal. 467, 38 Pac. 629.

The mother of the children testified in their behalf that she was their mother, that they were at the time in her custody, and that $20 a month for each child would be a reasonable sum for their support. On cross-examination the witness was asked whether the children went to school before they were in her custody, how much per month her present husband earned, whether he had not been for a year past incapacitated from earning anything, whether he was able to support the children, whether he had received them in his family, or had consented to her custody of them, whether she had not been assisted by friends, whether she had supported the children herself, how she had been herself supported for the past year, and whether she had not abandoned the children in 1904 and again taken them into custody in February, 1908. The rulings of the court sustaining objections to these questions were correct. The questions were not proper cross-examination. Inasmuch as the money allowed by the terms of the order appealed from must necessarily be paid to the guardian of the children, or for necessaries for their use, and not to the guardian ad litem, the fact of the mother's poverty, suggested by the questions, was utterly immaterial, at least from the standpoint of one who apparently desired to reduce the allowance. Where the mother is properly in custody of the children, such poverty might be taken into consideration as a circumstance from which the allowance might be increased where the children were so young as to require some one to care for them, as is the case here.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

If, as counsel suggests, the mother has also been appointed general guardian of the children, she will be under bond and subject to the direction and supervision of the court in the expenditure of any moneys she may receive on their account, and it must be presumed that it will be used for the children's benefit and not for her own personal behoof. The children are the interested persons. The appellant was allowed to make all proper inquiry as to their necessities. The court did not err in compelling appellant's counsel to cease useless inquiry into the minute details of the cost of clothing previously supplied to the children. More than sufficient latitude was given him on that subject.

We do not find any question in the record of sufficient importance to have justified the executrix in going to the expense of taking this appeal. Personally she had no right of appeal. No allowance should be made to her, or to her attorney, out of the estate, for services or expenses in connection with the appeal. It is a proper case for the imposition of damages.

The order appealed from is affirmed, and $50 as damages is awarded in favor of the said children against the appellant personally to be paid to their general guardian.

We concur: ANGELLOTTI, J.; SLOSS, J.

Supplemental Opinion.

PER CURIAM. In the opinion filed herein August 30, 1909, it is said that Leutie C. Snowball has no interest in the estate sufficient to entitle her, in her own right, to maintain an appeal, and that her appeal as executrix was the only one to be considered. Under the facts as stated in the briefs and apparently conceded by the appellant, this was correct. Since the filing of the opinion, our attention has been called to the fact, shown by the record, that the will of the deceased gives her a contingent remainder in one-half of the estate, to become absolute only in the event that the two children should both die childless before reaching the age of twenty-one years. The point is of no importance to the case. [1] Her personal interest adds nothing to the merits of the appeal and presents no additional points for consideration. We make the correction merely to avoid any prejudice to her from the inaccurate statement, in the event of her contingent interest becoming absolute in the future.

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156 Cal. 349

In re MORGANSTERN. (Cr. 1,565.)

(Supreme Court of California. Sept. 30, 1909.)

HABEAS CORPUS (§ 96*)—COMPLAINT IN CRIMINAL CASES—RIGHT TO DETERMINE SUFFICIENCY.

The sufficiency of the criminal complaint in a justice's court may be determined by the Supreme Court on habeas corpus for the discharge of one held under such a complaint.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 81; Dec. Dig. § 96.*]

In Bank. In the matter of the petition of A. J. Morganstern for a writ of habeas corpus on behalf of Ah Sing for his discharge from commitment under a criminal complaint in justice's court. Denied.

A. J. Morganstern, for petitioner.

PER CURIAM. The petition for a writ of habeas corpus is denied for the reason that so far as we can see the complaint in the justice's court, under which petitioner is in custody, clearly states a public offense under the laws of this state. In view of the statement in the petition for the writ to the effect that a difference of opinion exists among the courts of this state as to the right of a court on habeas corpus to determine the question whether a complaint in a court of limited or inferior jurisdiction states facts sufficient to constitute a public offense, it appears proper to say that the rule in this state in that regard is correctly stated in Ex parte Greenall, 153 Cal. 767, 770, 96 Pac. 804, in which case it is plainly pointed out that the rule is different from the one applied to courts of general jurisdiction, as in Ex parte Ruef, 150 Cal. 665, 89 Pac. 605. An examination of the opinion in the case of Tobias Watkins, 3 Pet. 193, 7 L. Ed. 650, cited in the Greenall Case, will disclose grounds for this distinction.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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(156 Cal. 350)

LOMPOC VALLEY BANK v. STEPHENSON et al. (L. A. 2,390.)

(Supreme Court of California. Oct. 1, 1909.)

1. Guaranty (§ 16*)—Consideration.
A loan of money is a valuable and adequate consideration for a guaranty of payment made at the same time.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 15; Dec. Dig. § 16.*]

2. Evidence (§ 444*)—Parol Evidence Affecting Writings—Guaranty of Payment.
Parol evidence, that a guaranty of payment was executed in consideration that the creditor would protect guarantors by taking a first mortgage on personalty of the principal debtor of greater value than the amount of the indebtedness, which it failed to do, was properly excluded, since it was an offer to prove, not a failure of consideration, but a contemporaneous oral agreement converting guarantors' absolute agreement in writing into a merely contingent agreement.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2049; Dec. Dig. § 444.*]

3. Evidence (§§ 397, 432*)—Parol Evidence Affecting Writings—Want or Failure of Consideration.
Want or failure of consideration may be proved in a proper case, but, in the absence of fraud or mistake, parol evidence cannot be permitted to vary a written contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1756, 1986, 2030; Dec. Dig. §§ 397, 432.*]

In Bank. Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by the Lompoc Valley Bank against H. S. Stephenson and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Denis & Loewenthal, for appellants. Wm. G. Griffith, for respondent.

BEATTY, C. J. June 10, 1905, the plaintiff loaned to one Hobson the full sum of $2,800, for which he executed his promissory note payable September 1, 1906. At the same time and place that the loan was made, and before the delivery of the note to plaintiff, the defendants signed the following guaranty indorsed thereon: "The payment of the within note and interest is hereby guaranteed. Dated June 10th, 1905." Part only of the loan has been repaid, and this is an action in the usual form against the guarantors to recover the unpaid balance. In defense of the action the defendants pleaded a failure of consideration. The substance of their plea was that their contract of guaranty was executed upon the express consideration that the plaintiff would indemnify them or protect them from any liability upon their guaranty by taking a first mortgage on personal property of Hobson of greater value than the amount of his note, which they failed to do. At the trial the superior court excluded the evidence in support of this plea and rendered judgment in favor of the plaintiff. Defendants, appealing from the judgment, contend that this ruling was erroneous. We do not think so. The loan of the money was a valuable and adequate consideration for the guaranty of repayment, and what defendants offered to prove by parol was not a failure of consideration, but a cotemporaneous oral agreement which would convert their absolute agreement in writing into a merely contingent agreement. This cannot be done. Want of consideration or failure of consideration may be proved in a proper case, but, in the absence of fraud or mistake, parol evidence cannot be permitted to vary the terms of a written contract.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.; MELVIN, J.; SLOSS, J.

(156 Cal. 253)

LAND et al. v. JOHNSTON. (Sac. 1,663.)

(Supreme Court of California. Sept. 1, 1909.)

1. Appeal and Error (§§ 353, 354*)—Time for Appeal—Enlargement by Stipulation or Order.
The time within which a notice of appeal may be filed is fixed by law, and cannot be enlarged by stipulation of the parties, or order of the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1920–1923; Dec. Dig. §§ 353, 354.*]

2. Appeal and Error (§ 867*) — Review — Scope.
There being no appeal from the judgment, but only from an order denying a new trial, the sufficiency of the pleadings or of the findings to support the judgment cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3478; Dec. Dig. § 867.*]

3. Waters and Water Courses (§ 151*)—Right to Use Water—"Abandonment."
The mere temporary nonuse of water during one year subsequent to its appropriation, without intent to abandon the appropriator's right, is insufficient to establish an "abandonment."

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 155; Dec. Dig. § 151.*

For other definitions, see Words and Phrases, vol. 1, pp. 4–13; vol. 8, p. 7559.]

4. Trial (§ 377*)—Reopening Case—Discretion of Court.
It cannot be held that the trial court committed an abuse of discretion in allowing plaintiffs to reopen their case and introduce further evidence, after the case had been submitted and before any decision rendered; it not being suggested that defendant was deprived of any opportunity to reply to the additional evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 889; Dec. Dig. § 377.*]

Department 1. Appeal from Superior Court, Placer County; Frank T. Nilon, Judge.

Action by William Land and another

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

against Alice K. Johnston. Judgment for plaintiffs. From an order denying a new trial, defendant appeals. Affirmed.

Tuttle & Tuttle, for appellant. Tabor & Tabor, for respondents.

ANGELLOTTI, J. This is an appeal from an order denying defendant's motion for a new trial in an action brought by plaintiffs to obtain a decree adjudging that plaintiffs are the owners of certain waters running in the north or east branch of a ravine in Placer county known as "Mormon Ravine," to the extent of 25 inches, miners' measure, and restraining defendant from interfering with, diverting, or using any of said waters in such a way as to prevent the flow of such quantity of water to the heads of plaintiffs' ditches. The judgment was in favor of plaintiffs, and restrained defendant to the extent asked in the complaint.

There is some question whether we have jurisdiction of this appeal. The order denying defendant's motion, for a new trial was a written order signed by the judge, and this, the record shows, was filed with the clerk of the superior court on June 1, 1907. The appeal was not taken until June 1, 1908. Reliance was apparently placed upon a stipulation of the parties that the defendant should have five days after notice of the entry of the order denying the motion for a new trial within which to serve and file a notice of appeal from such order. Such notice was not given until May 27, 1908, and the appeal was taken within five days thereafter. But the time within which a notice of appeal may be filed is fixed by law, and cannot be enlarged by stipulation of the parties or order of court. Statutes limiting the time of appeal are jurisdictional and mandatory. See Williams v. Long, 130 Cal. 58, 62 Pac. 264, 80 Am. St. Rep. 68. The time within which a notice of appeal may be given is expressly excepted by section 1054, Code of Civil Procedure, from the cases in which the time allowed by the Code may be extended. If it were not for the act providing a new and alternative method of appeal, approved March 20, 1907 (St. 1907, p. 753, c. 410), which went into effect a few days before the order denying a new trial was filed, we do not see why subdivision 3 of section 939, Code of Civil Procedure, providing that an appeal from various specified orders, including an order denying a motion for a new trial, must be taken within 60 days after the order "is made and entered in the minutes of the court or filed with the clerk" would not preclude consideration by us of the appeal. The act of 1907 referred to above, however, provides that the notice of appeal may be filed at any time after the rendition of the order, but must be filed within 60 days after notice of the entry thereof; provided, "that if no notice * * * be given the notice must, nevertheless, be filed, under any circumstances, not later than six months after the entry of the judgment, order or decree." The record does not affirmatively show the date of entry of the order, but only the date of filing. No point is made by respondents in regard to this matter; they apparently being desirous of abiding by the terms of the stipulation given by them. We think that, in view of the condition of the record, we are warranted in assuming that the order was not entered on the minutes of the court more than five days prior to the filing of the notice of appeal.

There being no appeal from the judgment, but only an appeal from the order denying a motion for a new trial, no question of the sufficiency of the pleadings, or of the findings to support the judgment, can be considered by us. It is urged that certain findings of fact are unsupported by the evidence. The plaintiffs' claim in this action is based on the alleged facts that plaintiffs' predecessor appropriated this water in the year 1857 for mining and agricultural purposes, that plaintiffs and their predecessors in title have continuously used the same for such purposes from that time down to the present, that at the time of such appropriation the land now owned by defendant, and for which, as a riparian owner, she claims the right to use the water, was unoccupied public land of the United States, not claimed by any person, and that it so continued until May 5, 1865, when the right of the Central Pacific Railroad Company under the act of July 2, 1862, attached. Their theory is that the railroad company, defendant's predecessor in title, thus subsequently acquiring this land from the United States, took it, under the express terms of the grant, subject to their appropriation so far as any riparian rights are concerned. Broder v. Natoma Water Co., 101 U. S. 274, 25 L. Ed. 790; S. Yuba Water Co. v. Rosa, 80 Cal. 333, 22 Pac. 222; Himes v. Johnson, 61 Cal. 259; Ramelli v. Irish, 96 Cal. 214, 31 Pac. 41. The trial court found that the appropriation was made by plaintiffs' predecessor, one Boles, in the year 1857, as alleged, and it is not claimed in appellant's brief that this finding is not sufficiently sustained by the evidence. Nor is there any claim in the brief that the evidence was insufficient to sustain a conclusion that both the land of defendant and the place immediately below the same where Boles' diversion of the water was made were then and for several years thereafter unoccupied public lands of the United States, unclaimed by any one.

There was an issue on the question whether plaintiffs and their predecessors had continued to use the waters from 1857 to the present, or had abandoned their rights under the appropriation, and the findings of the trial court in favor of plaintiffs on this question are attacked as not being sufficiently supported by the evidence. We are satisfied that the most that can be said for defendant on this contention is that the evidence was substantially conflicting. Mere temporary nonuse by Boles of the water during one year, some time subsequent to the appropriation, without any intent to abandon his right, which is the most that can reasonably be claimed to be shown by evidence without conflict, would not be sufficient to establish an abandonment of the acquired right. See Smith v. Hawkins, 110 Cal. 122, 126, 42 Pac. 453.

It is urged that the evidence shows that Boles on January 8, 1874, conveyed all his rights in this water to Lyman Crary and others, with whom plaintiffs have not connected themselves in title; but an inspection of the instrument of conveyance shows that Boles reserved such an interest in the water and water rights for irrigation purposes as entitles him and his successors in interest to the use of all thereof except such as may be needed and used by Crary and others for mining purposes. Any use for mining purposes of this water appears to have been abandoned long ago.

There was no error in the admission of evidence given by Boles as to the fact of his use of the water after 1865, or as to an arrangement made by him with Mr. Kelley in 1863, by which he authorized Kelley to use some of the water. The evidence was material and relevant upon the issues of abandonment and nonuse. It cannot be held that the trial court committed an abuse of discretion in allowing plaintiffs to reopen their case and introduce further evidence, after the case had been submitted and before any decision had been rendered. It is not suggested that defendant was deprived of any opportunity to reply to the additional evidence.

No prejudicial error was committed in the matter of evidence relative to the question presented by the pleadings whether the land now owned by defendant and the land where Boles' appropriation was made constituted, at the time of such appropriation, public land of the United States, unoccupied and unclaimed.

We find in the brief of appellant no sufficient reason urged for a reversal of the order.

The order denying a new trial is affirmed.

We concur: SHAW, J.; SLOSS, J.

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156 Cal. 245

HARPER v. GOLDSCHMIDT. (L. A. 2,298.)

(Supreme Court of California. Aug. 31, 1909.)

1. CONTRACTS (§ 10*) — MUTUALITY — NECESSITY.

To be obligatory on either party, a contract must be mutual and reciprocal in its obligations.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 21; Dec. Dig. § 10.*]

2. CONTRACTS (§ 15*) — NATURE AND REQUISITES.

As an essential of every contract, there must be an agreement and meeting of minds.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 61; Dec. Dig. § 15.*]

3. FRAUDS, STATUTE OF (§ 115*)—REAL PROPERTY—"PARTY TO BE CHARGED."

Civ. Code, § 1091, provides that an estate in real property, other than an estate at will or for a term of years not exceeding one year, can be transferred only by operation of law, or by a written instrument subscribed by the party disposing of the same or his agent. Code Civ. Proc. § 1971, provides that no such estate can be created, granted, etc., otherwise than by operation of law or a written instrument subscribed by the party creating, granting, etc., the same or by his agent. Code Civ. Proc. § 1973, and Civ. Code, §§ 1624, 1741, in effect declare that contracts for the sale of real property are invalid, unless they or some memorandum thereof be in writing and subscribed by the party to be charged or by his agent. *Held*, that the words "party to be charged" do not mean the vendor or the vendee, but the person charged in court with performance of the obligation.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 242; Dec. Dig. § 115.*

For other definitions, see Words and Phrases, vol. 7, p. 6513.]

4. FRAUDS, STATUTE OF (§ 115*)—REAL PROPERTY.

Under Code Civ. Proc. § 1973, and Civ. Code, §§ 1624, 1741, declaring in effect that contracts for the sale of land are invalid unless they or some memorandum thereof are signed by the party to be charged, in order to charge a vendee, his signature to the contract is absolutely essential, save where his conduct has amounted to such performance, or part performance, as to obviate the necessity of his signature.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 242; Dec. Dig. § 115.*]

5. FRAUDS, STATUTE OF (§ 129*)—PART PERFORMANCE.

Under such sections, where a land contract is wholly executory, the mere payment of a small amount by the vendee, and the acceptance by him of a receipt therefor, signed by the vendor or his agent does not constitute such part performance as binds the vendee.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 289; Dec. Dig. § 129.*]

6. FRAUDS, STATUTE OF (§ 150*)—PLEADING—DEMURRER.

Where it appears on the face of the complaint that the agreement sued on is within the statute of frauds, and fails to comply with the requirements thereof, the appropriate mode of taking advantage of the defect is by demurrer.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 360; Dec. Dig. § 150.*]

Department 2. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Carrie Harper against H. H. Goldschmidt. Judgment for defendant, and plaintiff appeals. Affirmed.

T. E. Gibson and G. W. Crouch, for appellant. Bert F. Mull and E. B. Coil, for respondent.

HENSHAW, J. This action was brought by plaintiff for the specific performance of a contract for the sale of realty, which contract, as pleaded in the complaint, was evidenced by the following written memorandum or receipt: "Los Angeles, Cal., Jan. 11, 1907. Received of H. H. Goldschmidt one hundred dollars, part payment on lot numbered 3, block —— Harper's Magnolia Place. Terms: Total price five thousand two hundred and fifty dollars; balance to be paid as follows: $1,400.00 cash on delivery of contract, less $250.00 discount as Com. on sale, $1,250.00 in 6 months from date—$1,250.00 12 months from date, $1,250.00 18 months from date and interest at seven per cent. semiannually. This receipt is issued subject to the conditions in the regular form of contract and deed given for lots in the herein mentioned tract. Geo. C. Peckham & Co. By Geo. C. Peckham." Plaintiff averred the tender to defendant of the contract mentioned in the receipt and the due performance of all of the terms and conditions upon her imposed by the contract, with defendant's refusal to accept the contract and to pay the moneys due thereunder. A general demurrer to this complaint was interposed and sustained. From the judgment which followed plaintiff appeals.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The principal question presented upon the appeal is whether, under the circumstances here indicated, a vendee who has not signed the contract of sale, and who has done no more than pay $100 upon the purchase price, accepting a receipt therefor, can be compelled specifically to perform. Appellant answers this question by saying that under our statute of frauds and the sections of the Code relating to specific performance, and the decisions of this court construing the statute and the Code, specific performance should be decreed. Respondent makes answer that under our statute of frauds, and the sections of the Code dealing with specific performance and the decisions of this court expounding the statute and the Code, no action will lie, and the defendant is not bound. That such a contrariety of opinion should exist upon a proposition which should be well settled, not only excites surprise, but demands an exposition of it resolving all uncertainty.

Upon the statute of frauds appellant points out that section 1091 of the Civil Code reads as follows: "An estate in real property, other than an estate at will, or for a term of years not exceeding one year, can be transferred only by operation of law, or by an instrument in writing, subscribed by the party disposing of the same, or his agent thereunto duly authorized"—that section 1971 of the Code of Civil Procedure prescribes that: "No estate or interest in real property, other than for leases for a term not exceeding one year, nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered or declared, otherwise than by operation of law, or a conveyance or other instrument, in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing." From the language of these sections he argues that when in section 1973 of the Code of Civil Procedure, and in sections 1624 and 1741 of the Civil Code, it is declared that contracts within the statute of frauds are invalid unless they, or some note or memorandum of them, "be in writing and subscribed by the party to be charged, or by his agent," the "party to be charged" is the vendor and not the vendee. And it is said that such is the construction put upon the statute in this state by the cases of Joseph v. Holt, 37 Cal. 254, Rutenberg v. Main, 47 Cal. 213, and Scott v. Glenn, 98 Cal. 170, 32 Pac. 983, while in other states this construction receives support in Wisconsin (Hubbard v. Marshall, 50 Wis. 322, 6 N. W. 497); in Nebraska (Gardels v. Kloke, 36 Neb. 493, 54 N. W. 834); in Michigan (Mull v. Smith, 132 Mich. 620, 94 N. W. 183); in Montana (Ide v. Leiser, 10 Mont. 5, 24 Pac. 695, 24 Am. St. Rep. 17); and in New York (Boehly v. Mansing, 52 Misc. Rep. 382, 102 N. Y. Supp. 171).

Upon the proposition that specific performance is a road open to the vendor under the circumstances here presented, it is said that the vendee who has not signed may prosecute such an action against the vendor who has signed. This being admitted, reference is made to section 3386 of the Civil Code, which declares that: "Neither party to an obligation can be compelled to specifically perform it, unless the other party thereto has performed or is compellable specifically to perform, everything to which the former is entitled under the same obligation, either completely or nearly so, together with full compensation for any want of entire performance"—and to such authorities as Wharton on Contracts, where (volume 1, § 2) it is said, "The parties to a contract, therefore, must both be bound," and the language of our adjudications, such as that in Doe v. Culverwell, 35 Cal. 295, where the well-established principle is enunciated that, "To be obligatory on either party, a contract must be mutual and reciprocal in its obligations." Upon these principles, it is argued that, as the contract is admitted to be enforceable against the vendor, and as it could not be so enforceable without mutuality of obligation, it must be equally enforceable against the vendee.

The English Statute of Frauds and Perjuries of Charles II, to which the similar statutes of all our states owe their origin, used the phrase "party to be charged" in precisely the same manner and to the same effect as it is now used in our sections of the Code. A glance at the English cases will establish that the "party to be charged" did not mean the vendor, nor yet the vendee, but it meant the person charged in court with the performance of the obligation—the party defendant. 1 Sugd. Vendors, c. 4, § 3, par. 2; Thornton v. Kempster, 5 Taunt. 786; Allen v. Bennett, 3 Taunt. 169; Seaton v. Slade, 7 Ves. Jr. 265. It was not the vendor alone whom the statute of frauds and perjuries sought to protect, but the vendee equally. For, as is well said by Ruffin, C. J., speaking for the Supreme Court of North Carolina: "The danger seems as great that a purchase at an exorbitant price may by perjury be imposed on one who did not contract for it as that by some means a feigned contract of sale should be established against the owner of the land. Hence the act in terms avoids entirely every contract of which the sale of land is the subject, in respect of a party—that is, either party—who does not charge himself by his signature to it, after it has been reduced to writing." Simms v. Killian, 34 N. C. 252.

In 1830 the state of New York changed the language of the English statute, and enacted the following: "A contract for the leasing for a longer period than one year, or for the sale of any real property, or an interest therein, is void unless the contract or some note or memorandum thereof, expressing the consideration in writing, be subscribed by the lessor or grantor, or by his lawfully authorized agent." In 1850 the state of California passed an act concerning fraudulent conveyances and contracts (St. 1850, p. 267, c. 114, § 8), which declared: "Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof expressing the consideration, be in writing, and be subscribed by the party by whom the lease or sale is to be made." This was an express and admitted adaptation of the New York statute. In turn a similar statute was adopted by the states of Wisconsin, Nebraska, Michigan, and Montana—all of the states upon whose decisions appellant leans to support his contention. It must be apparent that the language of the courts in construing a statute which requires only that the contract shall be signed by the vendor can have no weight, either by way of reasoning, or authority, in a case where a statute requires that the contract must be signed by the party to be charged. Such is the situation touching the last two of the cases from this state, relied upon by appellant. Joseph v. Holt, supra, was decided under the law expressed in the Statutes of 1850. Its language is: "To take a contract for the sale of land out of the statute of frauds a mere note or memorandum in writing, subscribed by the vendor or his agent, containing the names of the parties and a summary statement of the terms of the sale, * * * is all that is required." This language is strictly true with reference to the statute as it then stood. So, in Rutenberg v. Main, 47 Cal. 213, the same remark is applicable to the court's language when it states: "The statute only requires that the memorandum of sale of real property shall be signed by the vendor, or his agent. Act concerning Fraudulent Conveyances, §§ 8, 9."

As an essential of every contract there must be an agreement and meeting of minds. Thus the agreement must precede the signature to the contract, however speedily thereafter such signature may follow. Before the statute of frauds an oral agreement could be proved against either party. The statute of frauds in no way interfered, or attempted to interfere, with the antecedent oral agreement, but, in effect, declared a rule of evidence that such agreement could not be proved unless the essentials of it had been reduced to writing and signed by the party to be charged. By the English statute the party to be charged was either of the parties against whom enforcement of the contract was sought, but by the statute of California, until the reversion to the English statute, which took place in 1873–74, and by the statutes of New York, Wisconsin, and the other states whose law in this regard is like the early law of California, the statute of frauds was satisfied if the vendor of the property alone signed the contract. There was no such requirement as to the vendee, and, consequently, against him, proof of its acceptance could rest in parol. Hence the repeated declarations from the courts of those states—like the declarations above quoted from the early decisions of this state—to the effect that the statute is satisfied if the memorandum be signed by the vendor. The statute was satisfied, because all that it required was that the vendor alone should sign; hence the inapplicability of the decisions of those states to our existing law. Guthrie v. Anderson, 47 Kan. 383, 28 Pac. 164. But in all of the states, like California to-day, where the statute requires the signature of the party to be charged, when effort is made to charge the vendee, it is uniformly held that the signature of the vendor plaintiff is not sufficient, but that the signature of the defendant vendee is absolutely essential, saving in the exceptional class of cases where the conduct of the vendee has amounted to such a performance, or part performance, of the contract as to relieve the contract from the necessity of his signature.

Nor is there any weight to the objection of lack of mutuality which follows this interpretation of the law. Such objection was early made by Lord Chancellor Redesdale in Lawrenson v. Butler, 1 Sch. & Lef. 13. It was considered a valid objection by Chancellor Kent in Clason v. Bailey, 14 Johns. (N. Y.) 484, but, as pointed out in Vassault v. Edwards, 43 Cal. 458, the courts refused to hold it tenable. Says Parsons (Parsons on Contracts, §§ 9, 10): "The difficulty, therefore, cannot be that the contract is not mutual, but that one of the parties has not obtained the evidence which the statute requires him to produce to bind the other." In Chitty on Contracts (8th Am. Ed. 4) note, it is said that the reason why a party may sue on a contract, although it may be void against him for want of his signature under the statute of frauds, is that the signature is prescribed as "necessary evidence of a contract," and not as an essential or constituent part of the engagement itself. In equitable theory the requirement of mutuality of remedy is satisfied when the nonsigning plaintiff enters suit, since by the very bringing of his action he binds himself to abide by the decree of the court in chancery, and so empowers that court to decree specific performance against him. The commencement of his action is his offer to perform, and the precise situation is met and covered by the provisions of section 3388 of the Civil Code, which declares that, "A party who has signed a written contract may be compelled specifically to perform it, though the other party has not signed it, if the latter has performed, or offers to perform it on his part, and the case is otherwise proper for enforcing specific performance." Bird v. Potter, 146 Cal. 286, 79 Pac. 970. The decision of this court in Scott v. Glenn, 98 Cal. 168, 32 Pac. 983, must be construed by the light of this principle of mutuality of remedy, where the party not signing seeks the aid of the court. In Scott v. Glenn, the action was by the nonsigning vendee to recover the portion of the purchase price paid by him on the vendor's failure to perform. The vendor, by cross-complaint, alleged due tender of the deed, and demand and refusal of the payment of the balance due, and asked judgment that plaintiff be compelled to accept the deed and pay the balance of the purchase price. It was there insisted that the contract was void against the vendee plaintiff because not signed by him. The court said that the vendor was the party to be charged, as he was in the original action, and that his signature to the contract, taken in connection with the delivery thereof to the vendee and a partial payment thereunder, bound both parties. This was sufficiently accurate, perhaps, for the circumstances of the case, but, in fact, while by the original action the vendor who had signed was the party to be charged, by the cross-complaint the vendee, who had not signed, was the party to be charged; and, since the vendee had sought the aid of the court for a recovery growing out of this contract, he made the remedy mutual, and bound himself by his action to abide the judgment of equity upon the whole matter.

But where, as in this case, the contract is wholly executory, and the evidence of it amounts to nothing more than a receipt signed by the vendor, and the alleged part performance is nothing more than the payment of a small amount of money by the nonsigning vendee, and the acceptance of a receipt therefor, no case can be found which holds such to be sufficient part performance to relieve from the statute of frauds. In precise point upon this matter is Guthrie v. Anderson, 47 Kan. 383, 28 Pac. 164. The statute of Kansas, in which state the case arose, is identical with our own. The necessity of the signature of the party to be charged was pointed out, together with the inapplicability of the decisions of states such as New York and Wisconsin, whose laws differ from our own. It was shown that the statute is satisfied, and the nonsigning defendant is held, where the contract has been executed upon the part of the vendor, or lessor, by the giving of a deed or lease which has been accepted by the vendee or lessee. Worrall v. Munn, 5 N. Y. 229, 55 Am. Dec. 330; Wilkinson v. Scott, 17 Mass. 249; Wood on Frauds, §§ 222, 223. In such a case the contract has been wholly executed by the one party, and the acceptance of the deed or lease is consistently held to be a sufficient part performance to charge the other party. So, also, in case of executory contracts, where the nonsigning vendee enters into possession, or exercises dominion in other ways over the land, it is held that this amounts to such a part performance as will bind the nonsigning vendee. But where the act of the vendee is no more than the payment of a small amount of the purchase price, and the acceptance of a receipt for that amount, leaving all of the rest of the contract executory, both upon his part and upon the part of the vendor, no case has been pointed out which holds such acts to amount to a part performance which will bind the vendee. "His refusal to complete the contract after paying part of the purchase money is no fraud upon the seller but his loss." Fry, Spec. Perf. § 567. It is held, therefore, that in this case there was no such part performance as the law contemplates.

The questions here presented arose properly, and were properly decided upon demurrer. "Whenever it appears upon the face of the declaration, bill, or complaint, that the agreement sued upon is within the statute of frauds, and fails to comply with the requirements thereof, the appropriate mode of taking advantage of the defect is by demurrer." 9 Ency. of Pl. & Pr. p. 704, and cases.

For the foregoing reasons, the judgment appealed from is affirmed.

We concur: MELVIN, J.; LORIGAN, J

(156 Cal. 335)

In re McPHEE'S ESTATE.

Appeal of CORRIGAN. (S. F. 5,000.)

(Supreme Court of California. Sept. 24, 1909.)

1. Executors and Administrators (§ 507*)—Settlement of Accounts—Trial—Findings.

Findings of fact and conclusions of law are not required in a contested proceeding for the settlement of an administrator's account.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2183; Dec. Dig. § 507.*]

2. Master and Servant (§ 26*)—Executors and Administrators (§ 109*)—Accounts—Charges—Liability.

Where servants were employed to cut trees and make them into railroad ties at a specified sum per tie, without contracting for any specified number of ties, and without giving them any interest in the timber, the employment was terminable at any time, and under Civ. Code, § 1996, it was terminated at the death of the employer, and charges for money paid by the administrator of the employer for work done on the contract after the death of the employer were properly disallowed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 26; Dec. Dig. § 26;* Executors and Administrators, Cent. Dig. § 438; Dec. Dig. § 109.*]

3. Executors and Administrators (§ 132*)—Accounts—Charges—Liability.

Where a contract for the construction of a road across an owner's land was substantially completed at the time of the owner's death, subsequent work done on the road for another purpose was without authority, and charges for money paid by the administrator for such work were properly disallowed.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 437; Dec. Dig. § 132.*]

4. Executors and Administrators (§ 104*)—Funds—Compound Interest—Liability.

An administrator may be charged with compound interest on money of the estate converted to his own use.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 425; Dec. Dig. § 104.*]

5. Executors and Administrators (§ 104*)—Accounting—Interest—Liability.

An administrator delaying without excuse for many years the settlement of the estate, and converting money of the estate to his own use, is properly charged with compound interest after the expiration of one year from his appointment, and is also liable for simple interest during the first year for the use of the money of the estate, though the widow's consent to his use authorized him to use it.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 425, 426; Dec. Dig. § 104.*]

6. Appeal and Error (§§ 515, 757*)—Record on Appeal—Statutes.

The record on appeal prepared under Code Civ. Proc. §§ 953a–953c, as added by St. 1907, p. 750, c. 408, providing a new alternative method for preparing records on appeal, should contain as a part of the transcript papers and records offered in evidence, and the briefs or a supplement appended thereto should contain such portions of the record as the parties desire to call to the attention of the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2322–2325; Dec. Dig. §§ 515, 757.*]

Department 1. Appeal from Superior Court, Mendocino County; Emmet Seawell, Judge.

In the matter of the estate of George S McPhee. From an order settling the account of J. S. Corrigan as administrator, he appeals. Affirmed.

See, also, 154 Cal. 385, 97 Pac. 878, 101 Pac. 530.

Myrick & Deering and Weldon & Held (James W. Scott, of counsel), for appellant. Chas. E. Wilson and John W. Preston, for respondent.

SHAW, J. This is an appeal from an order settling the final account of the appellant J. S. Corrigan as administrator of the estate of George S. McPhee, deceased.

Alta McPhee, daughter and heir of the deceased, filed written objections to the account. Thereupon the court made an order referring the account and the objections to C. M. Mannon, as referee, directing him to examine and state the account, to try the issues raised by the objections and make findings thereon, and to report the same, together with the testimony taken by him. Pursuant to this order, the referee, after hearing the evidence, reported the same, with his statement of the account and his findings upon the issues, to the court. The statement and findings, with certain exceptions not necessary to note, were approved and adopted by the court as its findings, and thereupon the order appealed from was made.

The appellant at considerable length urges the point that the findings of the referee and his conclusions of law were not separately stated. We think the point is without merit. The objections are separated into paragraphs, each stating the objection to a single point or feature of the account. The report of the referee is also divided into paragraphs, each of which refers to a specified paragraph of the written objections and states the finding with respect thereto, with his recommendation concerning it. The recommendation is in each case a conclusion of law, and it is distinctly stated and sufficiently separated from the statement of the fact to be clearly intelligible. Furthermore, it has been repeatedly decided that findings of fact and conclusions of law are not required in a proceeding for the settlement of an administrator's account. Estate of Levinson, 108 Cal. 455, 41 Pac. 483, 42 Pac. 479; Estate of Adams, 131 Cal. 415, 63 Pac. 838; Rochat v. Gee, 137 Cal. 501, 70 Pac. 478; Miller v. Lux, 100 Cal. 613, 35 Pac. 345, 639. And it is not made to appear that either in the court below or in the presentation of his appeal the appellant has been in the least prejudiced by the manner of stating the findings and conclusions of law.

McPhee died on April 21, 1899. Corrigan was appointed administrator of his estate on June 9, 1899. He took charge of the estate and had the appraisement made on July 1, 1899. McPhee owed debts amounting to about $3,000 and left an estate worth from $25,000 to $30,000, of which over $17,000 was personal property, readily convertible into money. The real estate consisted chiefly of a large body of timber land. At the time of his death he was carrying on a country store at Westport, and had a large number of men engaged in cutting timber on his land and making it into railroad ties at a fixed price per tie. One Shelton was also then engaged in making a road for McPhee upon said lands to afford access to the ties. The agreement was that he was to receive $1.50 for each rod of road constructed. The goods in the store were appraised at $4,013. There were 24,500 ties on hand, some in the woods and some at Westport, all of which were appraised at $3,762.74. The store was in charge of T. H. Smith. After McPhee's death, Smith kept the store open, apparently without directions from any one, until Corrigan was appointed. Upon Corrigan's appointment he continued the sale of goods at the store as usual, under Corrigan's direction, until October 19, 1899, selling goods during that period to the amount of over $1,000, and buying new goods to the amount of $333.23. It seems that Smith, with Corrigan's consent, also had the men continue cutting timber and making ties upon McPhee's land, and had Shelton continue the construction of the road for a short time. The men thus engaged bought goods at the store and the wages due from their work were settled by a credit upon the accounts for the goods sold to them in the same manner as was the custom before McPhee's death. On October 19th the goods remaining in the store were sold by Corrigan at private sale to Smith and one Bates for $3,111, which was $133.80 below the appraisement. Of this price $1,431 was paid in cash and the balance, $1,680, was settled by a release from Smith of a claim for that sum made by him against the estate of McPhee. This claim had not been, and never was, presented and allowed as the law required. As a part of this contract of sale, it appears that Smith and Bates were to cut timber upon the McPhee lands, and make the same into ties. In pursuance of this arrangement, they made ties to the number of 7,555. These ties were mingled with those appraised as belonging to the estate, and others bought by Corrigan from third persons, and were shipped to San Francisco and sold by Corrigan at private sale. All this was done without any order or authority from the court. No order to sell the personal property was ever made, and none of the sales made were ever reported to or confirmed by the court.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The above transactions occurred in the years 1899 and 1900. No account was filed by the administrator until September 24, 1906, at which time the account now under revision was filed in response to a citation issued at the instance of the heir, Alta McPhee. It purports to show the foregoing transactions as having been done on behalf of the estate and as a part of the administration thereof. The items of receipts and expenses in carrying out the making and sale of the ties and in the conduct of the store are set forth in the account without regard to the inventory or appraisement. All of the items, however, are not given. The wages of the men who were making the ties were settled by the store accounts and in many instances only the balances for or against the administrator are given. These accounts with the men were inextricably confused, and neither the administrator nor Smith, who managed the affairs, were able to make a clear explanation thereof. The account is not accompanied by any report or explanation of the transactions to which the items relate.

The referee found that the unauthorized attempt of the administrator to carry on the business at the store and the making of ties out of the timber belonging to the estate entailed a loss to the estate. He accordingly rejected all the items on both sides of the account relating to the making of these ties and the sale thereof and the business thus carried on, including the sale of the ties appraised as well as those subsequently made and purchased. It was impossible from the account or from the evidence to distinguish the sales of ties belonging to the estate at the death of the deceased from the sales of those made or purchased after his death. The administrator was charged with the stock of merchandise and ties on hand at the time of the appraisement at the appraised value. The referee also found that the administrator had appropriated all the money of the estate received by him, in excess of the debts and expenses, to his own use, and on this account charged him legal interest thereon, with annual rests.

The appellant claims that the men engaged in making the ties and road were working upon contracts for an agreed number of ties, and, as to the road, upon a contract to build a road of a specified length, that these contracts were uncompleted at McPhee's death, that the men had the right to complete the work contracted for and to hold the estate for the contract price, and that for this reason the charges for money paid for work done on these alleged contracts after McPhee's death should have been allowed. There was no satisfactory evidence that the contracts were of this character. The proof was that the men making the ties were to fell the trees and make them into ties at 9 and 10 cents per tie according to size. There is no evidence that any specific number of ties had been contracted for. The employment was therefore terminable at any time. The employés had no interest in the timber and the employment was ended by the death of McPhee. Civ. Code, § 1996. A few trees had been felled before McPhee's death which were not made into ties at that time, but these were all worked up by the men before the administrator took charge, and the ties thus made, only 500 in all, constituted a part of the 24,500 ties which on July 1, 1899, were appraised as a part of the property of the estate. There is no evidence to show how much was due the men for the work done after McPhee's death upon these trees. The total amount could not have exceeded $50. There is no controversy over this trifle, and it appears probable from the evidence that it was paid by credits upon the sales of goods at the store made to the men before the administrator was appointed. These sales amounted to $144.65. The contract for the road was for a stated price per rod. There is no evidence that it was in writing nor of its terms. It was a road made into the timber lands, to be used in getting out the ties. There is no evidence that any specific length was contracted for, nor that its construction was continued for any definite distance or time after McPhee's death. It appears to have been substantially completed at that time so far as was necessary to get out the ties then made. The subsequent work thereon, if any, was apparently done to get at the ties made afterwards and without authority. The evidence on this entire subject is extremely vague and unsatisfactory, and it would not justify us in disturbing the decision of the referee.

The action of the referee in charging compound interest upon the money of the estate converted by the administrator to his own use was proper under the evidence, and the law as declared in the decisions of this court. Estate of Stott, 52 Cal. 406; Estate of Clark, 53 Cal. 359; Estate of Clary, 112 Cal. 293-295, 44 Pac. 569; Gassell v. Gassell, 147 Cal. 513, 82 Pac. 42. There are many other cases to the same effect.

The widow of the deceased survived him about eight months. There was evidence that in her lifetime, after McPhee's death, she told the administrator to use the money of the estate in his own business. This necessarily was before the time for the settlement of the estate had arrived. The referee did not charge interest until after the expiration of one year from the time of the qualification of the administrator. At that time, in the condition in which the estate was left, it should have been ready for final settlement. Even if we suppose that her consent would have authorized him to use the money, it would not have excused him from paying simple interest during the first year of the administration. As the settlement of the estate was delayed by him, without cause or excuse, for many years after her death, a charge of compound interest against him upon the money thus used was right and just. The evidence was sufficient to raise the inference that the money of the estate in his hands at the end of the first year was at that time or before all converted by him to his own use, and that the other moneys of the estate were converted as soon as received. He testified in a somewhat vague way that he frequently had on hand, or could have obtained on demand, as much as $1,000 or $1,500. It does not appear, however, that this was money of the estate, or that it had been kept separate from his own funds, or that it was not money he kept on hand for use in his own business. Under these circumstances the charge of compound interest on all the moneys of the estate in his hands was justifiable.

We have considered and discussed all the points made by the appellant in support of his appeal. The appeal was taken and the record prepared in pursuance of the provisions of the act of 1907 providing a new and alternative method for the preparation of records to be used on appeal. Code Civ. Proc. §§ 953a, 953b, 953c, as added by St. 1907, p. 750. c. 408. The record presented upon this appeal is deficient in many particulars. The papers, records, and files of the estate were offered in evidence, including the inventory and appraisement. A number of books kept by McPhee during his lifetime and by Smith as agent after his death were offered in evidence. None of these is produced as a part of the transcript. If the administrator made any report accompanying his final account, it is not given. We have presumed that the matters which would have been disclosed by these omitted portions of the evidence would not affect the soundness of the decision of the referee, and, as we have affirmed that decision, it is not necessary to go further than this. We wish, however, to call the attention of the appellant to the point that, if upon our consideration of the evidence before us we had been of the opinion that the referee and the court below was in error, it is not improbable that we would have been compelled to affirm the order because of these omissions of evidence from the record. This much we think it proper to say because of the fact that the new method of preparing records on appeal is to some extent untried and many questions concerning it and the proper method of dealing with records when so presented remain uncertain. We have also been at the pains of reading the typewritten transcript filed with the clerk in pursuance of the method authorized by the statute referred to. That statute provides that upon such appeals "the parties must, however, print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court." Code Civ. Proc. § 953c. If the court had paid no attention to any parts of the record except such portions as the appellant printed in his brief in the present case, it would have been unable to comprehend any of the points in the case, and the order appealed from must of necessity have been affirmed upon the ground that no error had been shown.

The order is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

(156 Cal. 343)

FLEET et al. v. TICHENOR. (L. A. 2,080.)

(Supreme Court of California. Sept. 29, 1909.)

1. LIBEL AND SLANDER (§ 100*)—PLEADING—PROOF OF ACTS CHARGED.

In slander actions, the substance of the precise words alleged or so many of the words as charge the particular act alleged must be proved, and it is not enough to prove other words which would give an impression similar to that of the words alleged, or justify an inference of a charge of the particular act or offense.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 263; Dec. Dig. § 100.*]

2. LIBEL AND SLANDER (§ 100*)—PLEADING—VARIANCE.

The complaint in slander alleged that defendant told another that plaintiff entered her house and stole some jewelry, and that in using such words defendant meant to charge plaintiff with committing a felony, to wit, burglary, which those who heard her understood. The person to whom the alleged statement was made testified that defendant asked him to discover whether plaintiff had some of defendant's jewels about her; that defendant told witness where she left the key to her house, and that the key was removed, the door unlocked, and the jewels taken; and that plaintiff alone knew where the key was, and took the jewels. *Held* that, as the evidence did not show that defendant charged that plaintiff "entered" or was in her house at all, it did not sustain the allegation as to the charge of burglary, nor did it sustain a charge of "stealing" the jewelry; both the charges of burglary and theft only being shown by inference which was insufficient.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 263, 268; Dec. Dig. § 100.*]

3. LIBEL AND SLANDER (§ 107*)—ADMISSIBILITY OF EVIDENCE—WANT OF MALICE.

In slander for charging that plaintiff entered defendant's house and stole jewelry, a question whether defendant was moved in anything she said about plaintiff by a desire or purpose to injure plaintiff was admissible to show absence of actual malice so as to avoid punitive damages.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 305; Dec. Dig. § 107.*]

4. LIBEL AND SLANDER (§ 109*)—EVIDENCE—PRIVILEGED COMMUNICATION.

In slander for charging that plaintiff entered defendant's house and stole jewelry, a question whether she was moved in anything she said of plaintiff by a desire to injure her was admissible under the defense of privileged communication.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 306; Dec. Dig. § 109.*]

5. EVIDENCE (§ 151*)—ADMISSIBILITY—INTENT.

As a rule a witness may be examined as to his intent in doing an act where the intent is a material element in the action, though the jury need not accept as true his statement as to his intent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 440; Dec. Dig. § 151.*]

6. APPEAL AND ERROR (§ 1057*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE—FACTS OTHERWISE SHOWN.

In slander for charging that plaintiff entered defendant's house and stole jewelry, error in excluding a question whether defendant was moved in anything she said of plaintiff by a desire or purpose to injure her, admissible to show want of malice, and under the defense of privileged communication, did not prejudice defendant where she testified fully as to her reasons for making the statement, and her testimony wholly negatived any ill will toward plaintiff, and her whole testimony showed that the excluded evidence could not have affected the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194-4199; Dec. Dig. § 1057.*]

In Bank. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Slander by Bessey Fleet and another against Adelaide Tichenor. From a judgment for plaintiffs, and from an order denying a motion for new trial, defendant appeals. Reversed.

Byron Waters and E. C. Denio, for appellant. Thomas Fitch and William A. Alderson, for respondents.

ANGELLOTTI, J. This is an action for damages for slander. The jury rendered a verdict in favor of plaintiffs for $1,000, and judgment was entered accordingly. Defendant appeals from the judgment and from an order denying her motion for a new trial.

Two points are made for reversal.

1. The complaint alleged the making of certain charges by defendant against plaintiff Bessey Fleet to different persons at different times. The trial court held the evidence insufficient to make a case for the jury except as to one of the charges, and the specific charge upon which the verdict and judgment must rest is stated in the complaint as follows, viz.: "That on an occasion in the month of June, 1905, at said city of Long Beach, in the hearing of Dr. J. M. Holden, a physician residing in said city, defendant spoke of and concerning plaintiff, Bessey Fleet, the false, malicious, and scandalous words following, to wit: 'Mrs. Fleet entered my house and stole some of my jewelry, and still has it'"; and, also, "that in using the words alleged * * * defendant meant and intended to charge said plaintiff with the commission of a felony, to wit, burglary, and defendant was so understood by those in whose hearing she so spoke as above alleged."

The only evidence given on the trial to substantiate the allegation as to the making of this statement is that of Dr. J. M. Holden. So far as material to the question presented, he testified that Mrs. Tichenor came to his office, knowing that he was Mrs. Fleet's physician, and suggested that she thought he might be able to ascertain, when treating Mrs. Fleet, whether she had any of her jewels secreted about her person. On that occasion she told him what jewelry had been stolen from her house. He further testified: "Well, she told me where she left the key, in a clothes bag or clothes basket, something like that, where her soiled linen was kept. The key was kept in the bottom of that receptacle, and the key had been removed from this, and the door opened, the jewelry taken, and the door locked again, and the key put back in such a manner that she herself did not notice that it had been disturbed until a day or two afterwards. She asked if I had noticed anything when treating Mrs. Fleet, or if I could not make arrangements to make examination or to find out about her person, if I could find any of the jewels secreted about her. Mrs. Tichenor told me that the property consisted of jewelry. * * * Q. * * * What did she say as to Mrs. Fleet in connection with the burglary? * * * A. Mrs. Tichenor made the out and out statement it was Mrs. Fleet that had taken the jewels. I remember asking her if she really thought so, or believed so, and she said she knew it. * * * I think she made the remark that Mrs. Fleet was the only one that knew where she kept the key." Learned counsel for defendant claims that the evidence of Dr. Holden does not constitute evidence of the slander charged, in that it does not show the speaking of words either literally or substantially the same as the words charged in the complaint to have been spoken by defendant, and that, therefore, there was a complete failure of proof. This point was made on the trial by motion to strike out the evidence of Dr. Holden, and also on motion for nonsuit.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

We are satisfied that this contention must be sustained, if we are to follow the rule laid down by text-writers and decisions generally. The ancient rule that in actions of this character all the precise words alleged must be proved has been somewhat relaxed, it is true, but not to an extent sufficient to sustain the judgment in this case. It is now, and long has been, the generally accepted rule that, where the defendant is charged with the speaking of certain specified slanderous words, it is sufficient to prove the substance of the precise words alleged, but by this is meant, according to the overwhelming weight of authority, not that it is sufficient to show the speaking of other words which would produce an impression similar to that which the words alleged would produce, but, as was said by Justice Taggart in the opinion rendered by the district court of appeal in this case: "Substantial proof of the words only is required as distinguished from a literal proof of the words alleged in the complaint, as was the original rule. The rule is not that the substance of the words alleged must be proved, but that the words alleged in the declaration, or enough of them to amount to a charge of the particular offense alleged to have been imputed, must be substantially proved." In other words, so many of the words alleged in the declaration "as constitute the sting of the charge" (Smith v. Hollister, 32 Vt. 708), or so many of such words alleged as contain "the poison to the character and constitute the precise charge of slander averred" (Lewis v. McDaniel, 82 Mo. 577), must be substantially proved. It is almost universally declared that it is not sufficient to prove equivalent words, but the rule has been held in a few exceptional cases to be complied with where the proof shows words synonymous with and carrying the same specific idea as those alleged, as for instance where the words "set fire to" were alleged the proof showed the word "burnt," and it was held sufficient. See Merrill v. Peaslee, 17 N. H. 540. See, also, Zimmerman v. McMakin, 22 S. C. 372, 53 Am. Rep. 720. Here the specific words alleged were: "Mrs. Fleet entered my house and stole some of my jewelry, and still has it." So far as the intimation of a burglarious entry is concerned, nowhere in the evidence of Dr. Holden does it appear that defendant told him that Mrs. Fleet "entered" or "went into" or "was in" her house at all, and the utmost that his testimony shows in this regard is that in a conversation with him she made certain other statements from which, if believed, the inference must be drawn that Mrs. Fleet had been in the house. Nor does it appear anywhere in his evidence that defendant told him that Mrs. Fleet "stole" any of her jewelry, or that she used any word or words in that connection synonymous with "stole," and that her alleged taking of the jewelry was a stealing thereof is only an inference to be drawn from the statement in the course of the conversation of various other specific facts. This is not substantially proving the specific words alleged to have been spoken and for the speaking of which plaintiff claims damages. No case cited and none we have been able to find goes to the extent of holding that, where a recovery is sought for the speaking of certain specified slanderous words, the allegations of the complaint are sustained by proof of different words which do no more than establish a basis for an inference that the defendant intended to make against the plaintiff a charge similar to that embodied in the words alleged. As stated in Haub v. Friermuth, 1 Cal. App. 556, 82 Pac. 571: "Neither is he required to prove all of the words set forth in the complaint unless all are essential for establishing the slanderous charge, but he must prove enough of them to sustain his cause of action. In actions for slander the rule that the probata must correspond with the allegata is eminently applicable. The plaintiff is not entitled to a recovery upon proof of words not set forth in his complaint, or upon a failure to prove the slanderous words which he has alleged. It is unavailing that the evidence is such as will authorize a jury to find that defendant intended to charge the plaintiff with the crime. Their function is to determine whether he spoke the words alleged in the complaint." This rule is sustained by practically all the authorities, and the few that we cite are only examples of the general course of decision. Roberts v. Lamb, 93 Tenn. 343, 27 S. W. 668; Gray v. Elzroth, 10 Ind. App. 587, 37 N. E. 551, 53 Am. St. Rep. 400; Estes v. Estes, 75 Me. 478; Comerford v. West End Co., 164 Mass. 13, 41 N. E. 59; Kimball v. Page, 96 Me. 487, 52 Atl. 1010; Schmisseur v. Kreilich, 92 Ill. 347; Smith v. Hollister, 32 Vt. 695; Linville v. Earlywine, 4 Blackf. (Ind.) 469; Newell on Slander & Libel, p. 804; 13 Ency. of Pl. & Pr. 63; 25 Cyc. 485.

We cannot see that it avails plaintiff in this connection that she further alleged "that in using the words alleged * * * defendant meant and intended to charge said plaintiff with the commission of a felony, to wit, burglary, and defendant was so understood by those in whose hearing she so spoke as above alleged." Without proof that she spoke the words alleged, this allegation has no application. As was said by the district court of appeal in this case: "Under the liberal rule relative to the allowance of amendments to pleadings in most jurisdictions a variance may easily be corrected, if the evidence is objected to upon its introduction, and thus the apparent hardship of the rule may be relieved from in all cases where a probable cause of action exists. Ranson v. McCurley, 140 Ill. 626, 31 N. E. 121. There need not be a failure of justice even though the discovery of the variance is not made until the reversal of the judgment, if the case be otherwise a proper one. Kenney v. Parks, 137 Cal. 527, 70 Pac. 556; Code Civ. Proc. § 355. And thus injustice need be done to no one having a cause of action by maintaining in its integrity the rule that the defendant shall be answerable only for the words spoken by him and that the jury may find a verdict for damages only upon the slanderous words spoken."

2. The trial court sustained objection to two questions asked the defendant as to whether or not she was actuated in anything she had said or done by any wish or desire or any design or purpose to injure plaintiff. The questions were proper, both to show absence of actual malice for the purpose of avoiding exemplary damages and under the defense of privileged communication; and the court erred in overruling them. The general rule is well settled that under our system a witness may be examined as to the intent with which he did a certain act, where that intent is a material thing in the action. A jury or trial judge is not bound, of course, to believe the witness when he says he did not have a certain intent, but may find in the circumstances, actions and language an entirely different intent, but the testimony of the witness "is competent and relevant, and not immaterial." See Walker v. Chanslor, 153 Cal. 118, 125, 94 Pac. 606, 17 L. R. A. (N. S.) 455, 126 Am. St. Rep. 61, and cases cited. But we are satisfied that these errors were not prejudicial to defendant's case. She testified very fully as to her reasons for going to Dr. Holden and various other parties, and her testimony was utterly irreconcilable with the theory of the presence of any feeling of ill will towards plaintiff or any desire on her part to injure her in the slightest degree. It is manifest upon a review of the evidence actually given by the defendant that the further express statement by her to the effect that she had no desire or intent to injure plaintiff could not have changed the views of the jury or affected the result. See Spinks v. Clark, 147 Cal. 439, 451, 82 Pac. 45.

The judgment and order denying a new trial are reversed.

We concur: SHAW, J.; SLOSS, J.; HENSHAW, J.

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11 Cal. App. 179

ATLANTIC, GULF & PACIFIC CO. v. WRIGHT et al. (Civ. 600.)

(Court of Appeal, Third District, California. Aug. 21, 1909.)

1. Judgment (§ 129*)—Default Judgment.

Where the memorandum of default attached to a complaint in an action against two defendants recited that, "defendants [naming them] having demurred, etc., and said defendant having failed to answer, etc., the default of said defendant is hereby entered," but the judgment on demurrer recited that "defendants [naming them] having demurred, etc., and said defendants having failed to answer," etc., it sufficiently appeared that the word "defendant" was intended to include both defendants.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 240; Dec. Dig. § 129.*]

2. Judgment (§ 530*)—Construction—Parties.

In case of doubt regarding the signification of a judgment or any part thereof, the whole record may be examined, and though the word "defendant" is written in the body of the judgment, it will be construed as referring to and including all of the defendants named in the caption.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 974; Dec. Dig. § 530.*]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by the Atlantic, Gulf & Pacific Company against Susie D. Wright and another. From a default judgment in favor of plaintiff, defendants appeal. Affirmed.

Jellett & Meyerstein and Maxwell McNutt, for appellants. Corbet & Selby, for respondent.

BURNETT, J. The appeal is from a default judgment entered by the clerk of the superior court in an action upon a promissory note.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The whole contention of appellants is based upon an obvious clerical misprision in the memorandum of default attached to the complaint, and is supported by an argument more ingenius than persuasive. This memorandum recited that: "In this action the defendants, Susie D. Wright and Frank V. Wright, having demurred to plaintiff's complaint on file herein, and said demurrer having been overruled by order of court, with leave to defendant to answer, and said defendant having failed to answer within the time allowed, after due notice of overruling said demurrer had been given, the default of said defendant in the premises is hereby duly entered herein." The "judgment on demurrer" contains these recitals: "In this action the defendants, Susie D. Wright and Frank V. Wright, having demurred to plaintiff's complaint on file herein, and said demurrer having been overruled by order of court, with leave to defendant to answer within 10 days, and said defendants having failed to answer within the time allowed, after due notice of overruling said demurrer had been given, and the default of said defendants in the premises having been duly entered according to law," etc. If there is any uncertainty in the memorandum as to whether the default of one or both of the defendants was entered it is entirely removed by the language of the judgment. By any fair and reasonable construction of these two instruments the conclusion is reached that when the word "defendant" appears it was intended to include both defendants. But it is proper also to consider the entire judgment roll including the complaint and the demurrer, and thereby the matter is settled beyond peradventure. The rule is undoubtedly as stated in section 45 of Freeman on Judgments, as follows: "In case of doubt regarding the signification of a judgment or of any part thereof the whole record may be examined for the purpose of removing the doubt. * * * On the other hand, though the word "defendant" is written in the body of the judgment, it will be construed as referring to and including all the defendants named in the caption." See, also, 25 Am. & Eng. Ency. of Law, 1070, and cases cited. Regarding, then, for the purpose of the decision the memorandum of default as a part of the judgment roll, no irregularity appears of sufficient gravity to justify a reversal of the judgment.

We deem it unnecessary to consider the contentions of respondent that this memorandum is not properly a part of the judgment roll; that there is an "amended default," unobjectionable in form, attached to the complaint, apparently as of the same date as the memorandum of which complaint is made, that no evidence appearing to the contrary, the presumption is that the default as actually entered was correct, and, furthermore, that there is an order and finding of the court to the effect that there was a clerical misprision on the part of the clerk, and directing that the record be corrected so as to speak the truth, as we view the position of appellants as entirely without merit and involving at most a mere irregularity which could not possibly have prejudiced their substantial rights.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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11 Cal. App. 188

PEOPLE v. CUSICK. (Cr. 93.)

(Court of Appeal, Third District, California. Aug. 23, 1909.)

CRIMINAL LAW (§ 1116*)—APPEAL—BILL OF EXCEPTIONS—MATTERS TO BE INCLUDED.

The sustaining of a demurrer to an information cannot be reviewed, where the information and the grounds of demurrer are not contained in the bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2924; Dec. Dig. § 1116.*]

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

J. J. Cusick was informed against for criminal libel. From a judgment sustaining a demurrer to the information, the People appeal. Affirmed.

U. S. Webb, Atty. Gen., and F. H. Greeley, for the People. W. H. Carlin and Waldo S. Johnson, for respondent.

HART, J. The defendant was informed against by the district attorney of Yuba county for the crime of criminal libel alleged to have been committed upon one W. C. Wilkins. A demurrer upon the ground that the facts stated in the information do not constitute a public offense, and that said information "does not substantially or at all conform to the requirements of sections 950, 951, and 952 of the Penal Code," was sustained by the trial court, and the defendant ordered discharged, and his bondsmen released. It is from the judgment upon the demurrer that this appeal is taken by the people.

Upon the oral argument of the cause before this court, the point was made for the first time that, as the bill of exceptions does not contain the information and the grounds of the demurrer, the ruling of the court below cannot be reviewed. The transcript contains the information, the demurrer, minutes of the arraignment, and a purported bill of exceptions, which, as respondent declares, does not embrace either the information or the demurrer or the grounds thereof. We are, therefore, without any properly authenticated record from which we can determine whether the court erred in its ruling on the demurrer. This case is substantially similar

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in all respects to the cases of People v. Long, 121 Cal. 494, 53 Pac. 1097, and People v. Druffel, 3 Cal. App. 731, 86 Pac. 907. In the former case the Supreme Court says: "Sections 1172 and 1174 of the Penal Code provide for exceptions and for a bill of exceptions to this very ruling. It may well be held that these provisions are exclusive of any other mode of obtaining a review, even when there is a judgment roll. But, however that may be, there can be no possible doubt about it in a case like this, where there is no other mode provided for a record upon appeal."

The Attorney General undertakes to differentiate the present case from those we have cited; but we fail to perceive any ground for any distinction between them. In both this case and the cases referred to the appeals are by the people from the order or judgment sustaining the demurrers. The only distinction between the cases, which is no distinction at all so far as the question here is concerned, is that in the cases cited the accusatory pleadings were indictments and the trial courts, in each case, upon sustaining the demurrer, ordered a resubmission of the case to another grand jury, while here the pleading is an information, and the defendant was ordered discharged upon the allowance of the demurrer.

There being no legal record before us from which it can be ascertained whether the order or judgment sustaining the demurrer was erroneous, the judgment appealed from must be affirmed; and it is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

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11 Cal. App. 190

PRESTON v. CENTRAL CALIFORNIA WATER & IRRIGATION CO. (Civ. 606.)

(Court of Appeal, Third District, California. Aug. 23, 1909.)

1. Sales (§ 353*)—Action for Price—Complaint.

A complaint alleging "that between the 1st day of January, 1907, and September 1st following, a lumber company sold and delivered to defendant lumber, materials, and merchandise, on which there became due to the lumber company a balance of $5,475.57," and that the claim had been duly assigned to plaintiff for a valuable consideration and was unpaid, was good as stating a cause of action in indebitatus assumpsit.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 353.*]

2. Contracts (§ 337*) — Breach — Nonpayment—Pleading.

A complaint alleging that the sum claimed or a part thereof had not been paid sufficiently alleged a breach of the contract declared on.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1682-1690; Dec. Dig. § 337.*]

3. Pleading (§ 126*) — Answer — Denial — Negative Pregnant.

A denial that defendant became justly or otherwise indebted to H. for a balance on account for labor and services rendered defendant by H. between March 1, 1907, and September 1, 1907, or at any other time, for the sum of $413.56, involved a negative pregnant, and was fatally defective.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 261-263; Dec. Dig. § 126.*]

4. Appeal and Error (§ 1040*)—Review—Harmless Error—Ruling on Demurrer.

In an action for the price of goods sold, it was harmless error to overrule a special demurrer to the complaint that it was uncertain whether the action was brought on an express or implied contract, where defendant not only answered by a mere negative pregnant as to the indebtedness, but also at the trial, made no attempt to disprove the claims sued on, nor is it an objection to this holding that the trial court would probably have rejected any evidence to disprove such claims under the answer.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1040.*]

5. Judgment (§ 256*)—Support in Findings —Pleadings.

A complaint containing several counts in assumpsit averred that plaintiff "claims interest" on the amounts alleged to be due. A special demurrer was filed, but not to such allegation, nor did the answer deny that plaintiff was entitled to interest on the claims. The court found generally that all the allegations of the complaint were true, and that all the allegations and denials of the answer were untrue. *Held*, that a judgment allowing interest was amply sustained by the findings, though the allegation in the complaint as to interest was not in the form of an allegation of fact.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 256.*]

6. Trial (§ 53*)—Scope of Evidence—Effect of Admission—Assignments.

Where, in an action on several assigned claims, each of the assignments contained an itemized account of the indebtedness, and the assignments, when introduced in evidence, were not specifically limited to the purpose of proving the assignments of the claims to plaintiff, the court was properly authorized to consider them as evidence of the indebtedness.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 53.*]

7. Corporations (§ 432*)—Claims—Assignments—Authority of Manager—Evidence.

Since the manager of a corporation ordinarily controls its administrative affairs to the extent of performing acts within the ordinary scope of its business without express or direct authority from the board of directors, assignments of claims for freight by a railroad corporation, and for merchandise by a mercantile corporation by the managers thereof, constituted prima facie proof of authority in such managers to execute the assignments on behalf of the corporations.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 432.*]

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by C. W. Preston against the Central California Water & Irrigation Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Jellett & Meyerstein and H. J. Miller, for appellant. W. O. Bradley and E. C. Farnsworth, for respondent.

HART, J. The plaintiff inaugurated this action to recover the sum of $8,445.43, and interest, alleged to be due for goods sold and services rendered by the assignors of plaintiff. The plaintiff secured judgment for the sum sued for, together with interest, and the defendant prosecutes this appeal from said judgment and from the order denying it a new trial. A general and special demurrer to the complaint was interposed by the defendant and overruled by the court.

The special demurrer assails the complaint on the ground of uncertainty, charging that from its averments it cannot be ascertained whether the "lumber, materials, and merchandise," etc., mentioned in the complaint, were sold at agreed prices or the amounts alleged as being due therefor were the reasonable value thereof. Similar criticism is directed against those counts of the complaint alleging the performance of certain services for which recovery is sought. In other words, it is insisted that the averments of the complaint are uncertain, in that it cannot be determined therefrom whether the action is for recovery upon express contracts by which the prices to be paid for the goods sold and the services performed were fixed and agreed upon or upon implied contracts for the reasonable value of the goods and services.

The claim is also made that the complaint is obnoxious to the objection that its averments throughout involve mere conclusions of law. The complaint sets out in as many distinct counts a number of different and distinct claims in various amounts, and alleges the assignments thereof to the plaintiff by the original owners of said claims. The first count of the complaint alleges, after declaring the defendant to be a corporation, "that between the 1st day of January, 1907, and the 1st day of September, 1907, the Exeter Lumber Company sold and delivered to said defendant lumber, materials, and merchandise upon which there became due to said Exeter Lumber Company a balance of five thousand four hundred and seventy-five and $^{57}/_{100}$ dollars." Assignment of said claim to the plaintiff for a valuable consideration and its nonpayment are alleged. The averments of the other counts are, mutatis mutandis, in identical language with that of the first count. As to the first and seventh counts (the latter being the claim of S. Sweet Company), the answer merely denies the assignments of the claim therein set out to the plaintiff by the original owners thereof, while, as to the other counts, the answer makes a futile attempt to tender an issue upon the question of the alleged indebtedness, and denies the assignments of the claims therein pleaded.

1. Counsel for appellant claim, among the other contentions mentioned, "that [adopting the language of their brief] while we are aware that it has been repeatedly held in this state that even under our Code a common count is not obnoxious to a general demurrer, it is apparent that the averment with reference to the Exeter Lumber Company's claim is not cast in the form of a common count." But there is in our opinion nothing in this point. It may be conceded that the complaint is not to be indorsed as an exemplar of model pleading, yet it is clear that its averments are in the form of an indebitatus assumpsit or a common count. Nor do we think that the complaint is obnoxious to the other objections pointed out by and insisted upon under the special demurrer. As we have said, the complaint is by no means a perfect pleading in an action indebitatus assumpsit in form, and, while there is no doubt that its averments could be construed as involving in a measure conclusions of law, we think they are sufficient to meet one of the essential requisites of all good pleading, to wit: That the matter pleaded must be clearly and distinctly stated, so that it may be fully understood by the adverse party, the counsel, the jury, and the judges, and especially (as regards the complaint) that the defendant may be enabled to plead the judgment, which may be rendered in the cause, in bar of any subsequent action for the same cause. Gould's Pleading, § 51, c. 3. Here the complaint states that between certain designated dates the defendant became indebted to the assignors of plaintiff in certain sums for goods and merchandise sold and delivered and for services rendered to the defendant, and that no part of such sums has ever been paid. It is difficult to conceive how the defendant or any person of ordinary intelligence could misapprehend these averments, or how a denial of them would not tender an issue of fact of which a judgment could be predicated so clear, definite, and certain as to constitute an obvious and readily perceivable bar against any subsequent action which might be instituted for the same causes.

But we are not without direct authority in California upholding a complaint in an action indebitatus assumpsit in form whose averments are identical with those contained in the complaint in the present case. In the comparatively recent case of McFarland v. Holcomb, 123 Cal. 84, 55 Pac. 761, the complaint alleged "that William A. Holcomb was at the time of his death indebted to the plaintiff in the sum of $7,500 as a balance due to plaintiff for nursing, boarding, lodging, counseling, advising, and taking care of the said William A. Holcomb almost continuously from the 29th day of November, 1870, down to the 4th day of November, 1895, in the city and county of San Francisco, state of California." To this complaint a demurrer, both general and special, was interposed, the latter for uncertainty, and the special demurrer sustained. The court, reversing the judgment entered after demurrer sustained, has this to say: "Under the system of pleading at the common law, it was requisite that the declaration in an action of assumpsit upon an executed consideration should show that the consideration for the promise by the defendant was sufficient to support his promise, and it was sufficient to aver that the consideration was executed at his request; but this averment was unnecessary when the consideration as well as the promise were implied from the nature of the transaction set forth in the declaration—as in an action for goods sold and delivered to the defendant, or for money loaned to him by the plaintiff. Fisher v. Pyne, 1 Man. & G. 265, note. Under our system of pleading, where only the facts which constitute the cause of action are to be alleged, it is not requisite to aver either the consideration or the promise, when they are implied as a legal conclusion from the facts which are alleged. While counsel and advice are frequently given without any request, and may be of no benefit to the party to whom they are given, yet a complaint which shows that the plaintiff rendered services to the defendant which were received by him in person, and were presumptively at his request, and of which he has enjoyed the benefit, states facts from which the liability of the defendant therefor is presumed, and is good as against a general demurrer. In the present case the nursing of the decedent by the plaintiff, and his acceptance from her of his board and lodging during the time specified, was a consideration sufficient to support the promise for compensation therefor which is implied in law, and to render him liable therefor."

In the case of Aydelotte v. Billing, 8 Cal. App. 673, 97 Pac. 698, the same proposition as the one here having been under review, similar objections to the complaint as those urged here were rejected upon the authority of McFarland v. Holcomb, supra. A petition for a rehearing was filed in this court in the first-mentioned case, and, in denying it, it was said through Mr. Justice Burnett, after setting out the averments of the complaint in the last-mentioned case: "It will thus be seen that the action was for services performed, that there was no allegation that they were performed at the instance or request of Holcomb, or that there was any promise to pay. The Supreme Court, however, held that the complaint stated a cause of action. If that case is not directly in point here, or if it is to be overruled, the decision to that effect must come from the Supreme Court." A petition for a rehearing in Aydelotte v. Billing was denied by the Supreme Court.

In the case at bar, as we have seen, the complaint alleges that the sums claimed or any part thereof have not been paid, and this has often been held to be a sufficient allegation of the breach of the contract declared upon. Ryan v. Holliday, 110 Cal. 335, 42 Pac. 891; Knox v. Buckman Contracting Company, 139 Cal. 598, 73 Pac. 428; Richards v. Lakeview Land Co., 115 Cal. 642, 47 Pac. 683. In the last-cited case the complaint, as here, contained several different counts. In each of the counts in said complaint, except the first, fifth, and seventh, there was an averment that the amount claimed "has not been paid, or any part thereof." In the first count the only averment as to nonpayment was that "there is now due and owing from said defendant to the said plaintiff" the amount stated in said count. The fifth and seventh counts upon the subject of nonpayment contained similar averments. These were held to be mere conclusions of law, and not an averment of fact. Each of the remaining counts, in which it was alleged that the amount claimed "has not been paid, or any part thereof," was held to be a sufficient averment of the breach of the contract, the failure to pay constituting the breach.

2. The point that the complaint is uncertain and ambiguous because it cannot be told therefrom whether the several claims therein set forth arose from an express or an implied assumpsit is, we think, without substantial merit. While it would undoubtedly be the better method of pleading a contract upon which an action is brought to clearly state the nature of the same—that is, whether the action is on an express contract or upon a quantum valbat or quantum meruit—we are unable to perceive upon what principle of logic the strict observance of that rule should be held to be indispensably necessary in such an action to the statement of a cause of action impregnable against the objection of a special demurrer. The mere denial that the defendant is indebted to the plaintiff in the sum alleged to be due would certainly raise the only important issue in the case, to wit, whether the defendant was or was not so indebted, and such issue would necessarily be thus tendered whether the alleged indebtedness was the result of an express or an implied contract. As was said in the case of Manning v. Dallas, 73 Cal. 420, 15 Pac. 34, where a complaint similar to the one here was considered, though not on demurrer: "Under the complaint the plaintiff was entitled to recover, if he had performed services for the defendant, such sum as defendant had agreed to pay him for his services, or, if no price was fixed, then such sum as his services were reasonably worth." But, while, as we have intimated, the special demurrer should perhaps have been sustained, if for no other reason than to compel pleaders to adhere to the very first rules of good pleading, we think the error of the court in overruling it could not have operated prejudicially against the defendant, in view of the answer and the trial. The averments of the answer addressed specifically to each of the counts of the complaint do not raise an is-

sue of fact, because they do not involve direct denials of the existence of the several claims declared upon. The answer "denies" each of the counts of the complaint in the form in which the denial is interposed to the count alleging indebtedness to one B. E. Hooper, which is as follows: "Said defendant denies that the defendant became justly or otherwise indebted to B. E. Hooper for a balance on account for labor and services, or labor or services, rendered said defendant by said B. E. Hooper between the 1st day of March, 1907, and the 1st day of September, 1907, or any other time, in the sum of $413.56." It is at once apparent that the foregoing denial involves a negative pregnant, the denial being in the precise sum alleged in that count of the complaint, and therefore an admission of an indebtedness of any lesser amount. Blankman v. Vallejo, 15 Cal. 638; Towdy v. Ellis, 22 Cal. 650; Estee's Pleadings, § 3174. Moreover, there was no evidence offered by the defendant to prove that the claims pleaded in the complaint did not exist and were not paid. Certainly it cannot be said that, having failed to deny that it was indebted to the plaintiff in some sum of money, and having made no effort to disprove the existence of the claims counted upon, the defendant suffered any injury. Our Code expressly declares that "the court must, in every stage of an action, disregard any error or defect in the pleading or proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect." Code Civ. Proc. § 475. In the case of Gassen v. Bower, 72 Cal. 555, 14 Pac. 206, it is said: "Where a pleading is demurred to for ambiguity, we think that, if the party was not misled to his prejudice, the ambiguity cannot be said to 'affect the substantial rights of the parties.' And we do not think that in this case the appellant was misled." In Rooney v. Gray Bros., 145 Cal. 753, 79 Pac. 523, it is said: "When a case has been tried and a judgment rendered on the facts, in order to warrant a reversal upon the ground of error in overruling a demurrer interposed upon the ground of uncertainty in the complaint, it must appear that some substantial right of the demurrant has been affected, some prejudicial error, as distinguished from abstract error, suffered by him, or he has no room for complaint." See, also, Alexander v. Central L. & M. Co., 104 Cal. 532, 38 Pac. 410 et seq.; Rooney v. Gray Bros., 145 Cal. 753–758, 79 Pac. 523; Bank of Lemoore v. Fulgham, 151 Cal. 234–237, 90 Pac. 936; Peterson Bros. v. Mineral King, etc., 140 Cal. 624–627, 74 Pac. 162; Huffner v. Sawday, 153 Cal. 86–89, 94 Pac. 424. In the case at bar, under the pleadings, there was nothing to prevent the defendant from attempting to disprove the claims set out in the complaint. It is no answer to the claim that the defendant sustained no substantial injury to now say that no issue upon the indebtedness was raised by the pleadings, and that the court would most likely have sustained objections to any evidence which might have been offered to negative the claim of indebtedness. The fact remains that the evidence is sufficient to support the findings of the court in favor of the plaintiff, and that the defendant made no effort either by the pleadings or proof to deny or disprove an indebtedness to plaintiff arising out of all the claims counted upon. In other words, we do not think that the defendant could have been misled to his substantial injury through the conceded inartificiality of the averments of the complaint, nor that, having gone to trial without tendering an issue upon the fact of indebtedness, and having failed even to offer proof against the existence or breach of the contracts out of which the several claims pleaded in the complaint are alleged to have arisen, it is in a position now to complain.

3. It is claimed that there is no finding as to interest, and that, therefore, the judgment, to the extent that it awarded interest on the several claims set forth in the complaint, is without support from the findings. This contention arises from the nature of the allegation as to interest and of the findings of fact. The complaint in each of the counts avers that the plaintiff "claims interest" on the amount alleged to be due. This, it is said, is not the averment of a fact, and that as the court does not make a specific finding as to interest, but only finds generally that "all the allegations and averments of said plaintiff's complaint are true," and that "all the allegations and denials of the answer of said defendant are untrue," the judgment is without a prop upon which to rest so far as interest is concerned. The special demurrer to the several counts of the complaint is not, as we have seen, addressed to the allegation upon the subject of the interest claimed upon the several pleaded claims from the time they became due and payable. And the answer does not deny that the plaintiff is entitled to interest on said claims, and thus the defendant admits the truth of the averments as to interest, although it cannot be denied that they do not involve high-class pleading.

4. It is lastly claimed that the evidence is insufficient to support the findings, and that the court committed prejudicial error in its rulings admitting in evidence the several assignments by the original owners of the claims. Neither point is well taken. As to the findings, the court based its decision upon the admission of the answer; that is, the court assumed, as we have held that it was justified in doing from the nature of the averments of the answer upon the question of indebtedness, that there was no issue before the court with the exception of that tendered by the denials as to the assignments. Besides, each of the assignments contained an itemized account of the indebtedness; and,

while the specific purpose for which the assignments were introduced was, no doubt, to prove the fact of the assignments of the claims to plaintiff, yet they were not specifically limited to that purpose, and therefore it was proper for the court to consider them for all the purposes of the case, and consequently as evidence of the indebtedness. We think the findings are sufficiently supported by the evidence and the admissions of the answer.

5. Nor was it error for the court to admit the assignments in evidence for the purpose of showing the transfer of the claims to the plaintiff. It was shown that the assignment by the Visalia Electric Railroad Company of its claim to plaintiff was executed on behalf of said company by James H. Crossett, the manager of that corporation. It was further proved that the assignment of the claim of S. Sweet Company, a corporation, was executed by Mr. Levis, its general manager, and to this assignment was attached the corporate seal of the corporation. It will not be doubted that the manager of a corporation may for such corporation perform any act within its ordinary business transactions and affairs. And it cannot be questioned that an assignment of an account for transporting freight by the manager or superintendent of a railroad corporation, or for merchandise sold by a mercantile company, involves anything beyond the transaction of the ordinary affairs of such corporation or mercantile company. The objection to the introduction of these assignments was upon the ground that there was no evidence disclosing the authority of the parties executing the assignments to thus act for the corporation. We think that the proof of the execution of the instruments by the managers of the corporations amounted to at least prima facie proof of the authority in the managers to execute them upon behalf of the corporations they represented, and that it was incumbent on the defendant to overcome the effect of such proof if it could do so.

In McKiernan v. Lenzen, 56 Cal. 61, objection having been made to the reception in evidence of an assignment of an account executed by the manager thereof on behalf of the corporation upon the ground that power in said manager to perform that act for the corporation was not shown, the Supreme Court thus disposes of the point: "No formal objection has been made to the assignment by him. The sole objection is that he had no power to make it at all. * * * In respect to the management of its business, a general managing agent and superintendent is the representative of the corporation, and may do in the transaction of its ordinary affairs what the corporation itself could do within the scope of its powers." In Jennings v. Bank of California, 79 Cal. 323, 328, 21 Pac. 852, 854, 5 L. R. A. 233, 12 Am. St. Rep. 145, it is said: "The officers who transact the ordinary business of a corporation are presumed to have authority to do all acts which are usual and incidental thereto." The following authorities affirm the rule as thus stated: Greig v. Riordan, 99 Cal. 316, 33 Pac. 913; Seely v. S. J. I. M. & L. Co., 59 Cal. 22; Bates v. Coronado Beach Co., 109 Cal. 160, 41 Pac. 855; Waterman on Corporations, § 30. The cases cited by the appellant upon this proposition are not in point. Two of these were where the secretary of a corporation undertook to perform some act for the corporation which was not within his authority as such officer. Besides, there should be a distinction between a secretary of a corporation and the manager or managing agent thereof as to the presumption of power to do or perform any act within the ordinary affairs of the corporation. Ordinarily a manager of a corporation has control of the administrative affairs of such corporation to the extent that he may perform many acts within the ordinary transaction of its business affairs without express or direct authority from the board of directors; while the secretary is, ordinarily, a mere ministerial officer under the control of the manager and the board of directors, and whose authority does not extend to the transaction of the ordinary affairs of the corporation upon his own independent volition and judgment.

Our conclusion is, as is apparent from the foregoing views, that, while there is much in this record justifying criticism, particularly as to the pleadings, there is nothing so serious as to warrant a reversal of the judgment and the order. The judgment appears to be just and the appeal here has been, as is obvious, pressed on ultra technical lines.

For the reasons herein set forth, the judgment and order appealed from are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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11 Cal. App. 129

PEOPLE v. MUHLY. (Cr. 90.)

(Court of Appeal, Third District, California. Aug. 21, 1909.)

1. Criminal Law (§ 404*)—Demonstrative Evidence.

About 40 days after a homicide, a silk handkerchief was found under manure in the barn on the premises where deceased and accused resided, and an old shoe was found some hundred yards from the house, as well as pieces of overalls, on all of which were discovered traces of blood, though it was impossible to determine whether it was human blood, but the articles were not shown to have been in defendant's possession. It appeared that many others had used the barn, and, while accused frequently wore blue overalls, the only positive evidence to identify the pieces found was that they were obtained from the granary where they were left by teamsters by accused's mother-in-law for rags. The shoes were two sizes smaller than those worn by accused, and his mother-in-law testified that they had been hers, but an expert testified that they were run over in the same manner as accused's shoes. On the day of the autopsy the coroner took a bunch of keys from decedent's pocket, and afterward handed them to another, who locked the door of the building in which decedent was shot and on unlocking it the next morning, saw a small spot resembling blood on the doorkey. *Held*, that accused was not sufficiently connected with the above articles to admit them in evidence.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 891-893; Dec. Dig. § 404.*]

2. HOMICIDE (§ 166*)—ADMISSIBILITY OF EVIDENCE—MOTIVE.

In a murder prosecution, the state offered to show as motive evidence of the deed made by decedent to accused of an undivided one-half interest in a tract upon which they both lived, and a sale for taxes of a part of the land assessed to decedent and its nonredemption, as well as the testimony of a witness to a conversation with accused a month before the killing while the latter was plowing his field which had been previously used for a melon patch, wherein witness asked accused why decedent was not raising melons there now, and accused replied with an oath, "No, he wouldn't," and had told accused that he raised melons there, but he did not know in what year. That accused also said that decedent never would raise any more melons there. *Held*, that such evidence was admissible as having some possible connection with the killing, though it was equally consistent with innocence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 320-331; Dec. Dig. § 166.*]

3. CRIMINAL LAW (§ 1137*) — INSTRUCTION — REQUEST—REQUESTS GIVEN IN PART—RIGHT TO EXCEPT.

Where the court only gave a part of an instruction requested by accused, it was subject to exception by accused in the same manner as if given without request.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3009; Dec. Dig. § 1137.*]

4. CRIMINAL LAW (§§ 758, 807*) — INSTRUCTIONS—WEIGHT OF EVIDENCE.

In a homicide case, a requested instruction that statements made by accused out of court should be received with caution and the jury might consider that there was danger of mistake or misapprehension of witnesses, misuse of words, failure of the party to express his meaning, the infirmity of memory of witnesses, and that the rule applied where only a part of accused's declarations were put in evidence could have been refused as argumentative and invading the province of the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1786-1789, 1805, 1959, 1960; Dec. Dig. §§ 758, 807.*]

5. CRIMINAL LAW (§ 758*)—INSTRUCTIONS—CREDIBILITY OF TESTIMONY.

In a homicide case, an instruction that verbal statements by accused out of court should be received with caution, which was only a part of an instruction requested by accused in view of the fact that the witnesses differed materially as to what accused said after the homicide and at the inquest relating to the case, was erroneous and prejudicial in requiring the jury to view with caution accused's evidence, which denied his guilt, instead of the testimony of others as to his statements; accused being entitled to have the credibility of his testimony determined by the jury alone.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1786-1789; Dec. Dig. § 758.*]

6. CRIMINAL LAW (§ 1163*)—PRESUMPTION—DISREGARD OF INSTRUCTION.

The appellate court cannot assume that the jury disregarded an instruction in a homicide case, so far as it was objectionable as being on the weight of the evidence so as to make it harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3090-3099; Dec. Dig. § 1163.*]

Appeal from Superior Court, Madera County; W. M. Conley, Judge.

T. H. Muhly was convicted of manslaughter, and, from the judgment and the order denying his motion for a new trial, he appeals. Reversed.

Ernest Klette and Frank Kauke, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Asst. Atty. Gen., for the People.

BURNETT, J. The defendant was charged with murder and convicted of manslaughter, and the appeal is from the judgment and the order denying his motion for a new trial.

The evidence claimed to be inculpatory was entirely circumstantial, some of it equivocal and of doubtful propriety, and all capable of reconciliation with the innocence of the accused. That an atrocious murder was committed is indeed clear, and is not disputed, but the guilty participation of appellant must have been a matter of grave doubt even to the jurors who rendered the verdict. Otherwise the conviction of manslaughter with a recommendation to the mercy of the court seems unaccountable.

It appears that the deceased, James H. Bethel, for a number of years had resided on his premises in the foothills of Madera county, where he kept a wayside saloon or roadhouse. At the time of the homicide, and for several years prior thereto, appellant and the deceased were the owners as tenants in common of a tract of land of 160 acres on which were located a dwelling house, the said saloon, and other buildings. For the preceding year defendant and his wife had been residing on said premises, and deceased had been taking his meals with them at said dwelling house, but he occupied as a sleeping apartment a portion of the saloon building. The house and saloon, about 170 feet apart, were situated on the same side of a public road passing across the premises, the other buildings being on the other side of the road and some distance from the residence. From the statements made the next day by defendant, from the testimony of his wife at the trial and the description of the scene of the homicide given by various witnesses, these facts are deduced: On the evening of February 28, 1908, the deceased ate supper as usual with defendant, and a short time thereafter the former went from the dwelling house to the saloon. About the time he reached the porch thereof, as near as can be determined, two shots were fired from a shotgun, one of which struck the head and face of the deceased and the other the wall of the saloon building. Thereupon the skull of the deceased was crushed by blows inflicted by some blunt instrument, from the effect of which he died—presumably instantaneously. According to the statement of defendant, which harmonizes with the testimony of his wife, he was in the kitchen at the time the first shot was fired, and he thereupon stepped outside the door, heard a sound as of some one scuffling and some words spoken by deceased, and then the second shot was fired. The defendant went back to his work in the kitchen, and later in the evening went over to the saloon, to inquire concerning the shots. He found Bethel's body lying on the ground at the corner of the saloon porch. Early the next morning the defendant notified a neighbor of the occurrence, and about 10 days thereafter the former was arrested and charged with the crime.

A brief recital of substantially all the circumstances which might have been considered by the jury as evidence of defendant's guilt will show the rather feeble foundation for the verdict, and emphasize the importance of examining with care certain rulings during the trial and an instruction given by the court which are assigned as error by appellant. The most significant circumstance in this connection is the disappearance of defendant's shotgun, which there is some evidence to show was probably used in the perpetration of the crime. Diligent search for this gun was made on the premises immediately after the homicide and at various times, but without avail. Appellant made a statement at the coroner's inquest to the effect that the gun was taken down to the saloon on the day of the homicide to shoot quail, and that he had never seen it since. The coroner failed to reduce to writing all the testimony, and there is some discrepancy between the statements of the witnesses as to whether appellant said he or the deceased took the gun. Audie K. Wofford, a member of the coroner's jury, testified that appellant said that "Mr. Bethel came over in the forenoon and got the shotgun, at that time. He said it was loaded when he gave it to him." The same witness declared: "I have seen Mr. Bethel use this gun more than once. I saw him shoot quail with it there."

Appellant's wife testified: "Mr. Bethel came over to the house during the afternoon. Mr. Muhly was in and out as usual. I was out in the kitchen. I did not see what he did or speak to him. I do not know what he came for. He was in and out a good deal of the time. Sometimes he came for his tools and sometimes he came to get the shotgun to shoot quail." She further testified that "at the time of the shots Mr. Muhly was out in the kitchen. * * * When the shot was fired, I stood up and I heard the screech and another shot, and then I put the baby down, and I started into the kitchen. I stepped out of the kitchen door and saw Mr. Muhly. I don't know where the gun was on that night. Mr. Muhly had nothing to do with that gun after or immediately before supper that I know of. After supper was eaten and Mr. Bethel got up and Mr. Muhly was in the dining room Mr. Muhly did not have the gun that night or at any time. I have not seen the gun since." The jury undoubtedly discredited the foregoing statements. It cannot be said that this was entirely unjustified since the jurors are the exclusive judges of the weight of the evidence and of the credibility of the witnesses, but there appears to be nothing unreasonable in the explanation of this circumstance given by the defense, especially in view of the undisputed fact that at times the deceased had the gun in his possession and would shoot quail from the saloon porch. And whatever may be said as to the probability that appellant murdered Bethel, it is clear that the prosecution produced no evidence—presumably because of its inability to do so—that Muhly on the evening of the homicide used or had in his possession this shotgun. The evidence further shows that it was the invariable custom of the deceased to leave the door of his saloon unlocked while he was taking his meals at the residence. Witnesses also testified that he had trouble with the Indians, and that he said he "expected to be killed by the Indians." Therefore, granting that this gun was the instrument of death, the conclusion of defendant's guilt is no more probable than the view that while Bethel was at supper some one else took the gun from the saloon and, lying in wait for him, brutally took the life of the deceased.

The conduct and appearance of the defendant after the homicide probably also excited the suspicion and indignation of the jury. There is no doubt, however, that his infant child was seriously ill, and the wife, testifying as to what occurred immediately after the shooting, said: "I came back into the house and I went back into the front room, and he went back with me. After that he went back and finished up his work in the kitchen. I remained in the front room. Then after he finished up his work he came back in the front room. When he came back, there was something said with reference to the noise or shooting, and after a while he went out to see if he could not find out what was the matter. He went out the front door. I don't know how long he was out. It was not very long, when he came back I asked him what was the matter. He said, 'They have got him. He is lying there dead;' and I went to crying. I was frightened. Mr. Muhly did not go anywhere that night. He wanted to go and notify the coroner and sheriff, but I would not let him go. I was scared. I knew that grandpa was killed and I was afraid, and just did not let him go, that was all." The jury may have concluded that the defendant's delay in communicating with others was indicative of guilt, but who can say that an innocent man under the same circumstances certainly or probably would have pursued a different course?

Some of the witnesses testified that after the homicide the defendant appeared to be nervous and excited and one of them said: "He looked like kind of down—looked like he was guilty." Others testified that there was nothing unusual in his appearance. It would not be surprising under the circumstances of suspicion if the defendant, whether guilty or innocent, was somewhat agitated, and this mental perturbation would probably exhibit itself so as to be observed by others, but it is clear that testimony concerning the same is so largely a matter of opinion, and depends so much upon the temperament of the accused and of the observers as to be of very little value.

About 40 days after the homicide, while the defendant was in the county jail where he had been for one month, some parties under the direction of the district attorney engaged in making additional search of the premises found an old silk handkerchief buried under the manure in the barn. They also picked up at a short distance from the dwelling house a number of pieces of overall cloth. Some time in September another search was made and an old pair of shoes was found in a crevice of the rocks from 100 to 150 yards from the house. These articles were examined by a chemist who testified that there were traces of blood on each, but it was impossible to tell whether it was human blood or not. These articles were not traced to the defendant. It was not shown that he ever had any of them in his possession, and they were admitted over the objection of appellant. The evidence shows that the horses of other persons as well as those of appellant had been kept in the barn and numerous other parties had been there at various times. The defendant frequently wore blue overalls, but the only positive evidence to identify the pieces of cloth was to the effect that they had been obtained from the granary by defendant's mother-in-law for the purpose of making rugs and that they were never worn by defendant, but had been left in the granary by teamsters who frequently slept there.

The only evidence offered to connect defendant with the shoes was the testimony of a so-called expert that the shoes were worn or run over in a manner similar to those admittedly belonging to defendant. There seems no doubt, however, that the shoes were two sizes smaller than those usually worn by the defendant, and the mother-in-law—however strange it may seem—testified positively that the shoes were hers, and she tells how they happened to be in the place where they were found. The only circumstance, therefore, lending color to the contention that these articles were in possession of appellant at the time of the homicide was the fact that they were found on his premises some time thereafter.

In State v. McAnarney, 70 Kan. 679, 79 Pac. 137, it is said by the Supreme Court of Kansas that: "Testimony was received in regard to a shirt found outside and near defendant's house on the day after the alleged homicide, and on portions of which there appeared to be a pasty stuff of a reddish cast. Attention was specifically called to this testimony in the charge of the court. The shirt was not the one shown to have been worn by the defendant at the time in question nor to have belonged to him. It was found after the post mortem examination and after crowds of people had been about the premises for hours; but where it came from, how it came to be there, and what afterwards became of it do not appear. The connection between the shirt and the defendant, or between it and the supposed homicide, was not sufficiently shown to make the testimony respecting it admissible." The evidence of identification was stronger in the case of People v. Hill, 123 Cal. 574, 56 Pac. 443, than in the case at bar. A certain stick was found by a witness about an hour after the affray, and very near where the fight took place, and it appeared that the deceased was killed by being struck on the head with a stick, but the Supreme Court declared: "The court also erred in permitting the club which McClure found in the corral to be received in evidence and exhibited to the jury. There was no evidence identifying the stick as the one with which the defendant struck the deceased, or in any way connecting the defendant with it. But, as it is evident from the description of the physician that the blow could have been produced by any other large and smooth instrument, it was necessary that there should be some evidence identifying the stick as the one with which the blow was given before it could be offered in evidence. Otherwise the jury could only conjecture that it had been used by the defendant. See Taylor on Evidence, § 557." Of course, circumstantial evidence is admissible to trace the natural objects to the possession of defendant at the time of the homicide, but it must be admitted that here the jury "could only conjecture" that the said articles were upon his person at the time. Indeed, their probative force depends upon the conjecture, first, that these objects were in possession of defendant at the time of the homicide; and, second, that there was upon them the blood of the deceased.

On the day of the inquest an autopsy on the body was performed, and the coroner took a bunch of keys from the clothing of the deceased and placed them in his own pocket. In the evening he handed them to one Charles N. O'Neal. The latter put them in his pocket, and that evening he locked the door of the saloon with one of the keys, and on the next morning, on going to unlock said door, he saw what he took to be a small spot on the doorkey resembling a blood stain. The keys were received in evidence, leading the jury probably to conjecture that the defendant, after killing the deceased, obtained the keys from his pocket, and therewith opened the door of the saloon. In our opinion the foregoing objects should not have been admitted in evidence as the connection of defendant therewith was not sufficiently shown, and there was too much scope for prejudicial surmise in view of the well-known fact that "there is a general mental tendency, when a corporal object is produced as proving something, to assume on sight of the object all else that is asserted about it."

The only evidence offered to show motive for the homicide was testimony of a deed of an undivided one-half interest in the 160 acres of land made by the deceased to the defendant in the year 1904 and the sale of a portion of the land assessed to Bethel for the nonpayment of taxes and the fact that it had not been redeemed, and, furthermore, the testimony of the witness Peabody to a conversation with defendant about a month before the homicide when the latter was plowing in a field where there had been a melon patch for several years. The witness said: "I asked him how it was that Jim wasn't raising any more melons there." He replied with an oath and said: "No; he wouldn't; just that. He said Jim told him he raised about $200 worth of melons there on that piece of ground, but I don't know whether he raised them that year or the year before." He also said "he never would raise any more melons there, as near as I can recollect." The witness, though, admitted that the relations between him and defendant were not friendly. These circumstances may have had some connection with the killing and were properly admitted in evidence, but it is obvious that they are consistent also with the innocence of the accused.

The court was requested by defendant to give the following instruction: "*You are instructed that it is the law that verbal statements, or as they are sometimes called extrajudicial statements—that is, statements made by the defendant out of court—are to be received by the jury with caution;* and you have a right to consider that there is danger of mistakes from misapprehension of the witnesses, the misuse of the words, the failure of the party to express his own meaning, the infirmity of memory on the part of the witness attempting to relate all of the conversation, and this rule applies when only a part of the defendant's declarations at the time are written down or remembered and proven." The court gave only the portion in italics, and therefore the modified instruction is the court's and subject to the same exception as if given without any request therefor. People v. Wong Sang Lung, 3 Cal. App. 221, 84 Pac. 843; People v. Fitzgerald, 156 N. Y. 253, 50 N. E. 846.

The instruction was requested in view of the fact that the various witnesses differed materially as to what the defendant said the day after the homicide and at the coroner's inquest concerning certain features of the case. The admonition therein contained is justified by general experience, and is an elaboration of the principle announced for the guidance of the jury in Code Civ. Proc. § 2061, subd. 4, that "the evidence of the oral admissions of a party (ought to be viewed) with caution." The whole instruction might well have been refused as argumentative and an invasion of the province of the jury, but, as given, it charged the jury to view with caution—not the evidence of the statements, but the statements themselves, thereby discrediting the defendant in the eyes of the jury. The prejudicial effect is seen from the fact that if the statements made by the defendant were to be believed he was entirely innocent. It is too clear for argument that the defendant was entitled to have his credibility determined by the jury without any adverse suggestion from the court. It is readily seen that by the modification of the court an instruction designed to afford to defendant the benefit of a friendly comment as to a universally conceded infirmity of human testimony is transformed into a hostile intimation that the defendant's statements concerning the transaction should be rejected as untrue.

It may be that this was the decisive factor in an admittedly close case. At any rate, the judgment cannot be sustained without virtually holding that the jury disregarded the instruction of the court, and that, as far as objectionable therefore it caused no injury to appellant. This we are unauthorized to do.

The judgment and order are reversed.

We concur: CHIPMAN, P. J.; HART, J.

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11 Cal. App. 26

ÆTNA INDEMNITY CO. v. ALTADENA MINING & INVESTMENT SYNDICATE et al. (Civ. 578.)

(Court of Appeal, Third District, California. Aug. 21, 1909.)

1. JUDGMENT (§ 707*) — CONCLUSIVENESS — PARTIES.

Where an assignee of a corporation's note and mortgage as collateral security was not a party to a suit to cancel the mortgage, a judgment granting such relief was not binding on the assignee.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1230; Dec. Dig. § 707.*]

2. JUDGMENT (§ 711*)—RES JUDICATA—PERSONS NOT PARTIES.

In a suit by the assignee of a corporate note and mortgage to foreclose the same, a judgment canceling the note and mortgage was properly received in evidence to sustain a provision in the foreclosure decree directing payment of any overplus to the corporation, though the assignee was not a party to the suit in which the note and mortgage were vacated.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 711.*]

3. CORPORATIONS (§ 482*)—MORTGAGE—AUTHORIZATION—FINDINGS.

Where a corporate mortgage in controversy was executed to two of the directors of the corporation, a finding that they did not vote or participate in the meeting when the execution of the mortgage was being considered and voted upon, but that the majority of the board of directors then remaining unanimously authorized the execution of the note and mortgage, etc., in effect found that a majority of all the directors were present and participated in the proceedings which culminated in the execution of the instruments.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 482.*]

4. TRIAL (§ 404*)—FINDINGS—CONSTRUCTION.

Findings of the trial court should receive such construction as will uphold, rather than defeat, the judgment.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 404.*]

5. CORPORATIONS (§ 298*)—MORTGAGES—AUTHORIZATION—MEETING—PRESUMPTION.

In the absence of evidence to the contrary, it will be presumed that a corporation's note and mortgage were authorized at a lawful meeting of the board of directors.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 298.*]

6. CORPORATIONS (§ 480½*)—MORTGAGE INDEBTEDNESS—PAYMENT.

Where a note was secured by a mortgage on corporate property generally, it was immaterial that the resolution authorizing the issuance thereof provided for payment from a specified fund.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 480½.*]

7. CORPORATIONS (§ 480½*)—MORTGAGES—ASSIGNMENT—RIGHTS OF ASSIGNEE—NOTICE.

Where an assignee of a corporation's note and mortgage as collateral security had no knowledge of a resolution providing for payment out of a specified fund, he was not bound thereby.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 480½.*]

8. BILLS AND NOTES (§ 499*)—PAYMENT—BURDEN OF PROOF.

A complaint on a note alleging that plaintiff is the "owner and holder" raises a presumption that the note has not been paid, and the burden is on the defendant to prove payment.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1695–1697; Dec. Dig. § 499.*]

9. BILLS AND NOTES (§ 539*)—FINDINGS—PAYMENT.

A finding that plaintiff is the holder of the note sued on constituted a sufficient finding that the note had not been paid.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 539.*]

10. CORPORATIONS (§ 316*)—NOTE AND MORTGAGE TO DIRECTORS—VALIDITY.

Though a director or other officer of a corporation is prohibited by Civ. Code, § 2230, from becoming interested as an individual in a transaction with the corporation involving the trust, with which as such officer he is charged, where his interest is adverse to that of the corporation, and a director is required by section 2228 to act in the utmost good faith, a note and mortgage executed by a corporation to two of its directors was not void where they took no part in the authorization thereof, and the instruments were executed in good faith and duly authorized, not only by a majority of the directors, but were ratified by a majority of the stockholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1401; Dec. Dig. § 316.*]

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by the Ætna Indemnity Company against the Altadena Mining & Investment Syndicate and others. From a judgment for plaintiff, defendants appealed to the Court of Appeal, Third District, by which the case was transferred to the Supreme Court pursuant to the following opinion, handed down July 12, 1909:

"This is an action for the foreclosure of a mortgage, and is therefore a suit in equity. The appeal was properly taken to the Supreme Court, but was erroneously filed in this court, such error doubtless occurring through the fact that the entitlement of the court on the back of the transcript an briefs is printed as follows: 'In the District Court of Appeal of California, Third Appellate District.' It ought to be pretty well understood by the profession by this time that, under section 4 of article 6 of the Constitution, this court is without appellate jurisdiction of suits in equity by direct appeal. The case will have to be transferred to the Supreme Court, and such is the order."

Thereupon, on July 13, 1909, the case was retransferred by the Supreme Court. Judgment affirmed.

E. W. Holland, for appellants. J. B. Curtin and H. F. Peart, for respondent.

HART, J. This is a suit for the foreclosure of a mortgage executed to secure the payment of a promissory note for the sum of $6,000. The appeal is from the judgment foreclosing said mortgage upon the judgment roll alone.

The facts as found by the court are as follows: On the 6th day of July, 1904, the defendant Altadena Mining & Investment Syndicate (to which we shall hereafter refer as "the defendant," inasmuch as the action was dismissed as to the fictitiously named defendants) executed to M. F. Fillmore and J. J. Smith its promissory note for the sum of $6,000, and at the same time executed and delivered to said Fillmore and Smith, as security for the payment of said note, a mortgage upon certain lands and premises situated in Tuolumne county. Said mortgage was recorded in the office of the county recorder of Tuolumne county. The indebtedness for which said note was given was incurred some time prior to the execution of the note, and, in the language of the finding upon that point, "was represented by bonds evidencing indebtedness." Fillmore and Smith, payees of the note, were members of the board of directors of the defendant at the time of the execution of the note and mortgage, but the court found that said Fillmore and Smith "did not vote or participate in said meeting when the execution of said mortgage was being considered or voted upon, but that the majority of the board of directors then remaining unanimously authorized the execution of said note and mortgage, and that the said board of directors in causing said note and mortgage to be executed by said corporation were not procured so to do by either said J. J. Smith or M. F. Fillmore, or by both of them." Subsequently to the execution of the note and mortgage the action of the board of directors in authorizing their execution and in executing the instruments was ratified by the holders of more than two-thirds of the entire capital stock of said defendant, said act of ratification having been reduced to writing, and signed, acknowledged, and certified to, as required by law, and recorded in the office of the county recorder of Tuolumne county. Thereafter, said J. J. Smith and M. F. Fillmore assigned said note and mortgage to one A. I. Smith, who on the 23d day of February, 1905, assigned the same to Paul M. Nippert Company, a corporation organized and existing under the laws of this state, and which corporation is the designated agent of the plaintiff in this state, and thereafter said Paul M. Nippert Company assigned said note and mortgage to the plaintiff under the following circumstances: It appears, and the court so found, that at the time of the assignment of said note and mortgage to the plaintiff an action was pending in the superior court of the county of Santa Clara wherein one E. G. Northrup was plaintiff and the defendant herein was defendant, in which action said Northrup on the 17th day of February, 1905, recovered a judgment against the defendant in said action (the defendant in this) in the sum of $1,968, including costs. The said defendant, desiring to take an appeal from said judgment to the appellate court of the first district, applied to the plaintiff in this action to become the surety on the undertaking on appeal, and the plaintiff herein agreed to become such surety on such undertaking provided that the defendant in said action and herein would indemnify plaintiff against loss in the event the judgment in said action was affirmed on appeal, and thereupon, for the purpose of so indemnifying plaintiff, the said A. I. Smith on the 23d day of February, 1905, assigned said note and mortgage to the plaintiff. In accordance with this arrangement, plaintiff executed and delivered to the defendant an undertaking on appeal in the sum of $300 to perfect said appeal, and a further undertaking in the sum of $3,950, the same being double the amount of said judgment, in order to stay execution thereon, the condition being that it would pay said judgment in case the same was affirmed on appeal. Thereafter, and on the 10th day of July, 1907, the said judgment was affirmed by the Court of Appeal of the First District, and therefore, at the time of the commencement of the present action, there was due said Northrup upon said judgment the sum of $1,968, including costs and interest. On the 5th day of September, 1906, in an action then pending in the superior court in and for Alameda county, in which said Northrup and others were plaintiffs, and the defendant herein and said J. J. Smith and said A. I. Smith and others were defendants, judgment was rendered and entered wherein and whereby the note and mortgage involved in the present controversy, together with the action of the stockholders of the defendant ratifying the action of the board of directors of said defendant in authorizing the execution of and in executing said note and mortgage, were set aside and canceled, and said "judgment has become and is now final." The plaintiff here was not a party to said action "and had no notice or knowledge of the entry of said judgment, but at the time that said note and mortgage were assigned to plaintiff, and at the time plaintiff became surety on said undertaking on appeal, it believed that said note and mortgage were in full force and effect, and that no officer or stockholder of said corporation Altadena Mining & Investment Syndicate or any person advised it to the contrary."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The court further found that at the time of the ratification by the stockholders of the action of the board of directors in the execution of the note and mortgage concerned here said J. J. Smith was the owner of 70,425 shares of the capital stock of the defendant. The decree in the Alameda county case adjudged that said Smith was not the owner of said stock or of any stock in defendant.

Upon the foregoing facts, as found by the trial court, the appellant urges the following contentions on this appeal, for which, it insists, the judgment must be reversed:

(1) That the court failed to make a finding, which is essential to the validity of the note and mortgage, that the "authorization or purported authorization of the note and mortgage was made at a regular meeting of the board of directors or at a special meeting regularly called for that purpose." That there is no finding that the note and mortgage or either of them were authorized by a majority of the board of directors.

(2) That the finding that the defendant was indebted to Smith and Fillmore is contradictory to and inconsistent with the recitals of the judgment of the superior court of Alameda county, setting aside and canceling the

transaction by the board of directors of defendant resulting in the execution of the note and mortgage in dispute and setting aside the purported ratification of said transaction by the stockholders of the defendant.

(3) That the finding that at the time of the ratification by the stockholders of the action of the board of directors in the execution of said note and mortgage said J. J. Smith was the owner of 70,425 shares of the capital stock of the defendant is contrary to and inconsistent with the judgment of the superior court of Alameda county, heretofore referred to, by which it was adjudged, among other things, that said J. J. Smith was not the owner of said stock or any stock of the defendant, said judgment having been rendered more than one month prior to the commencement of this action.

(4) That the court failed to make a finding with reference to the resolution adopted by the board of directors authorizing the execution of the note and mortgage. That said resolution was set out in the answer and involved a material fact in defense of the action, inasmuch as by the terms of said resolution the note is made payable "out of money to be received from one Mr. Holmes," and that thus an "equity was created between the payor of the note and the payees," and that the respondent took the note subject to such equity. That the failure to find on such issue is fatal to the judgment.

(5) It is further insisted that the court's failure to find that the note was unpaid constitutes an omission to find upon a material fact essentially an issue in the case, and that for such failure the judgment must be reversed.

(6) The point is made that the action of the board of directors is void, or at least voidable, for the reason that the payees of the note were members of the board of directors at the time the note and mortgage were authorized to be executed, and at the time the same were executed and delivered to the said payees.

1. It will be convenient to first dispose of the second and third points of appellant in the order in which they are stated in the foregoing. The defendant, in its answer, pleaded in bar of this action the judgment of the superior court of Alameda county canceling the note and mortgage in controversy and setting aside the action of the stockholders ratifying the action of the board of directors in executing said note and mortgage. Upon motion, however, that portion of the answer pleading said judgment was stricken out on the ground that the plaintiff became the owner and holder of said note and mortgage prior to the rendition and entry of said judgment, and was not made nor was it a party to the action in which said judgment was rendered and entered, and it could not therefore be bound by it. The motion to strike out that portion of the answer was proper, and the consequence of the granting of said motion was manifestly to eliminate said judgment as an issue in the case, in so far as any effect it might be supposed to have as a bar or a defense to plaintiff's cause of action. But the court made a finding as to the rendition and entry and the effect, in a certain aspect of the case, of said judgment, and the presumption is that evidence of said judgment and its recitals was received into the record. As one of its conclusions of law, the court found that, in the event that the mortgaged property should sell for a sum in excess of the judgment herein, costs, attorneys' fees, etc., such overplus should be paid over to the defendant. It is thus made clearly to appear that the reception of evidence of the said judgment of the superior court of Alameda county was grounded upon the proposition that the note and mortgage, having by said judgment been canceled, were void as to any rights which the assignor of the defendant might claim thereunder, and that any overplus from the sale of the property after the satisfaction of the judgment, costs, etc., herein, would rightfully belong to the defendant. It is, therefore, readily to be perceived that the position of appellant that the findings as to the indebtedness of the defendant to J. J. Smith and Fillmore, and that Smith, at the time of the ratification of the action of the directors in executing the note and mortgage, by the stockholders, was the owner of 70,425 shares of the stock of the defendant, are contradictory to the recitals in the said judgment of the superior court of Alameda county, is, as a matter of law, entirely devoid of any foundation for its support. It is plain to be seen that there could be no inconsistency between the court's findings on the points under consideration and the recitals of the Alameda court's judgment unless the latter could be successfully pleaded and proved in bar of plaintiff's right of action, and, as we have shown, evidence of said judgment and its recitals was not admitted upon that theory.

The court, to briefly recapitulate, correctly held in its ruling on the motion to strike out that the Alameda county judgment could not under the circumstances as disclosed by the answer itself, operate as a bar to plaintiff's right to the relief demanded by the averments of its complaint; but at the trial, with manifest propriety—indeed, in response to the demands of justice and equity—the court received evidence of said judgment so that any excess which might be realized from the sale of the property over the amount necessary to indemnify the plaintiff against loss might be adjudged to belong to the party justly and legally entitled thereto; or, as the court concluded as a matter of law, in case the plaintiff was not compelled to satisfy the judgment rendered by the superior court of Santa Clara county in favor of E. G. Northrup and against the defendant here, the whole sum realized from the sale of the mortgage property, less the costs, attorneys' fees, etc., should be paid to said defendant.

2. The contention that the failure of the court to make specific findings as to whether the resolution authorizing the board of directors to execute the note and mortgage was adopted at a regular or a legally called special meeting is without substantial merit, as is, likewise, the point that there is no finding that such authorization was made by a majority of the board of directors. It appears from the findings that at the time the note and mortgage were authorized to be made said J. J. Smith and M. F. Fillmore, payees of the note, were members of the board of directors of the defendant, and the proposition that the court did not find that the said instruments were authorized to be made by a majority of the directors proceeds from a somewhat subtle if not hypercritical analysis and challenge of that portion of finding No. 4 which reads as follows: "* * * but at the time and at the meeting whereby said mortgage was authorized to be executed said J. J. Smith and M. F. Fillmore did not vote or participate in said meeting when the execution of said mortgage was being considered or voted upon, *but that the majority of the board of directors then remaining*, unanimously authorized the execution of said note and mortgage," etc. It is said that the language of said finding which we have italicized is so ambiguous that it fails to clearly disclose that a majority of all the members of the board of directors authorized the mortgage to be executed. The finding, it may be conceded, could have been more clearly phrased, but we think its language is clear enough to indicate that the court therein intended to find and does thereby find that a majority of all the board of directors were present and participated in the proceedings culminating in the authorization of the execution of the instruments. In other words, we think the finding must be construed to mean that, with Smith and Fillmore absent, so far as taking any part in the proceedings was concerned, the remaining members of the board transacted the business concerning the note and mortgage. This construction not only gives the finding its evident meaning, but harmonizes with the rule as it has been uniformly followed in California in the construction of findings of fact. In Breeze v. Brooks, 97 Cal. 77, 31 Pac. 744 (22 L. R. A. 257), it is said that "the findings of the court should receive such construction as will uphold rather than defeat the judgment; and when, from the facts found by the court, other facts may be inferred which will support the judgment, such inference will be deemed to have been made by the trial court." And in Warren v. Hopkins, 110 Cal. 506, 42 Pac. 986, the court declares that "any uncertainty in the findings is to be construed so as to support the judgment rather than defeat it." See, also, Krasky v. Wollpert, 134 Cal. 342, 66 Pac. 309; Paine v. San Bernardino, etc., Co., 143 Cal. 656, 77 Pac. 659; Gould v. Eaton, 111 Cal. 639, 44 Pac. 319, 52 Am. St. Rep. 201; People's Home Savings Bank v. Rickard, 139 Cal. 285, 73 Pac. 858. It is true that there is no finding which in express language indicates whether the meeting at which this transaction was conducted was a regular meeting of the board or a regularly called special meeting. But we think the presumption must be indulged that it was a lawful meeting of the board.

3. The point urged by appellant that the resolution authorizing the execution of the note and mortgage having been pleaded in the answer as one of the defenses against the action to foreclose the mortgage involves a material issue, upon which a finding should have been made, cannot be sustained. The necessary effect of the argument upon this point is that the resolution, having specifically designated a particular fund, or money to be derived from a particular source, out of which the note should be paid, its payment out of any other money or by any other means cannot be coerced. This proposition is devoid of any solid reason for its maintenance. In the first place, the resolution does not by its terms limit the right to compel the payment of the note to the contingency that there shall be received by the defendant certain moneys from said "Mr. Holmes." It provides as well for a mortgage to be executed upon the property of the defendant as security for the payment of the note. Besides, the note, as must essentially be the fact, is upon its face an unconditional promise to pay to the payees the sum set forth therein, and there is no provision in said note that it is to be paid only out of money to be obtained from a particular person or source. The plaintiff, so far as the findings disclose, took the note by assignment in the nature of collateral security—that is, for the purpose of indemnifying it against any loss it might sustain through having become the surety for the defendant on the appeal from the judgment obtained against it by Northrup. Assuming that the terms of said resolution could in any event affect the right of plaintiff to maintain this action, there is absolutely nothing in the record from which it may even be remotely inferred that the plaintiff had any knowledge of the contents of the resolution, by which the directors of the defendant authorized themselves to make the note and mortgage. As before declared, the judgment adjudging the whole transaction void and setting it aside could in no manner or degree bind the plaintiff; it not having been made a party to the action in which that judgment was given. It would seem, we may say in this connection, that it was intended that the plaintiff should know nothing of that action, for the defendant knew that the note and mortgage had been assigned to plaintiff for its (defendant's) benefit prior to the com-

mencement of said action, and yet consented to a judgment declaring the note and mortgage void. We conclude upon this point that the resolution or its terms did not constitute a material issue in the case, and it follows, of course, that no finding with regard thereto was necessary or required.

4. The contention that the court committed a vital error by not finding that the note had not been paid is untenable. It is a well-established rule that where a complaint in an action on a promissory note alleges that the party declaring thereupon is the "owner and holder" of the note raises the presumption that such note has not been paid, and that the burden is upon the party defending against the note to prove that it has been paid, if such be his defense. Griffith v. Lewin, 125 Cal. 620, 58 Pac. 205; Pastene v. Pardini, 135 Cal. 434, 67 Pac. 681; Stuart v. Lord, 138 Cal. 672, 72 Pac. 142; Thompson v. Thompson, 140 Cal. 546, 74 Pac. 21. The court finds, but denominates it as a conclusion of law, that "plaintiff is the lawful owner and holder of said note and mortgage," etc. But, although this finding or conclusion is designated by the court as a conclusion of law, it nevertheless involves the finding of a fact, and is sufficient as such to support the judgment in that respect. If the plaintiff is the lawful owner and holder of said note, then certainly the presumption is that it has not been paid. It is, moreover, to be presumed that, if the defendant had introduced proof sufficient to overcome the presumption of the nonpayment of the note, the court would have made a finding accordingly. Furthermore, if, as a matter of fact, the defendant introduced evidence addressed to the proposition that the note had been paid, it should have brought up such evidence by a bill of exceptions or a statement, and, having failed to do so, the presumption is that, if evidence was offered and received upon the point, such evidence was against it, the burden being upon it to prove the fact or overcome the presumption of nonpayment.

5. It is lastly contended that the note and mortgage are void because the payees were directors of the defendant at the time of the execution of the instruments; Smith being also secretary of the board of directors at said time. In support of this proposition, we are referred to the comparatively recent case of Pacific Vinegar & Pickle Works v. Smith, 145 Cal. 365, 78 Pac. 550, 104 Am. St. Rep. 42; but an examination of that case will readily disclose that it does not sustain the position of appellant here.

It is there held (we quote from the syllabi which correctly state the propositions as they are treated in the text) that "one who is president and director of a corporation occupies a beneficiary and trust relation thereto; and where he purchased its notes outright, and caused the corporation, by himself as president, to become an indorser thereof to himself individually, guaranteeing the payment of the notes without the authority, knowledge, or approval of the corporation, he cannot maintain an action to enforce the express contracts of indorsement, the making and enforcement of which are equally prohibited by law. Such contracts are a breach of trust, and voidable at the mere election of the corporation, if not absolutely void. * * *" The president of the corporation in that case had done, according to the evidence, the very thing which the foregoing declares cannot be lawfully done in a transaction between himself and the corporation; the relation between the two being essentially fiduciary in its nature. No one could have the temerity to dispute the soundness, justice, and equity of the rule as thus laid down. Here, however, the findings show a state of facts which marks a clear line of distinction between that case and the one at bar. As seen, it not only appears that the payees of the note took no part in the execution of the note and the mortgage, or in the proceedings of the board of directors leading thereto, but that the action of the directors in the matter was subsequently ratified by the holders of more than two-thirds of the entire capital stock of the defendant. In Pacific Vinegar, etc., Works v. Smith, supra, Mr. Justice Lorigan, who wrote the opinion, exhaustively examines and reviews a large number of the cases touching upon the proposition under discussion, and with most gratifying perspicuity points out the difference between that class of cases where an officer of the corporation as such deals with himself in his individual capacity conerning the property of the corporation, without the knowledge and consent of the corporation or the stockholders, and that line of cases in which an officer of the corporation prosecutes and consummates a transaction in his individual right with such corporation with the consent of the corporation, and without having himself taken part as an officer of the corporation in the transaction. Referring to the cases cited by the respondent in that case (the president of the corporation), the opinion says: "In none of these cases is it held that he could deal with himself, or that a contract made with himself *without the knowledge of the other directors or the stockholders, or without the subsequent ratification or approval of the corporation* (italics ours), could be sustained or enforced against the corporation. This marked distinction is plainly declared in a line from one of the cases cited by respondent (Twin Lick Oil Co. v. Marbury, 91 U. S. 590, 23 L. Ed. 328), where the court says: 'The defendant was not here both seller and buyer.'" The court then proceeds to specifically notice the cases cited by respondent, and, among others, the case of S. C. R. R. Co. v. Spreckels, 65 Cal. 193, 3 Pac. 661, 802, of which it is said: "No question of a director dealing with himself is involved. The plain point decided there was that the corporation having borrowed money from the director, Hihn, the latter was entitled to be repaid"; citing a large number of California cases to the point that "where the corporation has dealt with the director he may recover upon a quantum meruit. Not, however, that a director can recover upon an express contract made with himself *without the knowledge or sanction of the corporation.*" (Italics ours.)

Of course, a director or other officer of a corporation cannot become interested as an individual in a transaction with such corporation involving the trust with which as such officer he is charged where his interest in such transaction is adverse to that of his beneficiary. Civ. Code, § 2230. A director of a corporation, like any other trustee, is bound to act in the utmost good faith toward his beneficiary. Civ. Code, § 2228; Schnittger v. Old Home, etc., Min. Co., 144 Cal. 606, 78 Pac. 9. But, as is declared by the Supreme Court in the last cited case, a person is not absolutely precluded from dealing directly with the corporation of which he is a director. "Any transaction between them is subject to rigid scrutiny and is voidable at the instance of the beneficiary for any violation of his duty as trustee, but is not ipso facto void. 'The mere fact that the creditor was a director of the company does not render the transaction fraudulent. There is nothing which forbids either members or directors of a corporation from making contracts with it like any other individual; and when the contract is made, the director stands as to the contract in the relation of a stranger to the corporation'"; citing Stratton v. Allen, 16 N. J. Eq. 229. In short, the sum of all the authorities is that, while transactions between a director of a corporation as an individual and the corporation will always be subject to severe scrutiny and required to be characterized by the utmost good faith, a director of a corporation may advance money to it, may become its creditor, may take from it a mortgage or security, and may enforce the same like any other creditor. 3 Thompson on Corporations, § 2068. The findings in the case at bar disclose no bad faith in the transaction resulting in the execution of the note and mortgage involved here. To the contrary, they show that the transaction was had in good faith and free from all taint of fraud. They further show, as we have seen, that the plaintiff accepted the note and mortgage as a security against loss as surety on the defendant's appeal in an action in which a heavy judgment had been obtained against it before any claim was made or effort put forth to show that the transaction was anything other than an honest one. While, as we have shown, the judgment of the Alameda superior court has no material relevancy to or bearing upon the merits of plaintiff's action here, it may be suggested that the circumstance appearing upon its face that said judgment was rendered and entered by consent of all the parties to the action of which it is the offspring furnishes some ground for suspecting that it was collusively procured for the purpose of defeating plaintiff's indemnity against loss.

In any event, we entertain no doubt that the judgment here is amply supported by the findings, and that it is just and involves a most equitable adjudication of the controversy.

The judgment appealed from is accordingly affirmed.

We concur: CHAPMAN, P. J.; BURNETT, J.

11 Cal. App. 125

Ex parte GREY. (Cr. 186.)

(Court of Appeal, First District, California. Aug. 20, 1909.)

1. MUNICIPAL CORPORATIONS (§ 62*)—GOVERNMENTAL POWERS—DELEGATION AND AUTHORITY.

Where the charter of a city grants to the mayor and common council the power to appoint a board of plumbing examiners, such power cannot be delegated to the board of police and fire commissioners, or to any one else.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 153, 154; Dec. Dig. § 62.*]

2. MUNICIPAL CORPORATIONS (§ 124*)—VALIDITY OF ORDINANCE—CONFLICT WITH STATUTE.

Act March 9, 1887 (St. 1887, p. 58, c. 50), amending the act approved March 3, 1885 (St. 1885, p. 12, c. 14), made it unlawful for any plumber to work in any city until he had obtained from the board of health of said city a license to be issued after satisfactory examination by the board. *Held,* that the law was general, and applied to every board of health in every city in the state, and a city ordinance attempting to delegate to the board of police and fire commissioners the power to appoint a board of plumbing examiners to examine and license plumbers is void.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 290–297; Dec. Dig. § 124.*]

Application of G. L. Grey for a writ of habeas corpus. Writ granted.

Frank H. Benson, for petitioner. Cleveland L. Dam and George Appell, for respondent.

COOPER, P. J. The petitioner is imprisoned under a complaint charging him with unlawfully practicing the trade of plumbing in the city of San Jose, in the county of Santa Clara, without first having obtained a certificate from the board of plumbing examiners authorizing him so to do, he being a journeyman plumber, contrary to the provisions of an ordinance of said city in relation to plumbing and drainage, a copy of which ordinance is set forth in the petition.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It is claimed that the ordinance, in so far as it provides for the appointment of a board of plumbing examiners, and the issuance of a certificate by them, and the fixing of a penalty for the violation of its terms in this regard, is in conflict with the general laws of the state, and therefore void. This is the only question in the case which we deem it necessary to decide. The ordinance provides as follows: "It shall be unlawful for any master plumber or journeyman plumber to practice his trade in the city of San Jose without first obtaining a certificate from the board of plumbing examiners. To obtain such certificate it shall be necessary for each plumber to pass a satisfactory examination before the said board of plumbing examiners, showing his knowledge and ability to do work as a master plumber or journeyman plumber in accordance with the latest and most approved method of sanitary plumbing. Said board of plumbing examiners shall consist of the plumbing inspector and six other members, to be appointed by the board of police and fire commissioners, to be submitted. They shall all be practical plumbers, three to be journeyman and three to be employers, and each of the members of said board to pass an examination under the supervision of the board of police and fire commissioners. No person shall be eligible to an appointment on the board of plumbing examiners until he shall have first passed a satisfactory examination the same as provided in this section for obtaining a certificate for practicing plumbing." It will be seen that under the said ordinance the board of plumbing examiners shall consist of the plumbing inspector, and six other members to be appointed by the board of police and fire commissioners. This is the board of plumbing examiners authorized by the ordinance to give the certificate, and the failure to obtain such certificate is the omission which it is claimed constitutes a crime, and for which the prisoner is held in custody.

If the charter of the city of San Jose confers upon the mayor and common council the power to appoint a board of plumbing examiners, such power is by implication under the general power to enforce police or sanitary regulations, for there is no language in the charter directly granting such power. If we were to hold that the mayor and common council have such implied power under the charter, it is clear that such power cannot be delegated to the board of police and fire commissioners or to any one else. It is elementary that the common council of a municipal corporation in whom certain specific powers are vested by the charter cannot delegate the trust so vested in such common council to other parties not named in the charter; and it is not necessary to cite authorities to sustain such proposition. The board of police and fire commissioners consists of five members appointed by the mayor. The charter expressly gives said board of police and fire commissioners certain powers, but we look in vain for any authority given said board to appoint a board of plumbing examiners. The powers of such board relate to the police and fire departments, the maintenance of law and order, the protection of the buildings in said city from fire; the superintending of the laying and erection of electric telegraph and telephone wires; the maintenance of fire alarm and police telegraph and telephone stations and apparatus; and other similar matters. There is not a word in the charter in any way granting to the board of police and fire commissioners any authority as to the construction of buildings, the plumbing thereof, or as to any other purely sanitary matters. The charter provides for a board of health, to consist of five members, who shall each be a duly licensed physician. It states: "The board of health shall exercise a general supervision over the health of the city, with full power to use all measures necessary to promote the cleanliness and sanitary conditions thereof; to prevent the introduction into the city of malignant or infectious diseases, and to remove or otherwise dispose of any person or animal attacked by any such disease, and to adopt in reference to such person or animal any restrictions, regulations or measures deemed advisable. Said board shall adopt and enforce such forms and regulations as in their judgment will secure reliable vital and mortuary statistics; shall have the supervision of all persons engaged or appointed to carry out any of the powers conferred on said board."

The Legislature of the state passed a general law, approved March 9, 1887 (St. 1887, p. 53, c. 50), entitled "An act to amend an act entitled 'An act to grant to boards of health or health officers in cities and cities and counties the power to regulate the plumbing and drainage of buildings, and provide for the registration of plumbers,' approved March 3, 1885, by amending section 1 and 2 thereof." This act provides:

"Section 1. It shall not be lawful for any persons to carry on business or labor as a master or journeyman plumber in any incorporated city or in any city and county in this state, until he shall have obtained from the board of health of said city or city and county a license, authorizing him to carry on business, or labor as such mechanic. A license so to do shall be issued only after a satisfactory examination by the board of each applicant upon his qualifications to conduct such business, or to so labor. All applications for license, and all licenses issued, shall state the name in full, age, nativity, and place of residence of the applicant or person so licensed. It shall be the duty of the secretary of each board of health to keep a record of all such licenses, together with an alphabetical index to the same.

"Sec. 2. A list of all licensed plumbers shall be published in the yearly report of the health officer or board of health."

The act just quoted makes it the express duty of the board of health in any incorporated city to examine plumbers, and to issue a license to them if found qualified after such examination. The law is general, uniform in its operation, and applies to every board of health in every incorporated city and every city and county in the state. The ordinance of the city of San Jose attempting to delegate to the board of police and fire commissioners the power to appoint a board of plumbing examiners to examine and issue licenses to plumbers is in conflict with the general law, and hence void. In re Desanta, 8 Cal. App. 295, 96 Pac. 1027. See, also, People ex rel. Wilshire v. Newman, 96 Cal. 605, 31 Pac. 564. The general law provides the machinery by which a plumber may be examined and a license issued to him. It makes it unlawful for any person to labor as a journeyman plumber until he shall have obtained a license from the board of health of the city or city and county in which the labor is to be performed. It is not charged, nor even intimated, in the complaint in this case that the petitioner has not procured such license under the general law.

It follows that the prisoner must be discharged, and it is so ordered.

We concur: HALL, J.; KERRIGAN, J.

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11 Cal. App. 181

DINGLEY et al. v. BUCKNER, Sheriff.

(Civ. 608.)

(Court of Appeal, Third District, California. Aug. 21, 1909.)

1. INJUNCTION (§ 55*)—GROUNDS—INJURY TO BUSINESS.

Under Code Civ. Proc. § 526, providing that an injunction may be granted when it appears by the complaint that plaintiff is entitled to the relief demanded, and such relief consists in restraining the commission or continuance of the act complained of, or where the commission or continuance of some act would produce waste or great irreparable injury to plaintiff, a complaint averring that plaintiffs were in possession and entitled to the possession of the necessary appliances connected with a building, used in conducting a creamery business; that they purchased daily large quantities of cream from neighboring farmers, and manufactured the same into butter, and shipped it to the city, where it was sold daily to a large number of customers, and that under a writ of attachment defendant, as sheriff, took possession of the property described, and was about to close the building, whereby plaintiff's business would be destroyed and all the patrons would be lost and great damage would result, stated a good ground for injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 108, 109; Dec. Dig. § 55.*]

2. INJUNCTION (§ 118*)—PLEADING—ALLEGATION OF INSOLVENCY.

In an application for an injunction, an allegation of defendant's insolvency is not necessary where it appears in legal contemplation that the damage sought to be enjoined will be irreparable.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 236; Dec. Dig. § 118.*]

3. INJUNCTION (§ 1*)—OFFICE OF WRIT.

The office of a writ of injunction is to restrain the wrongdoer, not to punish him after the wrong has been done or to compel him to undo it.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 1; Dec. Dig. § 1.*]

4. INJUNCTION (§ 136*)—IRREPARABLE INJURY.

While injunction is not a proper remedy for the recovery of possession of personal property, the court may interfere by way of interlocutory injunction to prevent irreparable mischief, though this may involve a change of actual possession, and hence, though defendant was in the possession of plaintiff's place of business, injunction would lie to prevent any further interference with the operation of the business, where the destruction thereof by defendant's acts was threatened.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 136.*]

5. APPEAL AND ERROR (§ 1033*)—PERSONS ENTITLED TO ALLEGE ERROR.

Defendants could not complain on appeal because plaintiff received less than he was entitled to.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4061; Dec. Dig. § 1033.*]

6. INJUNCTION (§ 172*)—MOTION TO DISSOLVE—PLEADING—DENIALS ON INFORMATION AND BELIEF.

While denials on information and belief are authorized by Code Civ. Proc. § 437, as matters of pleading, and are sufficient to raise an issue, they are not such denials as will serve as the basis of a motion to dissolve an injunction on the ground that the equities of the bill are denied by the answer.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 172.*]

Appeal from Superior Court, Kings County; John J. Covert, Judge.

Action by W. E. Dingley and others against W. V. Buckner, as sheriff of the county of Kings. From an order dissolving a preliminary injunction, plaintiffs appeal. Reversed.

F. J. Walker and M. L. Short, for appellants. H. Scott Jacobs, for respondent.

BURNETT, J. The appeal is from an order dissolving a preliminary injunction. The grounds upon which the motion for a dissolution was made were stated as follows: "(1) That said plaintiffs, or any of them, are not entitled to any injunction in the above entitled action. * * * (4) That there are no sufficient grounds for the retention of said injunction. (5) That said injunction was and is an abortive injunction." The second and third grounds stated are omitted, as they are covered by the first.

1. The facts alleged in the complaint are sufficient, we think, to justify the court in issuing the injunction. It appears by express averment that the plaintiffs were the owners, in the possession and entitled to the possession of the necessary appliances in-

cluding a boiler and gasoline engine connected with a certain building, and all of which were used in conducting a creamery business and were necessary therefor; that plaintiffs purchased daily large quantities of cream from the neighboring farmers and dairymen, and manufactured said cream daily into butter and shipped it at least three times a week to the city of Los Angeles where the same was contracted to be delivered and where it was sold daily to a large number of customers. "That on the 22d day of September, 1908, the said W. V. Buckner, as sheriff of the county of Kings, and under a writ of attachment issued out of the superior court of this county in the case of M. Fraga v. J. H. Weger and C. K. Sorenson, * * * took possession of all of the said property described in paragraph 1 of this complaint, and threatens to, and is about to, and will, take possession and close said building in which said creamery business is conducted unless restrained by this court from so doing"; that by reason thereof "the whole of said creamery business will be destroyed, and all of the patrons of said creamery will be lost and all of the customers of said creamery for butter will be lost * * * and great waste and damage will result, and irreparable injury and mischief will result to plaintiffs not susceptible of computation or compensation in a suit at law, and all of plaintiffs' rights and interests would be destroyed."

The complaint presents one of the most unquestioned grounds for the application to a court of equity for the writ of injunction. No proceeding at law can afford an adequate remedy for the destruction of one's business. The action of claim and delivery might result in the recovery of the possession of the personal property taken or its value in case delivery could not be had, but the judgment would not include the most important element of loss involved in this proceeding. Section 526 of the Code of Civil Procedure provides that "an injunction may be granted in the following cases: (1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief or any part thereof, consists in restraining the commission or continuance of the act complained of either for a limited period or perpetually. (2) When it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, great or irreparable injury to the plaintiff." Not only a part but virtually all of the relief demanded here consists in "restraining the continuance of the act complained of," to wit, the possession of said property and thereby an interference with the operation of the plant and the consequent destruction of the business. It is no answer to say that plaintiffs might go out into the market and replace the said personal property. It would be just as legitimate to argue that they might lease other premises or go into some other business. If the fundamental rights of the individual to liberty and the possession of property are to be regarded, plaintiffs obviously could not be precluded by a trespasser from conducting that particular business at that particular place and with the appliances of their own choosing. If authority should be deemed necessary for a proposition so manifest, we find it in the three cases cited by appellants: Watson v. Sutherland, 72 U. S. 74, 18 L. Ed. 580; North v. Peters, 138 U. S. 271, 11 Sup. Ct. 346, 34 L. Ed. 936; and Bolsa Land Co. v. Burdick, 151 Cal. 254, 90 Pac. 532, 12 L. R. A. (N. S.) 275. In the first of these a bill in equity was filed by one Sutherland to enjoin the further prosecution of certain writs of fieri facias as levied by the sheriff Watson, and so to prevent irreparable injury to himself, to wit, the destruction of his business as a merchant. The answer, among other things, set up the defense that the action of trespass furnished a complete and adequate remedy at law, as the complainant could easily obtain in the market property of the same description, quantity, and quality which would suit his purpose as well as those levied upon. The court, however, in reply to this, declared: "How could Sutherland be compensated at law, for the injuries he would suffer, should the grievance of which he complains be consummated? * * * Commercial ruin to Sutherland might, therefore, be the effect of closing his store and selling his goods, and yet the common law fail to reach the mischief. To prevent a consequence like this, a court of equity steps in, arrests the proceedings in limine, brings the parties before it, hears their allegations and proofs, and decrees, either that the proceedings shall be restrained, or else perpetually enjoined. The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case must depend altogether upon the character of the case as disclosed in the pleadings. In the case we are considering, it is very clear that the remedy in equity could alone furnish relief, and that the ends of justice required the injunction to be issued." And similarly in the North Case, supra, in response to the contention that either the action of trespass or replevin furnished an adequate remedy, it is said: "It does not need argument to show that neither of these actions would afford as complete, prompt, and efficient a remedy for the destruction of the business, which, with the goods levied upon, constituted the appellee's entire estate and pecuniary resources, as would be furnished by a court of equity in preventing such an injury." In the Bolsa Land Company Case it was held by our Supreme Court that "an injunction will lie, at the instance of the owners of an inclosed tract of land used as a game preserve, to restrain a large number of persons who were acting under an agreement and conspiracy between themselves from entering upon the land and committing continuous trespass thereon," and that these acts "constituted such an invasion of plaintiff's asserted rights as to have justified the continuance of the preliminary injunction." In fine, the rule as to the remedy at law is as stated in Story's Eq. Jur. § 33: "It must reach the whole mischief and secure the whole right of the party in a perfect manner at the present time and in future; otherwise equity will interfere and give such relief and aid as the exigency of the particular case may require."

In reply to the criticism of respondent that there is no allegation of the insolvency of defendant, it is sufficient to say that this is a false quantity where it appears in legal contemplation that the damage is irreparable. Wharf & Lighter Co. v. Simpson, 77 Cal. 286, 19 Pac. 426; Kellogg v. King, 114 Cal. 378, 46 Pac. 166, 55 Am. St. Rep. 74. None of the cases cited by respondent, as we understand them, is at all opposed to the foregoing views.

2. The contention that the injunction was "abortive" is based upon the consideration that the act which was sought to be enjoined, to wit, the taking possession of the personal property, had already been accomplished, and the temporary injunction had the effect of changing such possession, and to that extent was a mandatory injunction and should not have been issued, and also that it permitted "a sort of joint possession between the sheriff and appellants—a thing absolutely unheard of in legal procedure." In support of the first ground are cited Stewart v. Superior Court, 100 Cal. 543, 35 Pac. 156, 563; Hatch v. Raney (Cal. App.) 100 Pac. 190, and San Antonio W. Co. v. Bodenhamer, 133 Cal. 248, 65 Pac. 471. In the Stewart Case the question was whether an appeal bond operated to stay execution of an injunction, and in that connection the court took occasion to state what as a general rule is true that: "The office of a writ of injunction, as its name imports, is peculiarly a preventive and not a remedial one. It is to restrain the wrongdoer, not to punish him after the wrong has been done or to compel him to undo it." In the Hatch Case the wrong had been entirely consummated more than a year before the action was brought and hence it was not a case for injunction. The San Antonio Water Company Case was an action involving real property and under the facts was properly decided. It is also true, as stated therein, that injunction "is not a proper remedy for recovery of possession of personal property." It is just as true, however, as affirmed in said decision, that the court may interfere "by way of interlocutory injunction for the protection of legal rights and the prevention of irreparable mischief although this may involve a change of the actual possession. 2 High on Injunctions, § 1106." It is clear that here the wrong was a continuous one, and, as we have seen, the action was to prevent any future interference with the operation of the business and the possession of the said personal property was merely incidental to the primary purpose of the action. It would certainly be intolerable that equity should refuse to interfere to prevent the destruction of one's business for the reason that the despoiler has acted so speedily as to take possession of the appurtenances of said business before the owner is aware of his purpose or can move to circumvent it. Neither could respondent complain because the injunction provided that "the said sheriff shall be permitted to hold possession of said property by placing a keeper in possession thereof subject to the above restrictions." Plaintiffs, under the showing made, in our opinion should have been allowed to conduct the business without the presence of the keeper, but it surely does not lie in the mouth of defendant to complain because plaintiffs received less than they were entitled to.

3. Under the circumstances, we think the court should not have dissolved the injunction. By the dissolution, the purpose of the action was defeated and the continuance of the injunction in force could not have prejudiced the rights of the plaintiff in the attachment suit.

In High on Injunctions, § 1511, it is said: "If the continuance of the injunction, even admitting defendant's answer to be true, cannot prejudice or impair his rights, and on the other hand its dissolution might seriously impair the rights of complainant, the motion to dissolve upon the coming in of the answer should not be allowed." And, again (section 1512): "It is also held that where the injunction is not merely ancillary to some other or principal relief sought by the action, but is itself the principal relief desired and its dissolution would be equivalent to a dismissal of the action, if a reasonable doubt exists in the mind of the court whether the bill is sufficiently negatived by the answer, it is proper to refuse a dissolution, and continue the injunction to the hearing." If the material allegations of the complaint had been positively denied by the answer under the rule, the action of the court below could not be disturbed. But the denial of plaintiffs' ownership is only on information and belief, and the answer admits that defendant took possession of the property. Therefore we have a case for the principle announced in Porter v. Jennings, 89 Cal. 445, 26 Pac. 967: "Certain allegations of the complaint are denied upon information and belief. While denials in this form are authorized by section 437 of the Code of Civil Procedure as matters of pleading, and are sufficient to raise an issue, yet they are not such denials as will serve as the basis of a motion to dissolve an injunction on the ground that the equities of the bill are fully denied by the answer. Judge Story says: 'Such negation affords no presumption against the plaintiff's claim, but merely establishes that the defendant has no personal knowledge to aid it or disprove it.'"

As we view it, we think it was an injustice to plaintiffs to dissolve the injunction, and the order is therefore reversed.

We concur: CHIPMAN, P. J.; HART, J.

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11 Cal. App. 155

GRAY et al. v. TIMES-MIRROR CO.

(Civ. 546.)

(Court of Appeal, Third District, California. Aug. 21, 1909.)

1. Dismissal and Nonsuit (§ 60*)—Want of Prosecution.

Nisi prius courts have inherent power to dismiss pending actions when not diligently prosecuted.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 140; Dec. Dig. § 60.*]

2. Dismissal and Nonsuit (§ 60*)—Want of Prosecution.

Where plaintiffs' attorneys, for more than 13 months after defendant had sent them copies of the papers, pleadings, etc., to replace the destroyed record, and offered to stipulate that such papers, etc., might be substituted in place of the record, failed to proceed to have the record restored, the court properly dismissed the action for want of prosecution; that a large amount of business had accumulated in the office of plaintiffs' attorneys, being no excuse.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 140, 141; Dec. Dig. § 60.*]

3. Dismissal and Nonsuit (§ 60*)—Want of Prosecution—Excuses—Illness of Judge.

That the presiding judge of the department to which the action was assigned was too ill to tend to his judicial duties was not a reasonable excuse for plaintiffs' delay in securing an order for restoration of a destroyed record, since the signing of the order on presentation of proper stipulation of attorneys would have been a mere formal act, which could have been performed at any time by any of the 12 judges of the court.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 142; Dec. Dig. § 60.*]

4. Dismissal and Nonsuit (§ 60*)—Want of Prosecution.

It being the duty of plaintiffs to take all steps necessary to secure a decision on a demurrer to the complaint, that they could not force a decision on the demurrer did not excuse their lack of diligence in securing a restoration of the record which had been destroyed.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 142; Dec. Dig. § 60.*]

5. Dismissal and Nonsuit (§ 60*)—Want of Prosecution.

The party moving to dismiss for want of diligence in prosecuting an action need not affirmatively show the extent of the inconvenience or injury he has suffered, or may suffer, by the delay, since the law will presume injury from unreasonable delay.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 140, 141; Dec. Dig. § 60.*]

6. Dismissal and Nonsuit (§ 60*)—Want of Prosecution.

That defendant did not protest against plaintiffs' delay in prosecution was no answer to a motion to dismiss for such delay.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 142; Dec. Dig. § 60.*]

Appeal from Superior Court, City and County of San Francisco; Geo. H. Buck, Judge.

Action by C. F. Gray and another against the Times-Mirror Company. From a judgment dismissing the action, plaintiffs appeal. Affirmed.

Fisher Ames and Ames & Manning, for appellants. Hunsaker & Britt, for respondent.

HART, J. The court below rendered and caused to be entered a judgment dismissing this action on the ground that plaintiffs had not prosecuted the same with reasonable diligence. This appeal is by the plaintiffs from said judgment on a bill of exceptions.

There is no dispute with regard to the facts; and, as they are fully and accurately narrated in the brief of counsel for the respondent, we shall here state them in the language of said brief:

"The action is one to recover damages claimed to have been sustained by the plaintiffs by reason of the publication by defendant of an alleged libelous article in the Los Angeles Sunday Times July 3, 1904. The complaint was filed September 20, 1904. After defendant had filed a demurrer, an amended complaint was filed February 7, 1905, to which defendant filed a demurrer February 15, 1905, which was sustained May 11, 1905. A second amended complaint was filed May 25, 1905, to which defendant demurred June 3, 1905. This demurrer was under submission and undisposed of April 18, 1906, on which day all of the pleadings and records in the cause were destroyed by the general conflagration of that date.

"September 23, 1906, the attorneys for defendant received from Mr. Ames a letter dated September 22, 1906, requesting copies of the papers in the action, together with a stipulation that they might be substituted in place of the destroyed originals. In this letter the writer, among other things, said: 'All the public court records and all of my private record papers in the case of Gray et al. v. The Times-Mirror were destroyed by fire. Will you kindly send me copies of your papers, together with stipulation that they may be substituted in place of the destroyed originals? I have been unable to give this matter attention before this time on account of the terrible confusion incident to the loss of all papers in my office and the total loss of all our public records. Kindly send copies of all briefs and pleadings in the case. Please send bill for copies of papers, and I will promptly send check for the same.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

An early reply will be esteemed a great favor.' Immediately upon the receipt of Mr. Ames' letter directions were given to have a copy of the office files of Hunsaker & Britt of the papers in said action made for Mr. Ames; and on October 5, 1906, copies of all of the papers requested by Mr. Ames, including the briefs and a copy of all entries which had been made in the office docket or register of actions kept by Hunsaker & Britt relating to the proceedings in said cause were sent by mail to Mr. Ames, together with a letter dated October 5, 1906, in which, after stating that the copies had just been completed and compared, it was said: 'This copy was made by our office force, and there is no charge for it. We are also sending a copy of the entries in our register of actions. If you will take such portions of this copy as you desire to have substituted, and prepare the stipulation, we shall be pleased to sign it.' October 10, 1906, Mr. Ames wrote Mr. Hunsaker a letter in which he said: 'Many thanks for your kindness, courtesy, and promptness in forwarding these copies. As soon as I can examine them I will prepare a stipulation embracing such of the papers as are necessary to be filed in order to restore the record in our superior court, and forward same to you for signature.'

"Nothing further was done until November 14, 1907—13 months and 4 days after the date of the letter of Mr. Ames acknowledging receipt of the copies of the record—on which date Messrs. Ames & Manning mailed to Hunsaker & Britt the 'petition, papers, stipulation, and order restoring records' in the case, with the request that they sign the stipulation. November 21, 1907, Hunsaker & Britt wrote Messrs. Ames & Manning that they had inserted certain papers which had been omitted, which constituted a part of the record, and had modified the proposed stipulation for the restoration of the record by inserting the following clause: 'But by entering into this stipulation defendant does not waive its right to move to dismiss the action for the failure of plaintiffs to have prosecuted the same with diligence, or in any manner waive its right to move to dismiss the action for the delay of plaintiffs in instituting proceedings for the restoration of the record in said cause.' The stipulation as thus modified was filed and an order restoring the record made December 9, 1907. December 20, 1907, defendant served notice of its motion to dismiss the action, on the grounds that the plaintiffs had not prosecuted the same, and had not instituted or prosecuted the proceedings for the restoration of the record, with reasonable or any diligence, and that plaintiffs had not given an undertaking, as required by section 1 of the act entitled 'An act concerning actions for libel and slander,' approved March 23, 1872, as amended April 16, 1880, and that the record, as restored, fails to show that any such undertaking was given by plaintiff."

The reasons upon which resistance to the motion is urged are set forth in an affidavit made by Mr. Fisher Ames, counsel for the plaintiffs. They are as follows: "At the time of receiving said papers a large amount of business had accumulated in affiant's office, by reason of the holidays succeeding the fire and earthquake of April, 1906, and by reason of the unsettled condition of all business affairs in San Francisco, and the imperfect facilities of transacting business, and the difficulties under which the same could be transacted; that all of affiant's papers, documents, and memoranda, in all cases then pending, in which affiant was acting, or had acted, as attorney, were totally destroyed, and that it was extremely difficult, and in many instances nearly impossible, for affiant, to make any headway or progress in the transaction of legal business in which he was interested; that affiant acted with all possible dispatch in the transaction of business in his office, attending first, as it became necessary, to matters which were most pressing; that, owing to the prolonged ill health of the judge of this department, which began in the latter part of May, 1907, and continued until about the month of October, 1907, during which time the said judge was almost continuously absent from the bench by reason of sickness, affiant delayed the application to restore the records in this action until the said judge was restored to health, and had returned to the bench and resumed his judicial labors; that affiant deemed it proper that this matter should be heard by the said judge of this department for the reason that defendant's demurrer to plaintiffs' second amended complaint was pending before said judge and undecided, the same having been submitted to the court for consideration and decision on briefs duly prepared, served, and filed on or about the 12th day of April, 1906, a few days before the fire and earthquake."

Section 581a, Code Civ. Proc., added by St. 1907, p. 712, c. 376, § 2, and section 583, Code Civ. Proc., are not, as is readily observable from the statement of the facts, involved here. But that nisi prius courts possess inherent power to dismiss pending actions upon the ground that they have not been diligently prosecuted is a proposition repeatedly confirmed and well settled in this state. Kubli v. Hawkett, 89 Cal. 638, 27 Pac. 57; First National Bank v. Nason, 115 Cal. 626, 47 Pac. 595; Stanley v. Gillen, 119 Cal. 176, 51 Pac. 183; People v. Jefferds, 126 Cal. 296, 58 Pac. 704; San Jose L. & W. Co. v. Allen, 129 Cal. 247, 61 Pac. 1083; Mowry v. Weisborn, 137 Cal. 110, 69 Pac. 971; Galbraith v. Lowe, 142 Cal. 295, 75 Pac. 831; Marks v. Keenan, 148 Cal. 161, 82 Pac. 772; Bernard v. Parmelee, 6 Cal. App. 537, 92 Pac. 658; In re Heywood's Estate, 154 Cal. 312, 97 Pac. 825; Focha v. Focha's Estate, 8 Cal. App. 707, 97 Pac. 321.

The only question presented here for determination is, therefore, Did the court's order dismissing the action involve an abuse of discretion under the facts as the record discloses them? The facts constrain a negative answer to the question.

It is manifest that the most serious difficulty which could confront plaintiffs in properly proceeding to a prosecution of the action, after the destruction of the record in this cause by fire, was in the procurement of copies of the papers, pleadings, orders, etc., to be substituted as the record herein in lieu of the destroyed record; but, this difficulty having been readily overcome through the prompt assistance of the attorneys for the respondent, there was nothing remaining to be done but to secure a stipulation from the latter consenting to the substitution of the copies for the lost record, and then an order of the court restoring said record. On October 5, 1906, the attorneys for the respondent addressed to the attorneys for the appellants a letter in which they expressed a willingness to enter into a written stipulation authorizing the copies of the papers procured from them to be filed as the record in the cause. This letter was answered by Mr. Ames in a letter under date of October 10, 1906. There was then, it will be seen, nothing in the way to prevent the restoration of the record within a reasonable time after the time which would be required to prepare the stipulation, transmit it to the attorneys for the respondent at Los Angeles, and secure their promised signature thereto and its return. But counsel for the appellants, after having been assured that the stipulation assenting to the restoration of the lost record would be readily signed by counsel for the respondent, made no further move in the direction of restoring the record until the 14th day of November, 1907, a few days beyond 13 months subsequently to the date of the letter of Mr. Ames to the attorneys for the defendants, acknowledging the receipt of the papers, orders, etc., constituting the proposed substituted record, when the former sent to the latter for their signatures a stipulation consenting to the substitution of said papers and orders, etc.

There is nothing in the affidavit of appellants' counsel which suggests any valid excuse for this unreasonable delay; or, in other words, there is nothing therein from which this court would be justified in declaring that the court below, in refusing to accept the excuse offered by the appellants, abused its discretion. The fact that the general confusion and unsettled condition of affairs in San Francisco for some weeks or months after the occurrence of the great misfortune to that city had caused an unusually large amount of business to accumulate in the law offices of counsel for the appellants was, of course, a proper matter for consideration by the court in the determination of the motion to dismiss. But we do not hesitate to say that it was a matter entitled to no very great weight, since it is obvious that the very same reason could be urged in almost any case and, if valid, operate to interminably postpone the final disposition of such cause. In other words, we are unable to appreciate the logic of the plea that, because an attorney has other matters to which he prefers to give professional attention, he should be justified in neglecting, to the great inconvenience and detriment perhaps of the adverse party, some particular suit or action which he has instituted.

Nor is the fact that the presiding judge of the department of the superior court to which the action was assigned was too ill to attend to his judicial duties from May, 1907, until October of the same year a reasonable excuse for the delay in securing the order for the restoration of the record. There are, as this court judicially knows, 12 judges of the superior court in and for the city and county of San Francisco. As counsel for the respondent well say in their brief, "the signing of the order upon presentation of the proper stipulation would have been a mere formal act, which could have been performed at any time by any of the 12 judges of the superior court" of said city and county. There was therefore no overruling necessity for the postponement of the matter until the judge to whose department the cause had been assigned for trial had been restored to health sufficiently to give attention to his official duties. And it may be suggested that, if the continued illness of a judge were a valid excuse for inertness in pressing an action to issue or trial, the delay might be interminable, or at least involve an indefinite postponement of the prosecution of the action, since in such case whether it would or would not be brought to issue or trial would rest upon what might be the uncertain contingency of the recovery of the judge.

The demurrer to the second amended complaint was under submission and undecided at the time of the destruction of the record. This demurrer, by order of the court, was submitted upon points and authorities to be filed by the respective parties, the reply to the reply brief of plaintiffs having been filed on April 4, 1906, within 12 days after the respondent's counsel were served with a copy of the points and authorities of plaintiffs. It is clear that a decision on the demurrer could not well have been had until the restoration of the record, including the points and authorities addressed to the question raised by the demurrer. And even if the court could have done so, it would have been an idle act to have rendered a decision on the demurrer before the record was restored or competent secondary evidence thereof filed in lieu of the destroyed record (St. 1906, Ex. Sess. p. 73, c. 55) and, therefore, before it could be known that the record would be restored at all, or that there was any intention of restoring it, or that further steps would be taken to bring the cause to issue and trial. Counsel for plaintiffs declare that they could not force a decision on the demurrer. This proposition cannot be disputed, yet it was the duty of plaintiffs, the moving actors in the litigation, to take all the steps necessary to secure a decision on the demurrer. It was not the duty of the defendant to do so. San Jose L. & W. Co. v. Allen, 129 Cal. 247, 61 Pac. 1083; Kubli v. Hawkett, 89 Cal. 638, 27 Pac. 57; Mowry v. Weisborn, 137 Cal. 110, 69 Pac. 971. In the last-mentioned case the Supreme Court says: "It is true that the defendant may bring about a trial of the issue presented by his demurrer, but he is not under any duty to do so; his attitude in the case is involuntary, and quite different from that of the plaintiff; he is put to a defense only, and can be charged with no neglect for failing to do more than meet the plaintiff step by step. The plaintiff is the party charged with the duty of diligence in prosecuting the action, as the issues are presented. The case is at issue, whether it be an issue of law or an issue of fact, and when at issue the duty is upon the plaintiff to diligently pursue the action." In the case of In re Heywood's Estate, 154 Cal. 315, 97 Pac. 826, where a motion was made to dismiss certain appeals for want of prosecution, it is said: "Upon the hearing it was argued that it was the duty of respondents to restore the record, and that until they did so the appellants were justified in delaying the prosecution of the appeal. The contention is unfounded. * * * The appellant was endeavoring to overthrow those orders, and a restoration of the record thereof was by her considered necessary to enable her to do this. The duty was on her to effect a restoration of the records if she would escape the responsibility for unreasonable delay in the prosecution of her appeals. The final question, therefore, is, has she been sufficiently diligent in seeking such restoration, or, if negligent, is her neglect excusable?"

There is some discussion in the briefs of the proposition whether the respondent suffered any material inconvenience or hardship by the delay. The discussion is without force upon the only question which is involved here—whether the facts disclose an abuse of discretion by the trial court in the granting of the motion. We do not understand it to be necessary for the party moving to dismiss for want of diligence in prosecuting an action to affirmatively show the extent of the inconvenience or injury he has suffered, or may suffer, by reason of the delay. The law will presume injury from unreasonable delay. It is the policy of the law to favor and encourage a prompt disposition of litigation, and this policy is the outgrowth of sound and substantial reasons. The doctrine of laches as a bar to the assertion of stale claims and statutes of limitations rests upon the same reasons or principle. A party against whom an action is instituted is entitled to as speedy a disposition thereof as is consistent with his own and the rights of the plaintiff; and, if he who starts the law in motion does not with reasonable promptness pursue all the steps necessary to bring the litigation to an end, he should suffer the penalty of his default. It is no answer to say that the respondent did not, during the period of the delay, utter a word of protest against such delay. As we have said, it was the duty of the plaintiff to act and to act with reasonable promptness and diligence. It was not the duty of the respondent to make any move except such as the law requires it to make in response to the movements of plaintiff at the various stages of the litigation. As stated, the facts do not disclose, in our opinion, an abuse of discretion by the trial court in dismissing this action. Nearly all the cases cited by appellants are where the Supreme Court sustained the refusal of the trial court to grant the motion to dismiss for want of diligence in prosecuting the actions, merely holding that the facts failed to disclose an abuse of discretion. In Ferris v. Wood, 144 Cal. 429, 77 Pac. 1037, the judgment of dismissal was reversed because it clearly appeared that the facts in that case reasonably accounted for and excused the delay in serving the summons. But many of the cases relied upon by the appellants were reviewed by this court in Bernard v. Parmelee, supra, where it is said: "Each case must, as we have seen from all the authorities, rest upon its own peculiar circumstances, or, as it is expressed in First Nat. Bank v. Nason, 115 Cal. 626, 47 Pac. 595, 'each particular case presents its own peculiar features, and no iron-clad rule can justly be devised applicable alike to all.'"

The judgment appealed from is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

156 Cal. 353

MOORE v. TROTT et al. (L. A. 2,103.)

(Supreme Court of California. Oct. 8, 1909. Rehearing Denied Nov. 3, 1909.)

1. Deeds (§ 61*) — Delivery — Deposit for Delivery on Death of Grantor.

A transfer of a fee-simple estate, subject to a life estate in the grantor, to a stranger to the grantor's blood may be effected by a deed delivered by the grantor to a third person with instructions to deliver it to the grantee at the grantor's death, if the delivery to the third person is absolute, so that the deed is beyond the power of the grantor to recall or control in any event.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 140, 141; Dec. Dig. § 61.*]

2. Deeds (§ 66*)—Delivery—Deposit for Delivery on Death of Grantor—Questions for Jury.

Where the instructions given a third person to whom a deed is delivered by the grantor for delivery to the grantee are in writing, the effect of the transaction depends on the construction of the instrument, and is a question of law.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 127, 633; Dec. Dig. § 66.*]

3. Deeds (§ 61*)—Delivery—Deposit for Delivery on Death of Grantor.

A grantor delivered his deed to a third person, with directions to deliver to the grantee in case the grantor did not return from a hospital, where he was going for an operation, and requested the third person to keep to himself the name of the grantee until the delivery of the deed after the grantor's death. The grantor returned from the hospital and transacted various business matters, but his health rapidly declined, and in less than a month he died without communicating to the third person any other instruction. The grantor frequently stated that he wished the grantee to have the property described in the deed. *Held*, that the deed was not effectual, and a delivery by the third person to the grantee after the grantor's death was invalid.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 140, 141; Dec. Dig. § 61.*]

4. Escrows (§ 7*)—Duties of Depositary.

The depositary of a deed is the agent and fiduciary of both grantor and grantee, and where the prescribed condition for delivery is performed, he must deliver the deed to the grantee, and where it is not performed, he must return it to the grantor.

[Ed. Note.—For other cases, see Escrows, Cent. Dig. § 16; Dec. Dig. § 7.*]

5. Evidence (§ 385*)—Parol Evidence—Admissibility.

Declarations by a grantor, delivering a deed in escrow with written instructions made to a third person expressive of his intentions and wishes, were inadmissible to modify the reciprocal rights and duties of the grantor and the depositary as defined in the instructions.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1757, 1758; Dec. Dig. § 385.*]

6. Deeds (§ 194*)—Delivery—Presumptions—Evidence.

The presumption of delivery of a deed arising from possession of the deed by the grantee is overcome by evidence that the grantor delivered the deed to a third person for delivery on specified conditions, and that the third person, in violation of the instructions, delivered the deed to the grantee.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 577; Dec. Dig. § 194.*]

In Bank. Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by Mary O'Connor Moore, administratrix of Pat Moore, deceased, against Mrs. George Trott and others. From an order denying a new trial after verdict for defendants, plaintiff appeals. Reversed.

Wm. Shipsey (Peter F. Dunne, of counsel), for appellant. Sullivan & Sullivan, Theo. J. Roche, C. U. Armstrong, and Thomas A. Norton, for respondents.

BEATTY, C. J. This is an action to quiet title to certain lands formerly the property of Patrick Moore, deceased. The plaintiff is Moore's widow and administratrix, and the defendant Mrs. George Trott is the person named as grantee of said lands in two deeds which, on the 10th of May, 1906, were mailed by Moore to P. O. Tietzen, cashier of the bank at Santa Maria, under cover with the following letter: "Arroyo Grande, May 10, 1905. Mr. P. O. Tietzen. Dear sir and friend, I am sending you some deeds to lands that I have made to be delivered to the parties in case of my not returning from the California Hospital Los Angeles where I am going for to have an opperation performed I also enclose you 1000 shares of Pinal Stock to be turned over to Annie Gray for the purpose of paying for her education at Berkley and would like very much if you would take charge of it for her and see that she gets it all right. The Deeds that I am sending you, you will please lock them in your safe and in case I should die to immediately hand them to the parties named telling them to put them of record as soon as possible. The other Pinal reipt for stock I think is in your bank if so send it to me to the California Hospital and I will endorse and return to you as security for my indebtedness to your Bank. I am going to start today and I presume I will be there one or two days before they opperate on me so if yo mail that other certificate to me I will endorse and return it to you. you will please keep to yourself the names of the parties named in those deeds until you deliver them. After I pass in my checks and take flight for the other world from whence none return. Yours, Pat Moore." Immediately after mailing this letter Moore went to Los Angeles, where the contemplated operation was performed. Towards the end of May he was able to return to his home at Arroyo Grande, and to transact various business matters there and in San Luis Obispo, where he went to attend the June session of the board of supervisors, of which he was a member. But his health rapidly declined, and on the 18th of June he died, without ever having communicated to Tietzen any other instruction, oral or written, than those contained in his letter of May 10th. On June 22d Tietzen delivered the two deeds in question to Mrs. Trott, who filed them for record on the 23d. The sole question in the case is whether these deeds were so delivered as to pass the title to the lands in controversy to the defendant Mrs. Trott, or whether they remained inoperative for want of delivery. It was found by the superior court: "That at the time said Patrick Moore delivered said deeds to the said P. O. Tietzen as herein found he parted with all dominion over said deeds, and each of them, and reserved no right to recall or any way control said deeds, or either of them. That said deeds were delivered absolutely." Upon this and other sufficient findings judgment was entered in favor of the defendants, and plaintiff appeals from the order denying her motion for a new trial; her principal contention being that the finding here quoted is not sustained by the evidence.

It has been thoroughly established as the law of this state, by a series of decisions commencing with Bury v. Young, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186, that a valid transfer of a fee-simple estate, subject to a life estate in the grantor, may be effected by means of a deed delivered by the grantor to a third party with instructions to deliver it to the grantee at his (the grantor's) death, provided always—and this is the essential condition of the validity of such transfers—that the delivery is absolute, so that the deed is placed beyond the power of the grantor to recall or control it in any event. The finding of the superior court, it will be seen, fully supports its conclusion in favor of the validity of this transfer to Mrs. Trott, and it only remains to inquire whether the evidence in the record sustains the finding.

Moore at the time of his death was over 71 years of age. His first wife had died childless, and the plaintiff, to whom he had been married about two years, was without issue. His relation to the defendant was that of an old and intimate friend of herself and her parents. Annie Gray was a member of his own household, and the other persons named as grantees of different portions of his lands in the deeds placed with Tietzen were intimate and valued friends. Of his long-cherished design to make each of them a sharer in the estate he might leave at his death there can be no doubt, and it is equally clear from the evidence that he died in the belief that his purposes in this regard were fully effected by the deeds he had executed, and the instructions concerning them contained in his letter to Tietzen. But it is not enough that a man shall desire and intend that a stranger to his blood shall have and enjoy his real property after his death, for, unless he complies with the legal requisites of a valid transfer his wishes and intentions are unavailing, and his purpose is defeated. If, like Patrick Moore, he is unwilling to make a testamentary disposition which, if unrevoked, will pass the estate at his death, he must deliver his deed, absolutely and beyond his power to recall in any contingency, to a custodian whose duty it will be to keep it as long as the grantor lives, and then to deliver it to the grantee. Were these deeds so delivered? If Patrick Moore on his return from Los Angeles had demanded their return, could Tietzen have been justified in refusing to return them? If he could not have refused, it matters not that no such demand was made. The test of an effective delivery in such cases is the absolute relinquishment of the right of recall by the grantor in his instructions to the person charged with the duty of making the delivery. The transfer or attempted transfer of the estate being entirely gratuitous, the person named as grantee has no right beyond that which is voluntarily conferred, and the extent of that right is to be determined in every case where specific instructions are given by what passes between the grantor and his selected agent. The agent is of course bound to do what his instructions require him to do, no more, no less, and when, as in this case, his only instructions are in writing, the effect of the transaction depends upon the true construction of the writing. It is, in other words, a pure question of law whether there was an absolute delivery or not.

What, then, is the proper construction of Moore's letter? It seems very plain that Tietzen is authorized to deliver the deeds only "in case of my not returning from the California Hospital where I am going for an operation," and the implication that, if he does return, the deeds are to be at his disposal is clear. But counsel for respondent contends that a different intention is revealed by subsequent clauses of the letter. He relies greatly upon the direction to lock the deeds in Tietzen's safe, "and in case I should die to immediately hand them to the parties," etc. We think that this, so far from being inconsistent with our construction of the first part of the letter, is only corroborative of it. If Moore's intention had been to part with the deed, absolutely, he would not have directed their delivery "in case I should die," for he was sure to die at some time. He would more naturally have said when I die. It is apparent that he was not without some hope of obtaining relief, more or less permanent, from the contemplated operation; and, if he had returned from Los Angeles believing himself restored to health, and had demanded a return of the deeds from Tietzen, we can conceive of no ground upon which the demand could have been resisted. The concluding part of the letter to Tietzen, which counsel agree must be read without any period after the words "until you deliver them," neither aids nor weakens our construction of the first part. The directions to "keep to yourself the names of the parties named in those deeds until you deliver them after I pass in my checks," etc., while they certainly do consist with the idea of that death which is certain to come to every man, were entirely appropriate as referring exclusively to death as the result of the operation about to be performed.

Aside from the letter to Tietzen which, as above stated contained the only instructions ever given him as to the disposition of the deeds, it was shown by the testimony of numerous witnesses that Moore wished the persons named as grantees in his deeds to have the property therein described, and that his relations to those parties, and his condition and circumstances, made them the reasonable and meritorious objects of his bounty. There is, moreover, no reason to doubt that he died believing that his deeds in the hands of Tietzen would be sufficient to accomplish his purpose, but his purpose is defeated by the fact that the delivery was not absolute. A technical but inflexible rule of law governing the transfer of real property prevents his intention from being carried out.

We have examined the cases cited by respondent, but do not deem it necessary to review or even to cite them by title. Some of them are cases of delivery of deeds in escrow, which have but little application to a case of this character. In such cases the depositary of the deed becomes the agent and fiduciary of both parties. If the prescribed condition is performed, he is obliged to deliver the deed to the grantee; if it is not performed, he must return it to the grantor. Howlin v. Castro, 136 Cal. 605, 69 Pac. 432, and Keyes v. Myers, 147 Cal. 705, 82 Pac. 304, were cases of delivery in escrow. Such cases as Gaston v. Portland, 16 Or. 255, 19 Pac. 127, in which it is held that the instructions under which a deed is delivered in escrow may be partly in writing and partly in parol, have no application, for the additional reason that in this case all the instructions were in writing. What Moore said to third persons, expressive of his intentions and wishes, cannot be held to modify the reciprocal rights and duties of Moore and Tietzen as defined by the letter of instructions. Such cases as Crocker v. Hall, 154 Cal. 527, 98 Pac. 269, and Sprague v. Walton, 145 Cal. 228, 78 Pac. 645, merely hold with respect to gifts of personal property that the intent with which the donor transfers the absolute control of the property to his donee is a question of fact, to be proved, like other questions of fact, by the surrounding circumstances, including the declarations of the donor. They might be in point if the question here was as to Moore's intention to give the land to Mrs. Trott. But of that there is no question. The only question is whether he did what was necessary to carry out his intention, and that depends upon the instruction he gave to Tietzen.

Counsel for respondent urges with apparent seriousness the proposition that, the deeds to Mrs. Trott having been found in her possession, there is a presumption of delivery to her at their date, which is not rebutted by the evidence in the case. We think this presumption is not only overthrown by the evidence, but that the specific findings of the court show that the only delivery was that made by Tietzen after Moore's death.

The order of the superior court denying a new trial is reversed.

We concur: SLOSS, J.; ANGELLOTTI, J.; SHAW, J.; MELVIN, J.; HENSHAW, J.

156 Cal. 351

TEAGUE v. BOARD OF TRUSTEES OF CITY OF BELMONT HEIGHTS et al. (S. F. 6,357.)

(Supreme Court of California. Oct. 5, 1909.)

MANDAMUS (§ 74*) — CONSOLIDATION — PETITION FOR ELECTION — SUFFICIENCY — FINDINGS OF COUNCIL—CONCLUSIVENESS.

Where a petition for an election to determine the question of the consolidation of municipal corporations was presented to the city council of one of the corporations, as required, and the council, after investigation, found that the petition was signed by the requisite number of qualified voters, the finding is conclusive upon the court in mandamus proceedings to compel the city authorities to give notice of the election, at least in the absence of a showing of fraud on the part of the council.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 151; Dec. Dig. § 74.*]

In Bank. Mandamus by Albert Teague against the Board of Trustees of the City of Belmont Heights and others. Writ granted.

Stephen G. Long and Percy Hight, for petitioner. F. A. Knight, for defendants.

PER CURIAM. This is an original application for a writ of mandate to compel the board of trustees and the city clerk of the city of Belmont Heights, a municipal corporation, to give notice of a city election to be held in said city on the 9th day of November, 1909, at which election shall be submitted the question of the consolidation of said city with the city of Long Beach, in the time and manner required by "An act to provide for the consolidation of municipal corporations," approved March 11, 1909 (St. 1909, p. 282, c. 184), and for such other orders in the matter as to the court may seem proper.

No sufficient reason has been assigned for declaring the act above referred to to be violative of any constitutional provision. The petition for a writ of mandate sufficiently shows that the proceedings thus far had in the matter of the proposed consolidation have been in strict accord with the provisions of that act. The evidence introduced on the hearing in this court sufficiently shows the truth of all the material allegations of said petition. It was sought to show herein that the petition presented to the city council of the city of Long Beach was not signed by a sufficient number of qualified voters of the city of Belmont Heights; the law requiring that such a petition be signed by not less than one-fifth of the qualified voters thereof. The city council, after investigation in that behalf, made its finding that it was signed by the requisite number. It is well settled that such a finding is conclusive upon the courts in a proceeding of this character, at least in the absence of a showing of conduct amounting to fraud on the part of the council. People v. Los Angeles, 133 Cal. 342, 65 Pac. 749; People v. Loyalton, 147 Cal. 779, 82 Pac. 620. See, also, People v. Ontario, 148 Cal. 634, 84 Pac. 205; German S. & L. Soc'y v. Ramish, 138 Cal. 130, 69 Pac. 89, 70 Pac. 1067. There is no sufficient allegation of fraud in the answer, and no evidence was introduced that can be held to establish fraud.

Upon the facts alleged and shown, it is the plain legal duty of the defendants to give notice of the proposed election in the manner provided by the act, and to do all other acts in said matter of the proposed consolidation required to be done by the act of the Legislature hereinbefore referred to.

Let a peremptory writ of mandate issue forthwith, as prayed for in the petition.

11 Cal. App. 213

BURGE v. JUSTICES' COURT OF CITY & COUNTY OF SAN FRANCISCO et al. (Civ. 581.)

(Court of Appeal, Third District, California. Aug. 25, 1909.)

1. PROHIBITION (§ 3*) — WANT OF JURISDICTION—REMEDY AT LAW.

Want of jurisdiction is an insufficient ground for the issuance of a writ of prohibition if there be a plain, speedy, and adequate remedy at law.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 7; Dec. Dig. § 3.*]

2. PROHIBITION (§ 3*) — WANT OF JURISDICTION—OTHER REMEDY.

Prohibition does not lie to stay an action in justice's court because that court was without jurisdiction, in that the summons was served outside of the county in which the action was brought, where defendant defaulted, since his remedy was to move to quash the service of summons and to appeal if he failed.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 7; Dec. Dig. § 3.*]

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Prohibition by Charles Burge against the Justices' Court of the City and County of San Francisco, naming, also, the several justices thereof. From a judgment granting the writ, defendants appeal. Reversed.

M. H. Wascerwitz (Street & Street and C. C. Ringolsky, of counsel), for appellants. E. W. Holland, for respondent.

CHIPMAN, P. J. This is an action commenced in the superior court of Tuolumne county to obtain a writ of prohibition commanding the defendants to desist from further proceedings in a certain action. Defendants made default, and the court entered its judgment directing the permanent writ to issue as prayed for. The appeal is from the judgment on the judgment roll.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It appears from the affidavit on which the writ was based that on June 1, 1908, one Sol Kahn brought an action in the justices' court in the city and county of San Francisco against affiant, petitioner herein, for the recovery of judgment against affiant for the sum of $57.50, alleged to be due said Kahn for goods, wares, and merchandise sold and delivered to affiant by said Kahn within two years preceding the 1st day of June, 1908, and that said sum is due and payable in the said city of San Francisco; that summons has been issued in said action, and copy thereof and of the complaint has been served on affiant in the county of Tuolumne, Cal.; that affiant never contracted in writing or otherwise or at all to perform the obligation set forth in the complaint filed in said action; that the said justices' court has threatened to enter judgment against petitioner and have execution issue thereon, and will do so unless prohibited by an order of this court; that "said acts of entering judgment and issuing execution are without or in excess of the jurisdiction over this petitioner; and said acts of said justices' court in proceeding to judgment and execution in said action will greatly injure your petitioner, and petitioner has no plain, speedy, and adequate remedy herein in the ordinary course of law." The claim made by respondent is that the summons in such an action cannot be served outside the county where the action is brought unless the contract was made in writing, which the affiant shows was not the case here (Code Civ. Proc. § 848, as amended, St. 1907, p. 879, c. 478); and hence the justices' court was without jurisdiction. Want of jurisdiction is insufficient ground for issuing the writ, if there be a plain, speedy, and adequate remedy at law. Code Civ. Proc. § 1103. Where improper issue of summons or improper service thereof appears, the remedy of the aggrieved party is by motion to quash the service addressed to the court in which the action was commenced. History Co. v. Light, 97 Cal. 56, 31 Pac. 627; McDonald v. Agnew, 122 Cal. 448, 55 Pac. 324. If he fail, an appeal is available to him. S. P. Co. v. Superior Court, 59 Cal. 471; Baughman v. Superior Court, 72 Cal. 572, 14 Pac. 207, in both of which cases it was held that prohibition will not lie "unless the attention of the court whose proceedings are sought to be stayed has been called to the alleged excess of jurisdiction." See, also, Grant v. Superior Court, 106 Cal. 324, 39 Pac. 604. In McDonald v. Agnew, supra, the court said: "But granting that defendant does not waive his objection to the service and the ruling of the justice thereon by demurring or answering, these cases (certain cited cases) show that he has a plain, speedy, and adequate remedy in the ordinary course of law, by an appeal, and therefore prohibition will not lie."

So here petitioner had his remedy by moving to quash the service of summons, and, if unsuccessful, he had his appeal to the superior court. The affidavit shows that he failed to resort to the remedy given him at law, which was plain, adequate, and speedy, and hence he was disentitled to the writ.

The judgment is reversed.

We concur: HART, J.; BURNETT, J.

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11 Cal. App. 220

PEOPLE v. TANSEY. (Cr. 174.)

(Court of Appeal, First District, California. Aug. 27, 1909. Rehearing Denied by Supreme Court Oct. 26, 1909.)

1. HOMICIDE (§ 309*) — INSTRUCTIONS — EVIDENCE—MANSLAUGHTER.

Where the evidence shows that defendant and another were seized by two policemen and shoved along the street without cause, and that defendant was butted in the back with a club, and the other was bleeding from a cut, and the killing of the policeman occurred a brief space of time thereafter, it was not error to instruct that the jury, if they believed, from the evidence that defendant did the killing, they could find him guilty of manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 653, 654; Dec. Dig. § 309.*]

2. HOMICIDE (§ 171*)—EVIDENCE—MATERIALITY.

Where defendant admits that, if he did the killing, it was murder, he cannot object to the sustaining of an objection to a question asking a doctor as to the distance a person must have been from deceased as evidenced by powder marks on his face when he fired the shot, as such evidence was not material.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 351-358; Dec. Dig. § 171.*]

Appeal from Superior Court, City and County of San Francisco; Carroll Cook, Judge.

John J. Tansey was convicted of manslaughter, and he appeals. Affirmed.

King & Kirk and Carl E. Lindsay, for appellant. Attorney General Webb, for the People.

COOPER, P. J. The defendant was accused by the information of the crime of murder in the unlawful killing with malice aforethought of one McCartney in the city and county of San Francisco on the 3d day of September, 1907. The jury returned a verdict finding him guilty of manslaughter, and judgment was accordingly entered. This appeal is from the judgment and the order made by the court denying defendant's motion for a new trial.

The main contention of the defendant is

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that the court erred in giving to the jury the following instruction: "The court instructs you that if, from all the evidence in the case and the law applicable thereto, you should be satisfied to a moral certainty and beyond all reasonable doubt that the defendant here is guilty of any offense under the law, and within the information in this case, you may find him guilty as follows: You may find the defendant guilty of murder in the first degree; or you may find the defendant guilty of murder in the second degree; or you may find the defendant guilty of the crime of manslaughter." The argument is based upon the statement that the evidence clearly shows that the person who killed McCartney was guilty of willful and deliberate murder without any provocation or any extenuating circumstances, and that the only question for the determination of the jury was the question as to the identity of the defendant, or, in other words, whether or not defendant was the party who did the killing. It is said with much plausibility that the giving of such an instruction in a case where there is no question about the fact that the killing was deliberate murder, but the sole question is as to whether or not the defendant is the party who did the killing, would in many cases result in a compromise verdict, when, but for such instruction, the jury would never have agreed upon a verdict. It will be sufficient to decide such question when it is squarely presented by the record. In this case it is a sufficient answer to the contention to say that the record contains evidence which justifies the verdict of manslaughter. Indeed, if the jury believed defendant and the testimony he gave when upon the stand, it had the right to conclude that the killing was the result of sudden passion and in the heat of blood caused by the acts of deceased and the personal violence committed by deceased upon defendant. The defendant testified as follows: "As Bell and I were crossing Shotwell street on our way, two police officers met us. We were just walking along the street and were not making any noise or disturbance of any kind. The police officers got hold of us by the coat collars and shoved us along the street. The officer in the blue uniform had a hold of me and butted me in the back with something—I thought it was a club. The other officer hit Bell and shoved us along the street. I cannot say whether he used his club or fist. Bell was bleeding after he got down past Folsom street. I don't know whether it was from the nose or whether he was cut around the eye, but he was wiping off the blood from his face." It appears by the record that the killing was done within a brief space of time after the transactions thus narrated by defendant. The police officer was attempting to arrest the defendant and Bell, and it was then that the shots were fired by which the deceased met his death. The jury might well have concluded that the defendant, having been shoved along and butted in the back with a club, was still angry, and that his passions had not cooled so as to make the crime deliberate murder. At least, the jury gave the defendant the benefit of the doubt and found the lesser offense, evidently based upon his testimony as to the assaults made upon him. Therefore the giving of the instruction under the circumstances of this case was not error.

It is claimed further that the court erred in sustaining objections made to certain questions asked of the witness Dr. Kusich in cross-examination relative to certain powder marks found on the face of deceased, the questions relating to the distance of the muzzle of the pistol from the face when the shots were fired in order to have produced such powder marks. It is sufficient to say that there is no theory of the case upon which the question as to the distance of the party who did the killing from the body of the deceased at the time the shots were fired could have been material. The defendant's counsel concede that the killing was murder, and there is no dispute as to the fact that powder marks were found upon the face of deceased in and around the wound. The shots killed the deceased and left powder marks upon his face; and whether the powder marks could have been left upon the face if the shots were fired from a distance could only have been material in case the evidence showed that defendant was at a distance from deceased when he was killed, and that shots other than those fired by defendant could have produced the death. Not only this, but the evidence does not show that the witness was qualified to give an opinion upon such question or questions that were asked him.

Other errors are assigned by defendant in sustaining objections to questions asked of certain witnesses, but they do not appear to be urged, and it is sufficient to say that we have examined them and find that there was no material error committed by the court which would justify a reversal of the case.

It therefore follows that the judgment and order must be affirmed, and it is so ordered.

We concur: KERRIGAN, J.; HALL, J.

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11 Cal. App. 251

FIGONE v. REPETTI et al. (Civ. 656.)

(Court of Appeal, First District, California. Sept. 1 1909. Rehearing Denied by Supreme Court Oct. 28, 1909.)

MUNICIPAL CORPORATIONS (§ 244*)—EMPLOYÉS—INDEPENDENT CONTRACTOR—CONSTRUCTION OF CHARTER.

San Francisco Charter, art. 16, § 2, providing that all employés of said city and county must be citizens of the United States, must be strictly construed, and one who procures a contract for the removal of garbage and refuse from the public school buildings and grounds in the city, and who receives a monthly sum for such removal, and furnishes his own men and teams, is an independent contractor, and not within such charter provision.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 244.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by F. Figone against F. Repetti and others to restrain the auditor of the city and county of San Francisco from auditing and the treasurer of the city from paying a claim of defendant Repetti. From an order refusing to grant an injunction, plaintiff appeals. Affirmed.

A. D. Splivalo and Devoto & Richardson, for appellant. J. F. Riley, for respondents. F. V. Keesling, for respondent Koster.

COOPER, P. J. This is an appeal from an order refusing to grant an injunction restraining the auditor of the city and county of San Francisco from auditing, and the treasurer of said city from paying, a claim of defendant Repetti for the removal of garbage and refuse from the public school buildings and grounds in said city for the month of October, 1908.

It is the contention of appellant that the contract entered into by the board of education of said city with said Repetti for the removal of garbage and refuse, and which is the contract under which the claim arose, is void for the reason that Repetti is not a citizen of the United States, and that section 2 of article 16 of the charter of said city prohibits such contract. The section is as follows: "All deputies, clerks, assistants and other employés of said city and county must be citizens of the United States, and must during their respective terms of office or employment actually reside in the city and county, and must have so resided for one year next preceding their appointment." Repetti was not an employé of the city within the meaning of the section. He was an independent contractor, who procured his contract by making the lowest responsible bid after the board of education had duly advertised for bids. The board of education had the power to let the contract to a corporation or to any one else who would agree to do the work as an independent contractor. A statute like this, which restrains the right of a municipal corporation to employ certain classes of persons, must be given no broader construction than its plain words imply. A contractor, to whom a contract is let to construct a building, or a sewer, to pave a street, or to perform any other work for a definite sum is not an employé in the ordinary sense of the term. He ordinarily selects his own laborers, his own materials, and furnishes his own means of carrying out the contract. In this case Repetti was to receive a monthly sum for the removal of all the garbage and refuse from all the public school buildings and grounds in the city and county of San Francisco. He was to furnish his own men, his own wagons, and his own teams, and select his own time for doing the work, provided that he did it according to the contract. The horses he used were as much employés of the city as were the men who did the work of loading or driving the wagons. The men, horses, wagons, and tools used by Repetti were of his own selection.

It may be suggested that the complaint does not allege or show that the city and county of San Francisco or the plaintiff as a taxpayer would be injured by paying Repetti, who was a lower bidder than the appellant; nor does it in any way appear that appellant was injured because he does not allege that he could have made any profit out of the contract if it had been awarded to him.

The order is affirmed.

KERRIGAN, J. I concur.

HALL, J. I concur in the judgment and in all that is said in the opinion save as to the matter in the last paragraph.

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11 Cal. App. 231

GILLINGHAM v. LAWRENCE. (Civ. 592.)

(Court of Appeal, First District, California. Aug. 31, 1909.)

1. Appeal and Error (§ 957*) — Default — Vacating—Review.

The granting of a motion to set aside a default judgment rests largely in the trial court's discretion, and its decision will only be reviewed where its discretion is plainly abused.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3823; Dec. Dig. § 957.*]

2. Judgment (§ 138*)—Default—Vacating—Negligence of Defaulting Party.

Where defendant could read the summons served on him, which expressly stated that he must appear and answer, and was told by plaintiff's attorney that he would have to answer, he was guilty of such carelessness in not answering as to prevent him from having a default judgment for plaintiff, entered on his failure to answer, set aside on the ground of mistake and excusable negligence in not knowing that he must answer.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 249-254; Dec. Dig. § 138.*]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Rose B. Gillingham against Edward Lawrence. From a default judgment for plaintiff, and an order denying motion to vacate it, defendant appeals. Affirmed.

Charles R. Holton, for appellant. James A. Davis, for respondent.

COOPER, P. J. This appeal is from a default judgment and from an order denying defendant's motion to vacate the same. The defendant was personally served with summons on May 13, 1908, and his default duly entered on June 13th of the same year after the 30 days had expired which were allowed him by law in which to answer. On July 16th he served and filed a notice, accompanied by affidavits, to be relieved of the default, claiming that it occurred through his mistake, inadvertence, and excusable neglect. In the affidavit of defendant he states that he did not know that he had to file a written appearance or answer, and that he did not go to his own attorney, but went to the office of the plaintiff's attorney, had a conversation with plaintiff's attorney relative to the case, in which defendant stated that if plaintiff's attorney would appoint a day for the trial he, defendant, would be on hand with his attorney, and that plaintiff's attorney replied "All right." Defendant further averred that he relied upon such statement, and expected plaintiff's attorney to notify him when the case was ready for trial, and that, relying upon such statement, he took no further steps in the matter.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

An affidavit was filed on behalf of the plaintiff, in which plaintiff's attorney denies that any such conversation ever took place, or that he ever in any way stated anything to cause defendant to believe that he would notify him when the case would be ready for trial. Plaintiff's attorney further states in his affidavit that defendant, after being served with the summons, came to his office, and assumed a belligerent attitude, informing the attorney that he would fight the case to a finish, whereupon plaintiff's attorney notified defendant that he did not care to discuss the matter with him; that defendant would have to file an answer and should get an attorney, whereupon defendant replied that he did not want a lawyer; that he would be his own lawyer. Defendant did not employ any lawyer nor take any steps in the case until more than two months after he was served with summons.

As has been said many times, a motion to set aside a default judgment rests largely in the discretion of the trial court. It is only in cases where it plainly appears that such discretion has been abused that this court will interfere. It is sufficient to say that in this case no such abuse of discretion appears. The defendant could read, and the summons expressly told him the time within which he must appear and answer. He let the time pass, and never even consulted an attorney. He was guilty of such carelessness and lack of diligence as could not be imputed to a prudent business man in a matter of material concern to himself. While courts are liberal in relieving parties of defaults caused by inadvertence or excusable neglect, and while they much prefer that a case should be heard on its merits, yet they do not act as guardians for incompetent parties or parties who are grossly careless as to their own affairs. There must be rules and regulations by which rights are determined and under which judgments become final. If this court should determine that the defendant, as matter of law, was entitled to relief in this case, there could scarcely be a default judgment that would not have to be set aside, provided the proper affidavits could be procured from the defendant. We must presume that the court believed the statements made in the affidavit of plaintiff's attorney, and that the defendant was told that he must file an answer and get an attorney. Where a party willfully slumbers upon his rights when he should be alert, and makes no efforts to protect himself, courts cannot patiently listen to flimsy excuses and the claim of ignorance of the law. It was the duty of defendant to read the summons, and not only to read it, but to heed it.

The judgment and order are affirmed.

We concur: KERRIGAN, J.; HALL, J.

11 Cal. App. 207

MONTEREY COAL CO. v. SUPERIOR COURT OF SANTA CLARA COUNTY et al. (Civ. 716.)

(Court of Appeal, First District, California. Aug. 25, 1909.)

CONTEMPT (§ 80*)—DENIAL OF PRIVILEGES AS LITIGANT.

Mandamus will not be granted to compel a court to change the venue of an action, though the motion must be ultimately granted, where petitioners are in contempt for violation of an injunction in the case and the court is proceeding to determine the matter on order to show cause.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 261–266; Dec. Dig. § 80.*]

Petition by the Monterey Coal Company against the Superior Court of Santa Clara County, P. Gosby, as judge thereof, and others, for mandamus. Writ denied.

Francis M. Colvin, for petitioner.

PER CURIAM. The petitioner in this case asks for a writ of mandate to compel the superior court of Santa Clara county to grant the motion of the plaintiff for a change of venue in a certain action wherein one Lorenzo Fellers was plaintiff, and this petitioner, the Monterey Coal Company and others, were defendants. It is alleged in the petition that there was no conflict as to the showing made by the petitioner as to its residence in the city and county of San Francisco, and that the superior court announced that it would ultimately have to grant the motion for a change of venue to the city and county of San Francisco. It appears, however, from the petition, that, at the time of the commencement of the action of said Lorenzo Fellers against this petitioner, the

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Monterey Coal Company, and others, the superior court of Santa Clara county issued a preliminary injunction, enjoining the said Monterey Coal Company, its agents, servants, and employés, from doing certain things, and that prior to the motion for a change of venue the said petitioner, or its agents or employés, had been guilty of certain contempts of court in disobeying the order of injunction so issued by the court. It further appears that proceedings are now pending in said superior court upon an order to show cause, and an investigation is being made as to whether or not the said petitioner, its agents, servants, or employés, have been guilty of contempt.

The court will not be compelled by writ of mandate to grant an order for a change of venue while the petitioner is in contempt of court, and pending the hearing of proceedings in regard to such contempt. It is well settled that courts will not hear parties, or issue orders or other process in aid of litigants, when they are in contempt of court, until a reasonable time has expired, and the parties have been allowed to show cause, and either purged of the contempt or punished for such contempt. We will not compel the court to transfer the case. See Walker v. Walker, 59 How. Prac (N. Y.) 476; Remley v. De Wall, 41 Ga. 476.

The writ is denied.

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11 Cal. App. 209

PEOPLE ex rel. BROWN v. PACIFIC GROVE HIGH SCHOOL DIST.

(Civ. 679.)

(Court of Appeal, First District, California. Aug. 25, 1909.)

1. Appeal and Error (§ 907*)—Absence of Bill of Exceptions—Presumptions.

Where an appeal is prosecuted upon a judgment roll without a bill of exceptions, it will be presumed that the findings of fact are supported by the evidence and absolutely true, and that all the rulings of the court as to admission and exclusion of evidence are correct, and the only duty is to determine whether the findings are consistent and support the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2911, 3673; Dec. Dig. § 907.*]

2. Schools and School Districts (§ 22*)—Existence of District—Sufficiency of Findings.

In an action to have it adjudged that defendant was acting as a high school district without right, findings considered, and *held* to support a judgment that the district was one de jure by reason of curative acts. Pol. Code, § 1671, subd. 11; St. 1901, p. 299, c. 140.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 22.*]

Appeal from Superior Court, Monterey County; B. V. Sargent, Judge.

Action by the People ex rel. John P. Brown against the Pacific Grove High School District. From a judgment for defendant, plaintiff appeals. Affirmed.

R. H. Willey, for appellant. Sargent & Bardin, for respondent.

COOPER, P. J. This action was brought by permission of the Attorney General to have it adjudged that the defendant is wrongfully and without right exercising the functions of a high school district. The case was tried before the court and findings filed. Judgment was entered, declaring defendant to be a de jure high school district, organized and existing under the laws of the state of California. From this judgment plaintiff prosecutes this appeal upon the judgment roll without a bill of exceptions. We must therefore, under the well-settled rule, regard the findings of fact as supported by the evidence and absolutely true. We must also presume that all the rulings of the court upon the trial as to the admission or exclusion of evidence were correct. Our only duty in such case is to determine whether or not the findings are consistent and support the judgment. The complaint contains several allegations tending to show that the defendant was not legally organized as a high school district, but the court finds against the plaintiff upon each and every one of such allegations.

It is first alleged that there is not in the office of the school trustees of the district, or of the superintendent of schools of the county, or of the county clerk, any paper or entry or record of any kind showing that there was ever filed with the superintendent of schools of the county a petition to the board of school trustees of said district requesting that an election be called by the superintendent for the purpose of determining the question of the establishment of a high school in said school district, and, on account of the absence of such record, it is alleged that no such petition was ever filed or presented to the superintendent of schools. The court finds that the allegation is true as to the absence of any paper or record entry in the proper office, but further finds "that a petition was duly and regularly presented to the board of school trustees of said Pacific Grove school district, signed by a majority of the heads of families of said Pacific Grove school district as shown by the last preceding census, during the month of February, 1896, and that the whereabouts of said petition is unknown and that it is now lost, and that on the 27th day of February, A. D. 1896, the board of school trustees of Pacific Grove school district petitioned the county superintendent of schools of the county of Monterey, state of California, to call an election in said school district for the determination of the question of the establishment and maintenance of a high school in said school district, and that the whereabouts of said petition is unknown, and that said petition is now lost."

It is further alleged in the complaint that there is not in the office of the board of trustees, or of the county superintendent of schools or of the county clerk of the county any paper, record, or entry showing that the county superintendent of schools, within 20 days after receiving such petition, called an election in said school district for the determination of the question as to the establishment and maintenance of a high school in said district, or that the superintendent of schools appointed three qualified electors to conduct such election, or that the election was called by posting notices in five public places in said district, and publishing in a daily or weekly paper and so forth; and it is further alleged that in the absence of such record none of these things were done, that no such notice was given, and that no such qualified electors were appointed; but the court expressly finds "that within 20 days after receiving such petition of said school trustees Job Wood, Jr., the duly elected, qualified, and acting county superintendent of schools of the county of Monterey, did, to wit, on March 9, A. D. 1896, call said election of April 4, A. D. 1896, in said Pacific Grove school district, for the determination of the question of the establishment and maintenance of a high school therein, and did appoint three qualified electors thereof to conduct said election of April 4, A. D. 1896; that said election of April 4, A. D. 1896, was duly and regularly called by posting notices thereof in five of the most public places in said school district, and by publication in a weekly paper published therein for a period of five days immediately preceding said election; that said election of April 4, A. D. 1896, was conducted in the manner prescribed for conducting school elections, and that the same was held in conformity to law; that the ballots used at said election of April 4, 1896, contained the words 'For High School,' and the voters at said election of April 4, A. D. 1896, wrote or printed after said words on his ballot the word 'Yes' or the word 'No'; and that the election officers appointed to conduct said election of April 4, A. D. 1896, duly and regularly reported the result thereof to the said county superintendent of schools within 10 days subsequent to the holding thereof, to wit, on the day following said election of April 4, A. D. 1896." And in the same manner the court expressly found each and every fact which was necessary to exist in the calling of the election and creating said high school district. The court further found: "That said defendant claims, and for a period of over 10 years has continuously claimed, to be a regularly authorized and organized high school district, created and existing under and by virtue of the laws of the state of California providing for the organization, incorporation, and government of high school districts; and for a like period has performed all the acts required by law for the maintenance of a high school and a high school district. That said defendant claims, and since the year 1896 has claimed, to have been duly organized and created by virtue of an election held April 4, A. D. 1896, and also by virtue of another election, held on the 4th day of March, 1905, within said Pacific Grove school district, at both of which elections the question of maintaining a high school and a high school district * * * was carried by a majority vote of the electors of said school district."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

In the conclusions of law the court states: "That, if any defect of any kind existed by reason of any defect in its organization, such defect was cured by operation of law, and particularly by reason of the provisions of subdivision 11 of section 1671 of the Political Code of the state of California." The section of the Political Code referred to provides as follows: "All proceedings for the formation and organization of high school districts and the establishment of county, city, city and county, union, joint union and district high schools had prior to the passage and approval of this act, are hereby validated and declared legal, and said high school districts and high schools are hereby declared to be legally formed, organized and established; and in all cases where high school districts and high schools have heretofore been, or may hereafter be formed, organized and established, the certificate of the county superintendent mentioned in subdivision 4 of section 1670 of the Political Code when filed with the county clerk, when the result of the election as therein declared is in favor of the establishment of the high school, shall after the expiration of one year from the date of such filing be conclusive evidence that such high school district and high school has been legally established."

In March, 1901 (St. 1901, p. 299, c. 140), the Legislature declared: "All proceedings for the establishment of high schools heretofore established in incorporated cities are hereby declared legal." It was held in Board of Education v. Hyatt, 152 Cal. 515, 93 Pac. 117, that such curative act was valid, and that the Legislature possesses the power to pass curative acts curing failure to comply with statutory requirements in the formation of high school districts.

We conclude that the judgment was correct, and it is hereby affirmed.

We concur: HALL, J.; KERRIGAN, J.

11 Cal. App. 216

PEOPLE v. SPADONI. (Cr. 169.)

(Court of Appeal, First District, California. Aug. 26, 1909.)

CRIMINAL LAW (§ 511*)—ACCOMPLICE TESTIMONY—CORROBORATION.

Testimony of an accomplice, on a prosecution for theft of horses, that he was hired by defendant to steal them, and did steal them and deliver them to defendant, is sufficiently corroborated, within Pen. Code, § 1111, requiring such corroboration by evidence which, in itself and without the aid of the testimony of the accomplice, tends to connect defendant with commission of the offense; defendant, when the horses were found in his possession, soon after the theft, having given a false account as to where he got them, though on the trial he admitted he got them of the accomplice, the accomplice's wife having testified that shortly before the theft defendant called on him and asked him when he was going after the horses, and that soon after he brought home three horses and took them away after dark, another witness testifying that defendant, after being arrested, said he would be all right if B., the accomplice, didn't squeal, another testifying that shortly before the theft, defendant negotiated for purchase of horses from him, and soon after told him that he did not want to buy them, as he had made arrangements to get cheaper horses; and another witness testifying that defendant asked him to testify falsely as to where he got the horses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1127-1137; Dec. Dig. § 511.*]

Appeal from Superior Court, San Benito County; M. T. Dooling, Judge.

Bartolo Spadoni was convicted of larceny, and appeals. Affirmed.

Zabala & Wyatt and Briggs & Hudner, for appellant. Attorney General Webb, for the People.

KERRIGAN, J. The defendant was charged by information with grand larceny, committed by stealing three horses, and was tried and found guilty as charged. He moved for a new trial, which motion was denied, and he was thereupon sentenced to imprisonment in the state prison. This appeal is from the judgment and from the order denying the motion for a new trial.

It appears from the record that one Dan Biscarro had been tried for the same larceny. He pleaded not guilty, but strong and convincing evidence was introduced against him, and he was found guilty. At the trial of this defendant in this case Biscarro was a witness, and confessed the crime, but testified: That he committed it at the instance of defendant and for him; that in its commission he was aided and abetted by defendant; that defendant had told him that he needed five or six horses, and asked him on several occasions to steal them for him; that finally he consented to do so, and stole and delivered to the defendant the three horses in question, receiving therefor from him the sum of $80. It was principally upon the testimony of this accomplice that defendant was convicted, and the chief point in the case is: Was that testimony sufficiently corroborated?

The horses were found in the possession of the defendant within three days after they were stolen. He at the time denied persistently that he had received them from Biscarro, and claimed to have received them from some mythical person whom he described with minute detail. In this connection he stated that one morning at about 8 o'clock, while hunting for hogs, he met this unknown person, and after some negotiations purchased the horses from him, paying therefor on the spot $225, which sum he had in his overalls. Furthermore, he went with the sheriff to a point on the county road five or six miles from his home, which he designated as the place "where he paid the man the money for them over the fence." At his trial defendant admitted that this whole story was false and that he received the horses from Biscarro. The wife of Biscarro testified: That she saw the defendant at her house about the middle of the month in which the theft was committed. That he came to the door, knocked, and Dan went out. "I heard him ask Dan when he was going after the horses. Dan told him he was not going, and Spadoni told him he wanted to see him up town. The day following Christmas Dan was home and had three horses in the barn. He took them away after dark on the 26th, maybe 8 or half past 8." Another witness, Joe Scattini, said that he had a conversation with the defendant in reference to his arrest, during which he asked him how he was getting along, and that the defendant replied, "I will be all right if that fellow (Biscarro) don't squeal." It was shown by the witness Bonifacio that shortly before the theft the defendant had negotiated with him for the purchase of his horses, and that he had considered the price demanded too high. The witness further stated: "About 15 days after that I asked him if he wanted to buy that team, and he said 'No.' He told me he had made arrangements to get cheaper horses."

We think the conclusion is irresistible that, eliminating the testimony of the accomplice, there is evidence in the record tending to connect the defendant with the commission of the crime as required by section 1111 of the Penal Code. This view we think is sustained by cases in this state. In the case of People v. McLean, 84 Cal. 481, 24 Pac. 32, the defendant was convicted of arson, and it was contended that the testimony of the accomplice was not sufficiently corroborated. The accomplice testified that he had set fire to the house in the presence of the defendant and at his direction, and the house was in fact burned. The circumstances of corroboration in that case were these: Considerable ill will and bad feeling had existed between defendant and the owner of the cabin which was burned. The defendant had made contradictory statements concerning his whereabouts on the night of the fire, and there was also evidence tending to show that he desired the accomplice to leave that part of the country. It was held in that case that these circumstances tended to show defendant's guilty connection with the burning of the building. The court said: "The evidence is not strong; but although more is required by way of corroboration than to raise a mere suspicion (see People v. Thompson, 50 Cal. 480), yet the corroborating evidence is sufficient if it, of itself, tends to connect the defendant with the commission of the crime, although it is slight, and entitled, when standing by itself, to but little consideration. People v. Melvane, 39 Cal. 616; People v. Clough, 73 Cal. 351, 15 Pac. 5." In the case at bar, in addition to the testimony recited above tending to connect the defendant with the commission of the offense, the accomplice testified that he was short of money just before undertaking the larceny, and upon requesting money from defendant he received from him an order on Joe Scattini for $5, which was paid. Scattini testified that he received the order, that it bore the defendant's signature, and that he paid it, but the defendant contradicted both of these witnesses and denied he ever gave the order. As before stated, the defendant, in speaking of this trouble with the witness Scattini, remarked that he would be all right if Biscarro did not betray him. Finally, for the purpose obviously of strengthening his original position—that he purchased the horses from a stranger at a named point five miles from his home—he asked witness Charles Margintini in effect if he would not testify that he saw him (defendant) leading the horses from that point towards his home.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Another case where evidence tending to corroborate an accomplice is considered is People v. Melvane, 39 Cal. 616. It is there stated: "We think this proof tended in some degree to connect the defendant with the burglary. The weight to be given the testimony was for the jury to decide; but, when money is stolen, proof that a part of it, on the following day, was found on the person of another in the vicinity, certainly tends, when not satisfactorily explained, to raise a presumption that he is the guilty party, and if an explanation is attempted by the accused it is for the jury to judge of its truth and plausibility. The corroborating evidence may be slight, and entitled to but little consideration. Nevertheless the requirements of the statute are fulfilled if there be any corroborating evidence which, of itself, tends to connect the accused with the commission of the crime." To the same effect is the case of People v. Cleveland, 49 Cal. 577. The syllabus correctly states the point therein decided, and reads as follows: "On a trial for stealing a horse, if the prosecution prove the larceny by an accomplice, further proof that, the next morning after the horse was stolen, the prisoner received him from the person who stole the horse from the owner, and immediately removed him to another place for pasturage, and gave an assumed name to the person with whom he left the horse for pasturage, is a sufficient corroboration of the evidence of the accomplice to sustain a conviction. Admissions made by a prisoner, which tend strongly to connect him with the larceny for which he is on trial, are a sufficient corroboration of the testimony of an accomplice introduced by the prosecution to sustain a conviction." See, also, People v. Grundell, 75 Cal. 305, 17 Pac. 214; People v. Clough, 73 Cal. 353, 14 Pac. 5; Ross v. State, 74 Ala. 532; Bowles v. State, 58 Ala. 335; People v. Sansome, 98 Cal. 241, 33 Pac. 202.

A number of objections are made to the court's instructions. We have examined the objections and find them entirely without merit. The instructions as a whole gave the jury a full and fair statement of each and every phase of the law applicable to the case.

The judgment and order are affirmed.

We concur: COOPER, P. J.; HALL, J.

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11 Cal. App. 234

REAGAN v. BAHRS et al., Civil Service Com'rs of City and County of San Francisco.

(Civ. 614.)

(Court of Appeal, First District, California. Aug. 31, 1909. Rehearing Denied Sept. 29, 1909.)

1. Certiorari (§ 8*)—Grounds—Adequacy of Remedy.

Where a temporary appointment to a position in the municipal service, made by a city board of public works and approved by the civil service commission, as authorized by the city charter, had expired by force of the charter when plaintiff brought certiorari to annul the order of appointment on the ground that the position filled was the same as a civil service position to which he was entitled to priority of appointment, and a judgment annulling the order would not affect the board of public works in any proceeding by plaintiff to enforce his right to a permanent position, or affect the temporary appointee, or the city auditor or treasurer, in any action brought to enforce the temporary appointee's claim to his salary, they not being parties thereto, the writ will be denied.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 14; Dec. Dig. § 8.*]

2. Judgment (§ 707*)—Judgment—Conclusiveness—Persons Bound.

A judgment in certiorari will not bind persons not parties to the proceeding.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1230; Dec. Dig. § 707.*]

Appeal from Superior Court, City and County of San Francisco; George H. Buck, Judge.

Certiorari by Thomas Reagan against George H. Bahrs and others, as Civil Service Commissioners of the City and County of San Francisco. From a judgment awarding the writ, defendants appeal. Reversed, with directions to dismiss writ.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Percy V. Long and John T. Nourse, for appellants. Charles H. Forbes, for respondent.

HALL, J. Plaintiff brought a proceeding in certiorari in the superior court for the purpose of obtaining a judgment annulling an order made by the civil service commissioners, approving the appointment theretofore temporarily made by the board of public works of one P. Broderick to the position of superintendent of street repairs. Plaintiff's interest in the matter is based on the claim that the position of superintendent of street repairs is the same as superintendent of stone pavements, to which position he was entitled to be appointed when vacant, as being first in the list of eligibles on the civil service list, and that the creation of the office of superintendent of street repairs by the board of public works was a subterfuge. Plaintiff succeeded in obtaining a judgment annulling the order made by the civil service commissioners approving the temporary appointment of Broderick.

We think this judgment should be reversed. While the charter makes provision for a classified civil service, and lists of eligibles from which permanent appointments must be made, it also provides for temporary appointments good for 60 days only. Section 10 of article 13 of the charter is as follows: "To prevent the stoppage of public business, or to meet extraordinary exigencies, the head of any department or office may, with the approval of the commissioners, make temporary appointments, to remain in force not exceeding sixty days, and only until regular appointments under the provisions of this article can be made." It was under this section that the civil service commissioners acted. This proceeding was not brought until 7 months after the making of the order complained of, and 5 months after the term of the appointee under the order had expired. The force and effect of the order had expired, and the order had become functus officio before the action was brought.

The judgment annulling the order in an action against the civil service commissioners could have no beneficial effect on the rights of plaintiff. It would not bind or affect the board of public works in any proceeding that plaintiff might bring to enforce his claimed right to a permanent appointment to the position of superintendent of stone pavements, for such board is not a party to this action. For the same reason it would not bind or affect the rights of Broderick, or the auditor, or treasurer, in any proceeding brought to enforce Broderick's claim to his salary, for none of them are parties to this proceeding. The principles laid down in Burr v. Board of Supervisors, 96 Cal. 210, 31 Pac. 38, control this case. It was there sought, in an action brought by a taxpayer, to annul an order of the board of supervisors approving a claim against the county, upon which the money had in fact been paid before the action was brought. The court said: "Conceding that the action of the board of supervisors was unauthorized and in excess of its jurisdiction, and that the money was wrongfully and unlawfully obtained from the county treasury, I think the relief sought, and all relief that could be given in this proceeding, viz., the annulment of the order of the board allowing the claim, would be of no material or beneficial consequence to the petitioner or to the county. It would not restore to the county treasury the money obtained by McClatchy & Co., nor would the judgment be competent evidence in a suit by the county against McClatchy & Co., the county auditor, or the treasurer, as neither of them is a party to this proceeding. * * * 'The law neither does nor requires idle acts.' Civ. Code, § 3532. A court will not exercise a power for no material or useful purpose (Huntington v. Nicoll, 3 Johns. [N. Y.] 598), and will refuse a writ of mandamus if it appears that it can have no beneficial effect (People v. Supervisors, 12 Barb. [N. Y.] 222)."

The judgment is reversed, and the court directed to dismiss the writ.

We concur: COOPER, P. J.; KERRIGAN, J.

11 Cal. App. 115

PEOPLE v. ZIMMERMAN. (Cr. 127.)

(Court of Appeal, Second District, California. Aug. 2, 1909.)

1. Criminal Law (§ 1023*)—Appealable Judgments.

Appeal does not lie from a verdict (Pen. Code, § 1237), authorizing one only from a final judgment of conviction, an order denying a new trial, and an order after judgment; but matters which might be reviewed on such an appeal may be reviewed on appeal from the judgment and the order denying a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2583–2598; Dec. Dig. § 1023.*]

2. Criminal Law (§ 372*)—Evidence of Matters Subsequent to Offense.

On a prosecution for receiving stolen goods, the state could show, not only that on the day charged and on prior days defendant received from one who had stolen them from his employer's store new goods, for which he paid such employé one-fifth their value, but also that on the day subsequent, such employé was intercepted while taking some such goods from his employer's store, and then, with the consent and at such employer's request, took such goods to defendant's house, and defendant then made a like purchase thereof of him; there being a clear connection between the last two transactions, from the latter of which it might be inferred he was guilty of the former.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 833; Dec. Dig. § 372.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3. CRIMINAL LAW (§ 1170*)—APPEAL—HARMLESS ERROR.

Exclusion of the record of conviction of a witness was harmless; he having admitted his guilt, and the character of his sentence having nothing to do with his credibility, or with the guilt of defendant in receiving the goods for the theft of which witness was convicted.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1170.*]

4. CRIMINAL LAW (§ 315*)—PRESUMPTIONS—CONTINUANCE OF FACT—ORDINANCES.

An ordinance regularly passed is admissible, without proof of its having continued to be a law to the time in question; there being a presumption thereof, which defendant must overcome by showing its repeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 748; Dec. Dig. § 315.*]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Jake Zimmerman was convicted of receiving stolen goods, and appeals. Affirmed.

F. W. Allender, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

TAGGART, J. Information charging crime of receiving stolen property. Verdict of guilty, and appeal is from the verdict, judgment, and an order denying defendant's motion for a new trial. No appeal lies from the verdict in this state (Pen. Code, § 1237), but on the appeal from the judgment and order we may consider the matters here urged as error.

The testimony of the person from whom the goods were received shows that he was a shipping clerk for the corporation whose goods were stolen, but without authority to sell. During the year 1908 he carried away from his employer's place of business a large number of articles (approximately 500), which he sold to defendant in some 8 or 10 transactions, some of which were had at his own house and some at the house of defendant. These articles were all new, and he sold them to defendant for about 20 per cent. of their market value. The last of these transactions, prior to the date of the arrest of defendant, took place on December 14, 1908. On the evening of December 15, 1908, when leaving his employer's place of business, the witness again took some articles of similar character to those sold to defendant on December 14, 1908 (to wit, brass pipe fittings, gate valves, stop cocks, etc.), for the purpose of selling them to defendant, but was intercepted by some police officers who were watching his movements, and required to return to the place from whence he took the goods. The articles were then marked for identification in the presence of the secretary and manager of the corporation owner, and the witness was accompanied to the house of defendant by the officers, who concealed themselves while defendant purchased the articles from the witness, and then came forward and took the defendant into custody. Upon examining the premises of defendant other articles were found, among which were four two-inch valves, shown by the evidence to be some of the articles that defendant purchased from the witness on December 14, 1908.

The information alleges the crime to have been committed on December 15, 1908, but at the request of defendant the prosecution was required to elect the date as to which a conviction would be asked, and the district attorney named December 14, 1908. Evidence as to all the transactions was introduced, including that of December 15, 1908, the latter being objected to by the defendant. It is contended by appellant that it was prejudicial error for the court to admit evidence of the transaction of December 15, 1908, because the transaction was subsequent to the date on which the district attorney elected to prove the offense charged. In support of this contention People v. Willard, 92 Cal. 487, 28 Pac. 585, is cited. Accepting that case as correctly declaring the law in respect to the matters then before the Supreme Court, it may easily be distinguished from the case before us. The circumstances of the transaction of December 15, 1908, which were given in evidence, were merely those attending the arrest of the defendant. They did not constitute an offense, as the goods were taken to the defendant's house with the consent and at the request of the owner, and the jury were specially instructed by the trial court that proof of these acts did not constitute proof of the offense charged. In some of the cases in which the introduction of evidence as to transactions of similar character is considered solely with reference to the question whether or not the evidence of the other offense is intended to show guilty knowledge on the part of the defendant at the time of the transaction, it has been said that the facts to be admitted must contain some element of notice or warning, and therefore, if they relate to matters subsequent to the principal offense, are not admissible. Conceding this to be a proper deduction when guilty knowledge is the only matter being considered, when motive and intent are under consideration, it is said, a broader field is opened. People v. Harben, 5 Cal. App. 29, 33, 91 Pac. 398. Where the purpose is to show motive or system, the evidence is admissible if it have a direct tendency, in view of the surrounding circumstances, to prove motive or intent or other material fact, notwithstanding it has a tendency to prove a distinct offense also. There is a clear connection between the transaction of December 14th and that of December 15th, from which the jury might have logically inferred that if the defendant was guilty of one, he was guilty of the other. People v. Cook, 148 Cal. 334, 341, 83 Pac. 43.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

There was no error prejudicial to defendant in denying his request to introduce the record of conviction of the witness King. He (King) admitted his guilt, and this was the stealing which constituted the basis of the offense of receiving stolen property for which defendant was being tried. The record evidence, if introduced, would only have confirmed what the witness himself had already testified to without objection. We are unable to see how defendant was prejudiced by the exclusion of the evidence. The character of King's sentence had nothing to do with his credibility or defendant's guilt.

An ordinance of the city of Los Angeles requiring junk dealers to make reports to the chief of police of certain kinds of articles when purchased by them was introduced in evidence, and testimony given on behalf of the people to show that defendant was a junk dealer, and that he had not complied with the requirements of the ordinance in this respect. Defendant objected to the introduction of the ordinance, and urges that its admission was error because the affidavit of publication thereof is dated June 23, 1899, and there is no evidence to show that it continued to be a law of the city of Los Angeles on the 14th and 15th days of December, 1908. The ordinance was proved as required by subdivision 5, § 1918, Code Civ. Proc., and the prima facie showing made entitled it to be received in evidence. If the objection urged were good, the prosecution would be required to prove a negative, and, as the matter is one of record, this could only be established by the introduction of all the ordinances passed by the city since the date of the passage of the original ordinance, in order that the court might determine that the original ordinance had not been repealed. We are of opinion that the burden is upon the defendant to overcome the presumption raised by the introduction of an ordinance regularly passed. Merced Co. v. Fleming, 111 Cal. 46, 49, 43 Pac. 392; People v. Baldwin, 117 Cal. 244, 250, 49 Pac. 186. No other objection to the introduction of the ordinance is urged.

No prejudicial error appearing in the record, the judgment and order appealed from are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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11 Cal. App. 258

RITTER et ux. v. BRAASH. (Civ. 687.)

(Court of Appeal, Second District, California. Sept. 3, 1909. Rehearing Denied by Supreme Court Oct. 28, 1909.)

1. JUDGMENT (§ 132*)—DEFAULT—PREMATURE ENTRY.

Code Civ. Proc. § 1015, provides for service of papers upon the attorney of a nonresident party. Section 407 provides that a summons shall direct an answer within 10 days if served within the county, and within 30 days if served elsewhere. Defendant filed a cross-complaint under section 442, and on December 23, 1908, served the same on plaintiffs' attorneys. On January 17, 1909, defendant served the cross-complaint on plaintiffs personally. On January 22, 1909, default was entered for failure to answer the cross-complaint. Another entry of default was made on January 29, 1909, and on February 2, 1909, judgment was entered on the default. *Held*, that the personal service was unnecessary and surplusage, and, whether plaintiff's attorneys resided in the county or elsewhere, plaintiffs were in default at least as early as January 22d, and if they resided in the county plaintiffs were in default after 10 days from December 23d, and the entry of default was not premature.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 211, 212; Dec. Dig. § 132.*]

2. JUDGMENT (§ 132*)—DEFAULT—PREMATURE ENTRY.

If such personal service was necessary, the entry of default on January 29th was not premature.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 211, 212; Dec. Dig. § 132.*]

3. JUDGMENT (§ 120*)—DEFAULT—ENTRY OF DEFAULT.

The entry of a default in the minutes of the court, on plaintiff's failure to answer a cross-complaint, did not render it invalid.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 210; Dec. Dig. § 120.*]

4. JUDGMENT (§ 131*)—DEFAULT—ENTRY OF JUDGMENT.

Plaintiffs cannot complain of the clerk's delay in entering a judgment for defendant on plaintiffs' default; the provision requiring it to be entered immediately being merely directory and for the benefit of the party obtaining judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 160, 245; Dec. Dig. § 131.*]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by John G. Ritter and wife against F. Braash, in which defendant filed a cross-complaint. From a default judgment for defendant on the cross-complaint, and from an order denying plaintiffs' motion to strike the answer and cross-complaint, and from an order denying their motion to set aside the default entered thereon, plaintiffs appeal. Affirmed.

M. Randall and Randall & Gaines, for appellants. C. Ibeson Sweet, for respondent.

TAGGART, J. Action to cancel promissory note. Default judgment was entered on cross-complaint of defendant praying for judgment on the note. Appeal is by plaintiff from this judgment, from an order of the superior court denying his motion to strike defendant's answer and cross-complaint from the files, and from an order of the court denying his motion to set aside the default entered on the cross-complaint.

Complaint was filed December 3, 1908, demurrer thereto December 11th, and on December 18, 1908, demurrer was overruled.

On December 23, 1908, an answer and cross-complaint separately stated but bound as one instrument, stated in the transcript to have been "duly verified," was served on the attorneys for plaintiff; their acceptance of service being as follows: "Received copy of within answer & cross this 23rd day of Dec., 1908, Randall & Gaines, attorney for plaintiff"—their residence not being given. On January 18, 1909, personal service of the answer and cross-complaint was made on both plaintiffs in Los Angeles county, and default for failure to answer the cross-complaint was entered by the clerk of the superior court on January 22, 1909. The record also shows a minute entry of such default by the court on motion of attorney for defendant on January 29, 1909, and on February 2, 1909, judgment was entered by the clerk on default for failure to answer the cross complaint, for the amount due on the note and for costs. On February 13, 1909, plaintiffs served notice that on February 19, 1909, they would move the court to set aside the default judgment and all subsequent proceedings for irregularity, in that the default was entered before the time to answer the cross-complaint had expired; also, that they would move the court to strike out the paper purporting to be an answer and cross-complaint because not signed and verified; and, also, for judgment on the pleadings, for the reason that no answer to the complaint was filed in the time allowed by law. On the day noticed the motion to strike out was denied and the motion to set aside the default continued to February 26th that plaintiffs might file affidavits in support of that motion, and on the last-named date the motion was denied. The affidavits filed appear to be framed upon the theory that they are intended to support an application for relief under section 473, Code Civ. Proc., instead of a motion on the ground of "irregularity" in entering default before the time for answering had expired; but treated as a showing under section 473 they are insufficient and without any showing on the merits. The complaint, which was verified, was not made a part of the showing on the motion; but, even if it had been, we are not prepared to say the court abused its discretion in denying the motion.

There was no "irregularity" in the entry of the default of plaintiffs for failure to answer the cross-complaint. Prior to the entry of the judgment they were regularly served with the cross-complaint. Under section 1015 of the Code of Civil Procedure, the service made on their attorneys on December 23, 1908, set the time running within which, under the provisions of section 442, Code Civ. Proc., they must answer or demur to the cross-complaint. Estate of Nelson, 128 Cal. 242, 60 Pac. 772; Rose v. Mesmer, 134 Cal. 459, 66 Pac. 594; Wood v. Johnston, 8 Cal. App. 258, 96 Pac. 508. Whether the attorneys resided in Los Angeles county or elsewhere, the plaintiffs were in default at least as early as the 22d day of January, 1909. If they resided in Los Angeles county, the time expired in 10 days after December 23, 1908. The second entry of default made on January 29, 1909, by the court, apparently based upon the service on the parties personally on January 18th in the county where the action was brought, was sufficient upon which to predicate the default judgment if personal service on the parties had been necessary; but such service was mere surplusage and without effect upon the question.

Whichever service is relied upon, however, the time for plaintiffs to answer had expired before their default was entered. The entry of default in the minutes of the court did not render it invalid or ineffective, and the delay of the clerk in entering the judgment on the default is not a matter of which plaintiffs can complain. The provision that it shall be entered immediately is merely directory and for the benefit of the party in whose favor the judgment is given, and the plaintiffs cannot invoke such failure for the purpose of annulling the judgment in defendant's favor. Edwards v. Hellings, 103 Cal. 204, 207, 37 Pac. 218.

We see no error in the rulings of the trial court, and judgment and orders appealed from are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

(156 Cal. 359)

SMITH v. BANGHAM et al. (L. A. 2,186.)

(Supreme Court of California. Oct. 8, 1909.)

1. Vendor and Purchaser (§ 18*)—Option—Obligation of Holder.

An option to plaintiff to purchase certain real estate for a specified price, on or before February 26, 1906, when the grantor agreed to furnish an unlimited certificate of title, etc., was a unilateral agreement, which was not binding on the holder until he exercised the option and elected to purchase.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23; Dec. Dig. § 18.*]

2. Vendor and Purchaser (§ 18*) — Option Contract—Exercise of Option—Effect—Mutuality.

The election of the holder of an option to purchase real estate, to exercise the option within the time limited thereby, was sufficient to bind him and to constitute an enforceable mutual contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23; Dec. Dig. § 18.*]

3. Vendor and Purchaser (§ 57*) — Option Contract—Construction—Demand.

Where an option to purchase real estate bound the holder on giving notice of his acceptance, and on the furnishing of a certificate of title to purchase the property "on the above terms," and bound the vendor to convey to the vendee "on demand," the time for conveyance not having been fixed, the vendee was required to make the demand and accept the conveyance within a reasonable time.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 87; Dec. Dig. § 57.*]

4. Specific Performance (§ 51*)—Option—Equitableness.

Where an option to purchase real estate, requiring conveyance to the purchaser after his election to exercise the option, "on his demand," was construed to require him to make the demand within a reasonable time, the option was not objectionable, in a suit to compel specific performance of the contract, effected by acceptance, because inequitable or unfair in that the time of his demand was wholly a matter of his pleasure.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 153, 154; Dec. Dig. § 51.*]

5. Specific Performance (§ 49*) — Option Contract—Consideration.

Where plaintiff obtained for $1 an option to purchase certain land for $17,000, and later elected, within the time specified in the option, to purchase the land for that sum, which was an adequate price, the adequacy of the consideration paid for the option was immaterial, in a suit to compel specific performance of the contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 151; Dec. Dig. § 49.*]

6. Vendor and Purchaser (§ 13*)—Contract—Inadequacy of Consideration.

Inadequacy of consideration without fraud affords no ground for setting aside an executed sale of real estate, and is not considered, even in equity, except as bearing on the right to enforce specific performance.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 14; Dec. Dig. § 13.*]

7. Vendor and Purchaser (§ 13*)—Option—Executed Contract—Consideration—Adequacy.

Where the consideration for a written option for the sale of real estate had been paid, the option contract was executed, and could not be set aside, in the absence of fraud, for inadequacy of consideration.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 14; Dec. Dig. § 13.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

8. Specific Performance (§ 95*)—Right to Relief—Ability to Convey.

Specific performance will not be decreed against a vendor who is unable, for want of title, to comply with his contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 257; Dec. Dig. § 95.*]

9. Vendor and Purchaser (§ 57*)—Option—Rights of Holder—Relation Back.

An option to purchase real estate vests in the grantee the privilege of acquiring an interest in the land, which, when accepted, entitles the grantee to call for performance as of the date of the giving of the option, so as to cut off intervening rights acquired with knowledge of the existence of the option.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 87; Dec. Dig. § 57.*]

10. Homestead (§ 128*) — Declaration — Rights of Prior Vendee.

Where a wife, with notice that her husband had given plaintiff an option to purchase certain land within a specified time, dissented, and filed a homestead declaration, such homestead claim was subject to plaintiff's rights under the option; and he, having elected to purchase, was entitled to specific performance notwithstanding such declaration, under the rule that a homestead declaration is subject to all rights in the property known to exist by the person filing it.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 224; Dec. Dig. § 128.*]

11. Vendor and Purchaser (§ 239*)—Unrecorded Contract—Priority.

Civ. Code, § 1214, provides that every conveyance of real estate is void as against any subsequent purchaser of the same property, or any part thereof, in good faith, and for a valuable consideration, whose conveyance is first duly recorded. *Held*, that a purchase for value of certain real estate, without notice of plaintiff's prior unrecorded contract of sale from the vendor, would not protect a subsequent purchaser, unless his conveyance was first duly recorded.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 586; Dec. Dig. § 239.*]

12. Specific Performance (§ 126*) — Subsequent Purchaser—Parties—Right to Relief.

Where a subsequent purchaser of the same property was not made a party to plaintiff's suit for specific performance of a prior contract of sale, he could not be bound by a decree of specific performance for plaintiff, and hence specific performance would not be decreed, unless plaintiff would take and pay for his vendor's title, without regard to the validity of a subsequent purchaser's claim.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 401; Dec. Dig. § 126.*]

13. Vendor and Purchaser (§ 351*) — Contract—Breach—Measure of Damages.

Under Civ. Code, § 3306, the measure of damages for a vendor's breach of a contract for the sale of real estate is the price, and the expenses properly incident to examining the title, etc.; the purchaser being entitled to recover the difference between the price and the value of the property only in case of bad faith on the vendor's part.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 1047; Dec. Dig. § 351.*]

Beatty, C. J., and Melvin and Lorigan, JJ., dissenting.

In Bank. Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by W. Scott Smith against Joseph T. Bangham and others. Judgment for plaintiff for less than the relief demanded, and he appeals. Reversed and remanded.

Tanner, Taft & Odell and John E. Daly, for appellant. Denio & Monk, for respondents.

SLOSS, J. The plaintiff appeals on the judgment roll alone from a judgment in his favor for $1. The action was based upon an alleged contract for the purchase of real estate, and the complaint contained two counts; one averring facts upon which plaintiff asserted his right to a specific performance of the contract, and the other seeking damages for its breach.

The court found that on December 26, 1905, the plaintiff and the defendant Joseph T. Bangham entered into a written contract, whereby Bangham, in consideration of the sum of $1, granted to plaintiff, or his assigns, "the right and privilege of exercising an option to purchase" the property in dispute "for the sum and purchase price of $17,000, * * * provided that the said W. Scott Smith, or his assigns, shall exercise said option to purchase on or before February 26, 1906, by notifying me in writing of such exercise of option. Upon such notification within such time, I agree on demand to grant, sell and convey said real estate to said W. Scott Smith, or his assigns, on the above terms, and agree to furnish and deliver within ten days after such notification, to said W. Scott Smith, or his assigns, an unlimited certificate of title to said real estate * * * showing good marketable title of record to said real estate to be in me free and clear of all incumbrances and allowing the said W. Scott Smith, or his assigns, a reasonable time after said delivery to examine said certificate of title. Said notification and the furnishing of said certificate of title within said reasonable time showing title as aforesaid, shall bind the said W. Scott Smith, or his assigns, to purchase said real estate on said terms." The property referred to in the above instrument was the separate property of the defendant Joseph T. Bangham. On February 26, 1906, the plaintiff elected to exercise the option provided for, and to purchase the land in accordance with the terms and conditions named in the writing, and notified Bangham of his election. Bangham refused, and ever since has refused and neglected, to make, execute, and deliver a deed, or to furnish the certificate of title as provided in said contract.

The court finds that, in response to plaintiff's notification of his election to purchase, Bangham informed the plaintiff that he was unable to give title to the land, for the reason that his wife (the defendant Rowena Bangham) held a homestead on the property, and "positively refuses to release it." It is found that the consideration to be paid for the said land was adequate, just, and reasonable, and that "the price for the land at the time when plaintiff notified defendant Joseph T. Bangham that he elected to buy was a fair and adequate price for said land." It is further found that the contract was unjust and unreasonable, in this "that the only consideration paid therefor was the sum of $1," and that said sum of $1 was grossly inadequate and unjust for said option; that the said contract is also unfair and unjust in this, that plaintiff was thereby enabled to postpone indefinitely performance on his part. It is found that the defendant Rowena Bangham, the wife of Joseph T., had actual notice and knowledge of the entering into said contract by her husband, and that she did, after the date of said contract, make and file a separate declaration of homestead on said premises; that said declaration was made by her without the knowledge or connivance of her husband. The contract referred to in the complaint has never been recorded. It is further found that the defendant Joseph T. Bangham did not act in bad faith in his failure to perform the contract; that the land had increased in value to the amount of $5,000, as alleged in the complaint, but that plaintiff had not been damaged in any sum other than the sum of $1 on account of such failure. As conclusions of law the court found, with respect to the first count, that plaintiff was not entitled to recover, and that the declaration of homestead filed by defendant Rowena Bangham is valid, and is not subject and inferior to the contract relied on. On the second count the conclusion of law was that plaintiff was entitled to recover of defendant Joseph T. Bangham the sum of $1 and interest thereon from the 26th day of December, 1905.

On these findings the plaintiff contends that he was entitled to a decree specifically enforcing the contract, and that if, for any reason, such contract should not be enforced, he should recover a judgment for $5,000, the increase in the value of the land.

The agreement signed by the parties on December 26, 1905, was a unilateral agreement, of the kind usually known as an option. By its terms Smith was under no obligation to purchase the land or to pay for it. He was granted the right or privilege of purchasing upon certain terms within a given time. Until he should have exercised this option he was in no way bound by the agreement. His election to accept and exercise the option within the time limited was, however, sufficient to bind him and to remove any objection to the enforcement of the contract on the ground of want of mutuality. Hall v. Center, 40 Cal. 63; Ballard v. Carr, 48 Cal. 74; Calanchini v. Branstetter, 84 Cal. 249, 24 Pac. 149; Thurber v. Meves, 119 Cal. 35, 50 Pac. 1063, 51 Pac. 536; Sayward v. Houghton, 119 Cal. 545, 51 Pac. 853, 52 Pac. 44; House v. Jackson, 24 Or. 89, 32 Pac. 1027. The option had at least the force of an offer to sell, and the acceptance of this offer before it had expired or had been revoked constituted a valid and binding contract from which neither party could recede. 29 Am. & Eng. Ency. of Law (2d Ed.) 601; Vassault v. Edwards, 43 Cal. 458; Benson v. Shotwell, 87 Cal. 49, 25 Pac. 249.

We think the finding of the court that the contract is unfair in that plaintiff was thereby enabled to postpone indefinitely performance on his part is based upon an erroneous construction of the terms of the agreement. The contract reads that upon notification of acceptance Bangham agrees "on demand to grant, sell and convey said real estate to said W. Scott Smith, or his assigns, on the above terms." It is argued that since the obligation is only to convey upon demand by Smith, the latter may indefinitely postpone the making of his demand, and thereby compel the defendant to be ready to convey to him at all times, without making himself liable for the purchase price. But the contract, reasonably interpreted, does not give him any such right of indefinite postponement. It is provided in the agreement that the notification of acceptance, and the furnishing of a certificate of title shall bind him to purchase the real estate "on the above terms." If, under the agreement, the exact time of conveyance and payment were to be fixed by the purchaser's demand, there can be no question that such demand would have to be made by him within a reasonable time. What would be a reasonable time is a question of fact, to be determined upon all of the circumstances of the case. So construed, the provision is in no wise inequitable or unfair.

It is found by the court that the consideration agreed to be paid for the land—i. e., the sum of $17,000—was fair and adequate. The plaintiff having bound himself by the acceptance of the option to pay this sum, we think the question whether or not $1 was an adequate consideration for the option is a false quantity. The plaintiff is not seeking in this action to enforce the option, but to compel compliance with the contract, which resulted from his exercise of the option. That contract was one whereby Bangham bound himself to sell the land, and Smith agreed to buy it, for the sum of $17,000. This is found by the court to be an adequate and fair consideration for the conveyance, and on an action by the vendee for specific performance of such contract the adequacy of the price paid for the option is not a material consideration. In Guyer v. Warren, 175 Ill. 328, 51 N. E. 580, the court said: "The consideration named in the written agreement is $1. As the parties agree to sell an option to buy for the sum of $1, there is no reason why such an express consideration is not an adequate one." See, also, Ross v. Parks, 93 Ala. 153, 8 South. 368, 11 L. R. A. 148, 30 Am. St. Rep. 47. Inadequacy of consideration alone (without fraud, or something in the nature of fraud) is never considered, even in equity, except as bearing upon the right to specifically enforce an executory agreement. It affords no ground for setting aside an executed sale. Here there had been such executed sale of the option, which passed by the writing of December 26, 1905, and the payment of the agreed consideration.

The real question, then, is whether the fact that the vendor's wife declared a homestead upon the property is a sufficient answer to plaintiff's demand for a conveyance. Specific performance will not be decreed against a vendor who is unable for want of title, to comply with his contract. Bell v. Bank of California, 153 Cal. 234, 239, 94 Pac. 889, and cases cited. If the homestead was valid as against a prior agreement to sell, the refusal of the wife to join in a conveyance fully justified the judgment denying specific relief. It may be remarked that neither the pleadings nor the findings disclose the time when the homestead was declared. It is found to have been after the execution of the contract (of option), but whether before or after plaintiff had notified Bangham of his election to purchase is not shown. We think, however, that the rights of the parties would be the same in either event. It has been said that an option to purchase land does not before acceptance vest in the holder of the option an interest in the land. Richardson v. Hardwick, 106 U. S. 252, 1 Sup. Ct. 213, 27 L. Ed. 145; Gustin v. Union School District, 94 Mich. 502, 54 N. W. 156, 34 Am. St. Rep. 361; Phenix Ins. Co. v. Kerr, 129 Fed. 723, 64 C. C. A. 251, 66 L. R. A. 569. On the other hand, there are cases holding that the grant, on a valuable consideration, of an option to purchase constitutes the grantee the equitable owner of an interest in the property. House v. Jackson, supra; Kerr v. Day, 14 Pa. 112, 53 Am. Dec. 526; Telford v. Frost, 76 Wis. 172, 44 N. W. 835; Wall v. R. Co., 86 Wis. 48, 56 N. W. 367. At any rate the option vests in the grantee the right or privilege of acquiring an interest in the land, and, when accepted, entitles him to call for specific performance. Hawralty v. Warren, 18 N. J. Eq. 124, 90 Am. Dec. 613; Kerr v. Day, supra; People's Street Ry. Co. v. Spencer, 156 Pa. 85, 27 Atl. 113, 36 Am. St. Rep. 22; Guyer v. Warren, 175 Ill. 328, 51 N. E. 580. Such right, when exercised, must necessarily relate back to the time of giving the option (People's St. Ry. Co. v. Spencer, supra), so as to cut off intervening rights acquired with knowledge of the existence of the option. A subsequent purchaser with notice of a valid and irrevocable option would certainly take subject to the right of the option holder to complete his purchase (Barrett v. McAllister, 33 W. Va. 738, 11 S. E. 220; Sizer v. Clark, 116 Wis. 534, 93 N. W. 539; Kerr v. Day, supra), and we see no reason why the declarant of a homestead should stand in any better position.

A declaration of homestead creates no new or additional title. It attaches certain privileges and immunities to such title as may at the time be held. If the husband, for example, owns a title subject to an outstanding equity, a declaration of homestead by the wife, at least where she has knowledge of this equity, does not destroy it. Her homestead claim is impressed upon the title that her husband had; i. e., the title subject to such rights against it as were known to her to be held by third parties. These conclusions seem to follow from the former adjudications of this court. In Gilbert v. Sleeper, 71 Cal. 290, 12 Pac. 172, the plaintiff's husband had entered into an agreement with the defendant Sleeper to exchange two tracts of land, and each entered into possession of the tract which he was to receive. Subsequently Gilbert conveyed to his wife all of his property, including the land which he had agreed to convey to Sleeper, and plaintiff filed a homestead upon all the land so conveyed to her. It was held that plaintiff's rights in the tract agreed to be conveyed to Sleeper were subject to the rights created by the agreement. "There was no error," says the court, "in refusing to admit in evidence plaintiff's declaration of homestead. Obviously she could not, by filing it, defeat or impair the previously existing rights of defendant." In Snodgrass v. Parks, 79 Cal. 55, 21 Pac. 429, action was brought to quiet title to land which one of the plaintiffs had agreed to convey to some of the defendants; such defendants having wholly failed to pay the purchase money, or to comply with any of the conditions of their contract. The defendants relied upon a declaration of homestead filed by one of them upon the land while in possession under this contract. This was held to constitute no defense to the action. The court said: "It is further urged that because a homestead was declared upon the property by Mrs. Dunlap, the action cannot be maintained. This cannot be so. Conceding, as claimed by the appellants, that a homestead may be declared upon land held under a mere contract to convey, such declaration did not give any new title, or tend in any way to strengthen or enlarge the one then existing. Therefore, when the equitable title created by the contract, and possession under it, was lost in the manner stated, the homestead fell with it. It would be a marvelous doctrine that the filing of a declaration of homestead could create a new title, or render a bad title good." In Hayford v. Kocher, 65 Cal. 389, 4 Pac. 350, certain premises were by mistake excluded from a conveyance of lands. The wife of the grantor, with knowledge of the mistake, filed a declaration of homestead upon the lands so omitted. This was held not to affect the pre-existing right of the grantee to have the conveyance reformed so as to carry title to such premises.

The fundamental basis upon which all

these decisions must rest is the proposition that (except where the contrary is expressly declared by statute) a declaration of homestead is subject to all rights in the property known by the person filing the declaration to exist. And this principle, applied to the facts of the present case, requires the holding that the declaration of homestead, made by Mrs. Bangham with knowledge of the contract theretofore entered into with the plaintiff, was subject to his right to demand a conveyance of the land in accordance with his contract.

The authorities principally relied on by the respondent (Fitzell v. Leaky, 72 Cal. 477, 14 Pac. 198; Ontario Bank v. Gerry, 91 Cal. 94, 27 Pac. 531; Lee v. Murphy, 119 Cal. 364, 51 Pac. 549, 955) are not in point. These cases hold that a declaration of homestead by the wife is good as against a prior unrecorded mortgage executed by the husband, although the wife had knowledge of the existence of the mortgage. But this conclusion is based upon the express provisions of Civ. Code, §§ 1240, 1241, which provide that the homestead is exempt from execution or forced sale except "* * * (3) on debts secured by mortgages on the premises, executed and acknowledged by husband and wife, or by an unmarried claimant; (4) on debts secured by mortgages on the premises, executed and recorded before the declaration of homestead was filed for record." Here is an express statutory declaration that certain mortgages only shall be superior to the rights created by a declaration of homestead. As the mortgages in the cases cited did not come within the terms of the statute, they necessarily were inferior to the homestead. Here, however, we have no question of an attempt to subject the land to execution or forced sale from which it is specifically exempted. The question is merely whether antecedent rights in the property shall be cut off by a declaration of homestead, or, otherwise stated, whether such declaration shall enlarge the title owned at the time of its filing. For the reasons stated, we think this question must be answered in the negative.

On the facts as hereinbefore stated the plaintiff was entitled to a decree specifically enforcing the contract of conveyance made by the defendant Bangham. But the record discloses further facts bearing on the appropriateness of this remedy. It is found that the American Avenue Building Company, a corporation, claims and has an interest in the said premises, "by virtue of a written agreement to convey by defendant Joseph T. Bangham, made in good faith and for value." If this interest is superior to that of plaintiff, it would make it impossible for Bangham to comply with his contract to convey a good marketable title free and clear of incumbrances. But the court does not find the interest of the Building Company to be superior to that of plaintiff, nor does it find facts from which the respective priorities may be determined. A purchase for value, without notice of plaintiff's unrecorded contract, would not, under our statute, protect the subsequent purchaser, unless his conveyance was "first duly recorded." Civ. Code, § 1214. For all that appears, the Building Company's contract was never recorded. The facts as found do not therefore offer any impediment to a decree of specific performance. But the American Avenue Building Company is not a party to this action, and obviously its rights cannot be affected by any decree that might be rendered herein. A reversal of the judgment, with directions to the court below to enter a decree of specific performance, might result in plaintiff's obtaining a conveyance which would be valueless to him. Unless the plaintiff is willing to take and pay for Bangham's title, without regard to the validity of the Building Company's claim, the question whether an effective decree for specific relief can be made should be determined in an action in which every party having an interest in the property is represented. To this end a new trial should be ordered. If, upon such new trial, it should appear that specific performance cannot be decreed, the question of plaintiff's right to damages, as prayed by the second count of the complaint, will arise. The measure of damages in such cases is clearly defined by Civ. Code, § 3306. The difference between the price agreed to be paid and the value of the estate may be recovered only where there has been bad faith on the part of the vendor. Here the court came to the conclusion that the defendant Bangham did not act in bad faith. On this appeal on the judgment roll we cannot therefore direct the allowance of damages for any greater sum than that recovered. But the question of good or bad faith should be considered anew by the trial court in the light of our views on the main question discussed in this opinion. Accordingly the issue of damages, as well as the issues arising on the prayer for specific performance, should be retried.

The judgment is reversed, and the cause remanded for a new trial. The plaintiff should have leave to amend his complaint, and to bring in new parties, if so advised.

We concur: SHAW, J.; ANGELLOTTI, J.; HENSHAW, J.

BEATTY, C. J. I dissent. A dollar is not an adequate consideration for such an option as is here held to defeat the right of Mrs. Bangham to declare a homestead upon property occupied as such. It was a merely nominal consideration, and, as against a right so highly and so deservedly favored as the right of homestead, it should be disregarded by a court of equity.

MELVIN, J. I dissent. It does not appear from the record whether or not the declaration of homestead was made prior to the 26th day of February, 1906—the date upon which appellant notified respondent that he elected to buy the property—but under the rule favoring a construction in support of the regularity of a judgment we may assume that Mrs. Bangham had filed her declaration of homestead before appellant signified his willingness to pay $17,000 for the property. If, therefore, she could not make a valid declaration of homestead, the only thing which prevented her from doing so was the option for which plaintiff had paid the price of $1. In other words, to find that the declaration of homestead was ineffective, we must hold that the option which the purchaser might ignore and surrender, without the loss of more than the trifling sum of $1, was sufficient to deprive this woman of a right given her by the law under the Constitution of California. Article 17, § 1. It may be that after the acceptance of all of the terms of a sale contemplated under the provisions of a contract of this kind, and the offer of an adequate price, the wife of the owner of the property, if she knew all of the facts, would be powerless to declare a valid homestead upon it; but we are not here confronted by such a state of facts. Suppose that, instead of 60 days, a period of 10 years had been named as the time within which the option of purchase might be exercised. Might a husband, by the simple device of giving such an option, deprive his wife for a term of years of the right of securing a homestead given her by statutes passed under the solemn mandate of the Constitution? Such a result, it seems to me, was never contemplated.

In the opinion of the majority of the court, great reliance is placed upon the authority of People's Street Railway Co. v. Spencer, 156 Pa. 89, 27 Atl. 113, 36 Am. St. Rep. 22, to the effect that when an option to purchase is exercised, the right to buy the property relates back to the date of the original contract, so as to cut off intervening rights acquired by those having knowledge of the option. That was a case not involving any interpretation of the law relating to homesteads. The facts there considered showed that there had been a conveyance of property as security for a loan, but that the grantor took a lease for a nominal sum and an exclusive option of repurchase for the amount of the loan and interest. The court treated the transaction as one in which the railroad company never surrendered its equitable estate and, held that, upon the repayment of the loan with interest, the company's title became effective as of the date of the option. It was held that upon payment of the loan and interest the railroad company became the owner of the land as it was at the date of the original agreement "or of the insurance money which stood pro tanto in its place." The case is so dissimilar to the one at bar that I cannot see its appositeness.

Section 1238 of the Civil Code, gave Mrs. Bangham the right to declare a homestead upon her husband's property. This, I submit, existed independently of any adverse equitable title which she was not by statute compelled to recognize as paramount to it. I cannot subscribe to the doctrine expressed in the main opinion that: "The fundamental basis upon which all of these decisions must rest is the proposition that (except where the contrary is expressly declared by statute) a declaration of homestead is subject to all rights in the property known by the person filing the declaration to exist." The Code does not declare the instances in which a homestead is not subject to execution and forced sale, but does enumerate the four kinds of judgments which are superior to it. Civ. Code, § 1241. All other kinds of judgments not enumerated are ineffective because not specified in the statute, and the inference is inevitable that, without the barrier of the statute, no unexecuted judgment could avail against a homestead. By parity of reasoning we should deduce the rule that the homestead must prevail against all liens not by statute made superior to it.

Mr. Justice McFarland, in Ontario State Bank v. Gerry, 91 Cal. 97, 27 Pac. 531, 532, said: "But the doctrine that unrecorded deeds and mortgages are good except as against subsequent purchasers for a valuable consideration does not apply to homesteads. Rights to homesteads are defined by the provisions of the Code which directly deal with that subject. 'The doctrine bearing upon conveyances made to hinder, delay, or defraud creditors has no application to the creation of a homestead.' And a declaration of homestead is not a 'conveyance' as that word is used generally in the Code." And again in the same opinion he says: "There is no question about the morality of the transaction. It is simply a matter of statutory provision." In the case of Lee v. Murphy, 119 Cal. 374, 51 Pac. 553, the homestead defeated the lien of an unrecorded mortgage, of which the wife who declared the homestead had actual notice, and this significant language is used in the opinion: "I have not overlooked the equitable considerations so persuasive in this case, and so ably presented by counsel for respondent, but they all proceed from the assumption that the case is one for the application of general principles of equitable cognizance, whereas it is hedged in and controlled entirely by legislative enactment." In Warner v. Warner, 144 Cal. 615, 78 Pac. 24, a homestead on the husband's separate property was held good as against an antenuptial agreement, wherein the wife had promised not to claim her husband's property "either as heir or otherwise." In Simonson v. Burr, 121 Cal. 582, 54 Pac. 87, it was decided that the question of fraud of creditors cannot be raised as against a homestead which one of the spouses had the right to declare.

Following the rule that a contract is to be construed most strongly against the person seeking to sustain it, I am still of the opinion that the contract in the case at bar was properly held to be unfair because under its terms plaintiff would be enabled to postpone indefinitely performance on his part, and I wish to repeat the language used as follows in the opinion heretofore rendered in Department 2: "While the contract provides that the option must be exercised by written notification prior to February 26, 1906, it also contains this language: 'Upon such notification within such time I agree on demand to grant, sell and convey said real estate to said W. Scott Smith,' etc. The contract further provides that Bangham shall within 10 days after notification furnish a certificate of title, that thereafter Smith or his assigns shall have 'reasonable time' to examine said certificate, and that 'said notification and the furnishing of said certificate of title within said reasonable time showing title as aforesaid, shall bind the said W. Scott Smith or his assigns to purchase said real estate on said terms.' Conveyance by Bangham 'on demand' being one of said 'terms,' the option might, if enforced, result in giving plaintiff the power to hold the land indefinitely, subject to his privilege of purchase, and without the expenditure of a dollar, by the simple expedient of omitting to demand from Bangham a conveyance of the title. The lower court properly declined to enforce the specific performance of a contract so inequitable and one in which the consideration was so inadequate. Civ. Code, § 3391, subd. 1. It follows also that such a contract, being of but little more dignity than a nudum pactum, would be no obstacle to the declaration of a homestead by Mrs. Bangham on her husband's property. As the court found appellant suffered no detriment other than the payment of $1 for the option, judgment in his favor for that sum on the second count was proper. Civ. Code, § 3306."

I am of the opinion that the judgment of the lower court should be affirmed.

LORIGAN, J. I concur in the foregoing dissenting opinion.

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156 Cal. 373

CORTELYOU v. IMPERIAL LAND CO. et al.

(L. A. 2,122.)

(Supreme Court of California. Oct. 8, 1909.)

1. Corporations (§ 99*) — Stock — Issue of Shares.

Corporations cannot issue shares of stock except for money paid or property or labor received, and hence an issue of stock by a corporation to a person without consideration, simply upon an agreement that he would sell certain of it and turn the proceeds over to the corporation, would be void unless an innocent party had acquired rights on the faith of the issue.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 444–446; Dec. Dig. § 99.*]

2. Corporations (§ 107*)—Stock—Issue of Shares—Interest of Buyer.

If decedent, with knowledge that a corporation had issued all its shares of stock to its general manager under an agreement, void for want of consideration, that the manager should sell some of the stock and turn the proceeds over to the corporation, bought shares through the manager and consented that they should be evidenced by the certificates in the manager's hands, the shares, as distinct from the evidence of ownership, vested completely in decedent, who become a shareholder, and, where the manager subsequently transferred the stock to others, decedent's representative could compel the corporation to issue certificates for decedent's shares.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 456; Dec. Dig. § 107.*]

3. Corporations (§ 119*)—Stock—Transfer—Right of Buyer.

If the issue of stock by a corporation to its manager was valid as being on account of services theretofore rendered, and an incidental agreement of the manager to turn over to the corporation the proceeds from a sale of certain of the stock was not supported by consideration, and the agreement did not include any particular number of shares evidenced by any specified certificates, the shares, in the absence of fraud, became his property, and decedent, having bought shares of him, acquired the property thereunder, though the certificates remained in the manager's hands, so that, the manager having sold the shares to others, decedent's representative could compel the corporation to issue certificates to him for decedent's shares.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 119.*]

4. Corporations (§ 121*)—Stock—Transfer—Actions—Parties.

The manager having no interest in the property, and no trust relation existing between decedent and the manager, he was not a necessary party to a suit by decedent's representative to compel the issuance of certificates.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 504; Dec. Dig. § 121.*]

5. Corporations (§ 121*)—Stock—Transfer—Actions—Parties.

The persons to whom the manager had sold decedent's stock and who occupied the possession originally held by the manager were proper parties defendant.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 504; Dec. Dig. § 121.*]

6. Corporations (§ 121*)—Stock—Transfer—Actions—Laches.

A purchaser of corporate stock having a property right therein, the right to demand certificates therefor, which, under the law and by agreement, the corporation was required to furnish, could be enforced without reference to the lapse of time if no loss or injury had resulted to an innocent person by reason of delay.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 504; Dec. Dig. § 121.*]

In Bank. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by James G. Cortelyou, administrator of John G. Cortelyou, against the Imperial Land Company and others. A demurrer to the complaint was sustained, and plaintiff appealed to the District Court of Appeal, which was unable to concur in a judgment, and the cause was transferred to the Supreme Court. Reversed and remanded on an opinion of the District Court of Appeal.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

M. M. Meyers and James P. Clark, for appellant. Edwin A. Meserve, Paul H. McPhersin, and Walter Malins Rose, for respondents.

PER CURIAM. This case was originally before the District Court of Appeal for the Second Appellate District for decision; but, that court being unable to concur in a judgment, the cause was brought here for further consideration. Accompanying the transfer of the case here are the several opinions of the judges of the District Court of Appeal. One of those opinions, signed by the majority of the judges of the District Court of Appeal, is as follows:

"Action in equity to establish the right of plaintiff as the administrator of John G. Cortelyou to 250 shares of the capital stock of the defendant Imperial Land Company, and to require the corporation to issue to the administrators certificates evidencing such ownership. A demurrer to the complaint was sustained with leave to amend, and upon failure to amend the complaint judgment went for defendants and against plaintiff, from which judgment this appeal is taken.

"While the complaint is not happily worded, the same may fairly be construed as alleging the following facts, namely: That one Cortelyou, deceased, plaintiff's intestate, purchased from defendant corporation, through one Ferguson, its general manager, 250 shares of its capital stock, paying therefor an agreed price, which it is averred was at the time the reasonable value thereof. That prior thereto the corporation had issued all of its shares of stock to Ferguson, its general manager, in payment for services rendered, but upon the agreement that certain of the stock so issued should be sold by Ferguson as treasury stock and the proceeds turned over to the corporation, and that certificates should be issued of such treasury stock in the same manner and with the same effect as though such stock had been retained in the treasury of the company unissued. That when Cortelyou purchased the shares of stock it was agreed that the stock should be held by one Chaffey as trustee and voted by him under a pooling agreement, but that when the full purchase price was paid the purchaser should receive a copy of the certificates of stock with the pooling agreement indorsed thereon; such copy of the certificates to be in form so as to enable the holder to transfer the same by indorsement. That no certificates were ever issued to Cortelyou as agreed; but the certificates evidencing the shares of stock purchased by Cortelyou continued to stand in the name of Ferguson. That long after the purchase by Cortelyou of the stock Ferguson assigned and transferred all the stock of the corporation in his name, including that of Cortelyou, to the defendants other than the corporation, who took the assignment of such certificates with full knowledge of Cortelyou's rights, and upon an agreement that when the voting pool was dissolved they would cause to be issued to Cortelyou his certificates for the stock so owned by him. It is alleged that the pooling agreement was, by mutual consent, dissolved; when is not made to appear. The demand for such certificates by plaintiff in his representative capacity is alleged, as is the refusal to issue the certificates as agreed. The prayer is that the right of plaintiff to this stock be established and the corporation be ordered to issue certificates therefor, and other allegations with reference to the rights claimed against the parties holding the certificates, not necessary to mention in connection with the consideration of the demurrer. The demurrer was a general one, and upon the grounds that the complaint disclosed a bar of the statute of limitations, a misjoinder of parties defendant, and that certain ambiguities existed, by reason of which it could not be determined how or in what manner the agreement to sell the shares had been made, or how the defendant could agree to sell the stock when all of the stock had been issued.

"Treating the complaint as averring that certain of the stock, including that purchased by Cortelyou, was issued by the corporation to Ferguson without consideration, simply upon the agreement that he should sell the same and turn the proceeds over to defendant, such issue is forbidden by the Constitution and statutes of this state, for corporations are forbidden to issue shares of stock except for money paid, property or labor received, and shares issued in violation thereof are void, 'and the parties receiving them do not thereby become shareholders' (Kellerman v. Maier, 116 Cal. 424, 48 Pac. 377); and the effect of which issue would be to leave in the treasury, subject to issue by the corporation, the stock so improperly issued as completely as though the void certificates had never issued. This, of course, presupposes that no innocent party should have acquired rights on the faith of the issue; but, notwithstanding the unwarranted character of the issue, if such an allegation be considered as made, Cortelyou, with knowledge of the fact that the stock was thus issued, bought the same and consented that it should be evidenced by the certificates thus in the hands of Ferguson. The shares, as distinct from the evidences of ownership, were by such purchase vested completely in Cortelyou, and he became thereafter a shareholder to the extent of his purchase, and, under his agreement, entitled to have transferred to him the evidences of ownership. Ferguson did not hold the property of Cortelyou after the sale. That property, which was the shares and personal property, passed with the purchase and payment of money. Upon the other hand, if we construe the complaint as alleging that the issue to Ferguson was valid, by reason of the same being on account of services theretofore rendered, the incidental agreement on the part of Ferguson to turn over to the corporation the proceeds from a sale of certain of the stock does not seem to be supported by any consideration. Nor does it appear that the agreement included any particular number of shares evidenced by any specified certificates, and whatever cause of action the corporation had against Ferguson by reason of such incidental agreement would be in the nature of an action for damages if he failed to carry out the same. The shares having been issued to him for an agreed consideration, in the absence of fraud, the same became the property of Ferguson. It seems to us, then, that, construing the complaint as we may, the facts set out are sufficient to show Cortelyou's acquisition of the personal property by the purchase, and whether Ferguson sold the same as his own, or as part of the treasury stock of the corporation, by the sale his interest in the shares, the subject of the sale, vested in Cortelyou. 'His interest in the subject-matter ceased upon the consummation of the sale as effectually as though he had in person assigned his shares to the plaintiff.' Tregear v. Etiwanda Water Co., 76 Cal. 537, 18 Pac. 658, 9 Am. St. Rep. 245. In the case last cited, it is held that where the owner of shares executes a mortgage in form sufficient to create a lien upon the shares of stock in a corporation, which mortgage is subsequently foreclosed and the property purchased at sheriff's sale, the purchaser takes all of the interest of the mortgagor and is entitled to have certificates issued to him, notwithstanding when he took the mortgage he permitted the certificates evidencing the ownership to remain in the possession of the mortgagor. We are unable to see why the same principle would not apply here, and that Cortelyou's representative, notwithstanding the retention of the certificates by Ferguson, might not have a decree as prayed for against the corporation. Ferguson, having no interest in the property, was not a necessary party to this proceeding upon the authority last quoted, the effect of which decision can only be to hold that no trust relation existed by reason of the mortgagor holding the evidences of the ownership in the shares of stock, for had such trust relation existed he would have been a necessary party to the proceeding instituted by Tregear against the water company. Our Supreme Court having held that he was not a necessary party, it must be held as determining that no trust relation existed. It does not follow, however, that the other defendants in this case, who occupied the position originally held by Ferguson, are not proper parties, for, as stated in the case last cited, 'a decree cannot bind one who is not a party to the action, and by making him a party he may frequently be bound and questions as to him determined which would otherwise remain open and subject to future adjudication.' In our opinion the complaint, then, constituted a cause of action, and there was no misjoinder of parties defendant.

"Eliminating, therefore, as we do, any trust relation as arising in this transaction between Cortelyou and the defendants other than the corporation, the only question remaining is as to the right of a corporation which has received the full value of its shares to refuse to issue certificates to its stockholders simply because they may have been guilty of laches in making application therefor. The demurrer admits that in the agreement between Ferguson and the corporation, through which the shares were originally issued, it was stipulated, in the event of a sale by Ferguson, 'that certificates should be issued of such treasury stock in the same manner and with the same effect as though such stock had been retained in the treasury unissued,' which is a reserved right of cancellation in event of sale. It is not averred that the shares sold to Cortelyou were in fact issued to Chaffey under any pooling agreement; but, on the contrary, it is alleged that the certificates 'continued to stand in the name of Ferguson.' Under this agreement between the corporation and Ferguson, no intervening parties having acquired an interest, it became the duty of the corporation, upon the sale to Cortelyou, to issue to him his certificates, unless the subsequent agreement between Ferguson and Cortelyou, that the certificates issued to Ferguson should represent Cortelyou's shares and should so stand in Ferguson's name until the pooling agreement was dissolved, would excuse the corporation from the further issue to Cortelyou during the existence of this pooling agreement. Assuming this, nothing appears in the complaint indicating that such time has elapsed since the dissolution of the pooling agreement as in equity would bar plaintiff from relief, were it even conceded that laches could be invoked by the corporation as a reason for the nonissuance of the evidences of ownership in property sold under the circumstances of this case. Cortelyou and his estate have, under the allegations of this bill, been continuously the owners of these shares ever since their purchase, entitled to dividends, and subject to all the liability of shareholders; and to say that the election to continue such relation without affirmative evidence upon the books, or by certificate, would destroy the property right, cannot be admitted. The property right existing, the right to demand the evidence from the corporation, which under the law and by the agreement it is required to furnish, is a right which may be enforced without reference to the lapse of time, if no loss or injury has resulted to an innocent person by reason of the delay. Cook on Stockholders, § 61; Helliwell on Stock & Stockholders, §§ 110-114.

"We are of opinion therefore that the court erred in sustaining the demurrer to the complaint, and for that reason the judgment is reversed, and cause remanded for further proceedings."

We are satisfied that the foregoing opinion correctly disposes of the matters presented for determination on this appeal.

We adopt it as the opinion of this court, and order that the judgment be reversed, and the cause remanded.

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11 Cal. App. 237

KROGH v. PACIFIC GATEWAY & DEVELOPMENT CO. (Civ. 565.)

(Court of Appeal, Third District, California. Sept. 1, 1909.)

1. Venue (§ 8*)—Transitory Action—Place of Trial—False Representations.

An action for false representations by defendant's agent, inducing a sale of certain of defendant's shares to plaintiff, whereby he was damaged, was a personal, transitory action, not within Code Civ. Proc. §§ 392, 393, or 394, prescribing the venue of certain enumerated actions, but was within section 395, declaring that in all other cases the action must be tried in the county in which the defendants, or some of them, reside at the commencement of the action, etc.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 17; Dec. Dig. § 8.*]

2. Corporations (§ 503*)—"Principal Place of Business"—Action—Venue.

The "principal place of business" of a corporation, for the purpose of the venue of an action against it, is its residence.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1935; Dec. Dig. § 503.*

For other definitions, see Words and Phrases, vol. 6, pp. 5559, 5560.]

3. Corporations (§ 503*)—Actions—Venue.

Const. art. 12, § 16, provides that a corporation may be sued in the county where the contract is made, or is to be performed, or where the obligation or liability arises or breach occurs, or in the county of its principal place of business, subject to the court's power to change the place of trial as in other cases. *Held* that, where a complaint against a corporation, residing in S. county, for false representations in the sale of its stock to plaintiff by its agent, in F. county, did not show that the contract was made, or was to be performed, or that defendant's liability arose, or that its breach of contract, if any, occurred, in F. county, defendant was entitled to have the venue of the action changed to the county of its residence, under Code Civ. Proc. § 395, providing that in other cases than those specified in sections 392, 393, and 394, an action must be tried in the county in which the defendants, or some of them, reside; the corporation being entitled to the same rights under such section as natural persons.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1935; Dec. Dig. § 503.*]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by J. C. Krogh against the Pacific Gateway & Development Company. From an order denying a change of venue, defendant appeals. Reversed.

Ashley & Neumiller and Everts & Ewing, for appellant. Cartwright & Caslin, for respondent.

CHIPMAN, P. J. Defendant is a corporation organized under the laws of this state, and its principal place of business is the city of Stockton, San Joaquin county. The action was commenced in the superior court of the county of Fresno. Defendant appeared, and at the time of filing its demurrer filed an affidavit of merits, and made demand and moved the court that the place of trial be changed from Fresno county to San Joaquin county. The motion was denied, and defendant appeals from the order.

The action was commenced to recover damages for the false and fraudulent representations alleged to have been made by the authorized agent of defendant in the county of Fresno, relating to the sale of certain shares of the defendant corporation to plaintiff whereby he was damaged. The action is clearly a personal or transitory action. It does not fall within the provisions of either sections 392, 393, or 394, Code Civ. Proc., but does come within the provisions of section 395 of that Code, which provides that "in all other cases, the action must be tried in the county in which the defendants, or some of them, reside at the commencement of the action." Where commenced in the wrong county, the place of trial may be changed in the cases mentioned in section 397, as here, "when the county designated in the complaint is not the proper county."

The principal place of business of a corporation is its residence. Cohn v. C. P. R. R. Co., 71 Cal. 488, 12 Pac. 498; Buck v. City of Eureka, 97 Cal. 135, 31 Pac. 845; Trezevant v. Strong Co., 102 Cal. 48, 36 Pac. 395. The complaint alleges that in the month of January, 1906, in the county of Fresno, the defendant by its authorized agent, one Abrams, represented to plaintiff that defendant had entered into a contract with said Abrams and one Brandt, whereby upon the payment of a certain sum of money to Abrams and Brandt they would transfer to defendant certain valuable oil-bearing lands situated in San Benito county; that Abrams and Brandt and certain other persons had each subscribed for 25,000 shares of defendant corporation, and had each paid to defendant the sum of $5,000 therefor, and that the money so paid would be used to pay Abrams and Brandt for said land; that should plaintiff purchase 25,000 shares, and pay $5,000 therefor, the money so paid would be applied, together with the money paid by the other said subscribers, in the purchase of said land, and that defendant would thereupon proceed to develop said property by sinking wells, etc.; that "plaintiff, believing said representations and relying thereon, in the belief that they were true, thereafter subscribed for 25,000 shares of the capital stock of said corporation, and on or about January 10, 1906, paid to said corporation therefor the sum of $5,000." Then follow averments showing that said representations were false, and made to deceive plaintiff, and that in fact no money was paid to defendant, except as paid by plaintiff, and that defendant has never acquired any oil land, and has never developed any oil land, that said stock is of no value, and that defendant "has never issued to plaintiff a certificate of said stock."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Section 16, article 12 of the Constitution provides as follows: "A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases." In Cohn v. C. P. R. R. Co., supra, it was held that: "In an action against a corporation for damages for breach of contract, the defendant is entitled to a change of place of trial to the county in which its principal place of business is situated, when the county in which the action was brought is not the one in which the contract was made, or was to be performed, or in which the obligation arose, or in which the principal place of business is situated." It cannot be said from any facts set forth in the complaint that the contract sued upon was made, or was to be performed, or that the alleged liability arose, or that its breach occurred, in Fresno county. But it does appear by the affidavit that the principal place of defendant's business is in San Joaquin county. The only contract shown by the complaint was made, and was to be performed subsequently to the representations made, at Fresno county. No obligation or liability or breach occurred at Fresno county so far as appears. The alleged representations made by Abrams may have induced plaintiff to subscribe for the stock, and pay his money to defendant for the same, but this took place, as appears from the complaint, after the representations were made, and not until then did any obligation arise, and defendant's alleged breach occurred still later.

In Trezevant v. Strong Co., supra, the construction placed upon the section of the Constitution, above quoted, in Lewis v. S. P. Coast R. R. Co., 66 Cal. 209, 5 Pac. 79, and National Bank v. Superior Court, 83 Cal. 498, 24 Pac. 157, was followed. It was held, as in National Bank v. Superior Court, that "where a corporation is sued in any one of the counties mentioned in this section, it cannot demand a change of venue as matter of absolute right, but only as in other cases and for other reasons than that the county in which the action is commenced is not the proper county." But even as held in these early cases, plaintiff has not brought himself within the provisions of the Constitution, and defendant is entitled to a change of the place of trial under the last clause of the section. But if we are mistaken in this view of the facts as shown, still defendant is entitled to the same right in the matter as would be accorded to a natural person (Grocers', etc., Union v. Kern, etc., Co., 150 Cal. 466, 89 Pac. 120); and, if defendant were a natural person, there could be no doubt of its right in the case. Lewis v. South Pacific Coast R. R. Co., supra, was distinctly overruled in Grocers', etc., Union v. Kern, etc., Co., in so far as it held that the provision of the state Constitution is not in conflict with the provision of the fourteenth amendment of the Constitution of the United States. In Grocers', etc., Union v. Kern, etc., Co., the right claimed was under section 392, Code Civ. Proc., and the court said: "No conceivable ground can be suggested why a natural person should have the right of trial of an action involving an interest in land in the county where the land is situated, and the same right should be denied to a corporation." What is true of the rights of corporations arising under section 392 must be true of the rights of corporations arising under section 395. We see no escape from this conclusion.

Respondent has filed no brief in the case, from which we might infer that he concedes the correctness of appellant's position. Whether this be so or not, in fairness to the court respondent should have given us such assistance as he could if, after the appeal, he still believed the trial court was justified in denying the motion.

The order refusing a change of venue of the action is reversed.

We concur: BURNETT, J.; HART, J.

11 Cal. App. 224

PITTMAN v. CARSTENBROOK et al.

(Civ. 592.)

(Court of Appeal, Third District, California. Aug. 30, 1909.)

1. VENUE (§ 62*)—MOTION FOR CHANGE—PARTIES.

The general rule that all the defendants who have been served or have appeared must join in the motion to change place of trial is subject to the qualification that the county in which the action is brought is the proper county for its trial, which depends on the character of the action or the residence of defendants; so that motion for change of place of trial to Y. county of an action brought in S. county for negligent acts committed in Y. county, which is one of the actions that Code Civ. Proc. § 395, provides must be tried in the county in which defendants or some of them reside (except that section 396 provides that it may be tried in the county where brought, in the absence of a demand for trial in the proper county), need not, on evidence that some of defendants reside in Y.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

county, and none of them reside in S. county, be joined in by a defendant which is a foreign corporation not shown to have its principal place of business in S. county, as even though, under Const. art. 12, § 16, providing that a corporation may be sued in the county where the liability arose or where it has its principal place of business, it being a foreign corporation may be sued in any county, so that as to it S. county may be considered proper, it is not proper in the sense that it may demand to be tried there, and so prevent change by the other defendants of the place of trial.

[Ed. Note.—For other cases, see Venue, Dec. Dig. § 62.*]

2. VENUE (§ 77*) — MOTION FOR CHANGE — WAIVER.

Under Code Civ. Proc. § 396, providing that, though the county in which an action is brought is not the proper county for trial, it may be tried there, unless defendant, when he answers or demurs, files an affidavit of merits and a demand for change of place of trial, he does not waive his motion by filing prior to hearing thereof his amended demurrer, which amendment under section 472 he could make of course, and which relates to the time of filing the original.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 134; Dec. Dig. § 77.*]

3. VENUE (§ 66*)—MOTION FOR CHANGE—AFFIDAVIT OF MERITS — "ATTORNEY" — "COUNSELOR"—"ATTORNEY AT LAW."

Defendant's affidavit of merits for change of place of trial, averring that he has fully and fairly stated all the facts to his "attorney," C., is sufficient without further stating that C. is his counsel in the case; "attorney," "counselor," and "attorney at law" being used synonymously by Code Civ. Proc. §§ 275–299.

[Ed. Note.—For other cases, see Venue, Dec. Dig. § 66.*

For other definitions, see Words and Phrases, vol. 1, pp. 630–632; vol. 8, p. 7586; vol. 2, p. 1644; vol. 1, pp. 632–634.]

Appeal from Superior Court, Sacramento County; C. N. Post, Judge.

Action by Uletta Pittman, administratrix of Charles E. Allen, deceased, against Harry J. Carstenbrook and others. From an order granting the motion of defendants, other than the Southern Pacific Company, for change of place of trial, it appeals. Affirmed.

W. H. Devlin, for appellant. C. E. McLaughlin and R. T. McKissick, for respondent Pittman. W. H. Carlin, for respondents Carstenbrook and others.

BURNETT, J. The appeal is from an order granting the motion of the defendants other than the Southern Pacific Company for a change of place of trial from the county of Sacramento, in which the action was brought, to the county of Yuba, the residence of two of said defendants.

Appellant contends that the order was erroneous for the following reasons: "(1) The defendant, Southern Pacific Company, had appeared in the case, filed a demurrer after having been previously served with summons and complaint, and did not join in the motion to change place of trial. Hence the motion should not have been granted. (2) The moving defendants waived their motion to change place of trial by filing an amended demurrer before presenting their motion. (3) The moving papers were insufficient. (4) Sacramento county was the proper county in so far as the defendant, Southern Pacific Company, was concerned, and hence the other defendants could not remove the cause to the county of Yuba."

Appellant states the rule too broadly in the declaration "that all necessary defendants who have been served or who have appeared must join in the motion to change place of trial," although it is so expressed in some of the decisions. For instance, in Pieper v. Centinela Land Company, 56 Cal. 175, it is said: "Under these circumstances, all the defendants should have joined in the motion, and, as they did not do so, the motion was properly denied." While the decision was based upon the ground that Martin, the defendant, who did not join in the motion, was a necessary party, it can be justified upon the theory that it did not appear that the said Martin was not a resident of the county where the action was brought. The general rule as stated by appellant is subject to the qualification that the county in which the action is brought is the proper county for the trial of the action, and this depends upon the character of the proceeding or the residence of the defendant or defendants. It appears that the acts of negligence of which complaint is made were committed in Yuba county, and therefore, while it is not a local action, as far as appellant is concerned, the venue could have been laid in said Yuba county. Section 16, art. 12, Const. Cal. If it had been shown that its principal place of business was in Sacramento county, then, under this provision of the Constitution, plaintiff had the privilege of bringing the action therein, but it does not so appear, and we need not consider the question whether in that event, notwithstanding this privilege, the other defendants could have the cause transferred to the place of their residence. It has been so held in G. & S. Co. v. M. & F. H. Co., 107 Cal. 380, 40 Pac. 495, and in Fresno Nat. Bank v. Superior Court, 83 Cal. 491, 24 Pac. 157. We are aware, however, of the more recent case of Grocers', etc., Union v. Kern, etc., Co., 150 Cal. 466, 89 Pac. 120, modifying the earlier decisions, and holding that no discrimination can be made in the change of venue between the corporation and the individual. The question, though, is foreign to the discussion, as treating appellant exactly as a natural person the case is one contemplated by section 395 of the Code of Civil Procedure that: "In all other cases the action must be tried in the county in which the defendants, or some of them, reside at the commencement of the action." The evidence introduced shows that some of the defendants resided in Yuba and none of them in Sacramento. Therefore Yuba is the proper county for the trial, and Sacramento is not. There is no sort of contention about the residence except an intimation that the case should be treated as though the corporation were a resident of Sacramento county. But the affidavit of the moving parties is that appellant is a resident of Kentucky, and there is no counter showing even to the effect that it has its principal place of business in said Sacramento county. We must be governed, of course, by the showing made, and therefore it must follow that the respondents who resided in Yuba county had a right to invoke section 396, Code Civ. Proc., providing that: "If the county in which the action is commenced is not the proper county for the trial thereof, the action may, notwithstanding, be tried therein, unless the defendant, at the time he answers or demurs, files an affidavit of merits, and demands, in writing, that the trial be had in the proper county." The decisions of the Supreme Court are in harmony with the views herein expressed. In O'Neil v. O'Neil, 54 Cal. 187, it is held that, where the action is to determine rights to real estate against several parties, each defendant is entitled as a matter of right to have the action tried in the county in which the real estate is situated, and it is said: "There is nothing in the provisions which require all the defendants to join in claiming such a right. * * * Each defendant may waive it for himself, but the waiver of one cannot be used to prejudice or destroy the right of another."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

In McKenzie v. Barling, 101 Cal. 460, 36 Pac. 8, a personal action, one of the defendants who was a necessary and proper party was a resident of Fresno county where the action was brought. He did not join in the motion for a change of venue, and it was correctly held that Fresno was not an improper county for the trial within the rule as accurately stated therein: "Where in a case coming under section 395 of the Code any of the defendants reside in the county in which the suit is brought, a motion to change the place of trial to a county in which others of the defendants reside will not be granted unless all of the defendants join in the motion, or unless good reason is shown why they have not so joined." In Banta v. Wink, 119 Cal. 78, 51 Pac. 17, the action was for the purpose of having it adjudged that the plaintiff is the owner of an undivided interest in all the property, business, proceeds, and profits of an alleged copartnership and for an accounting thereof, and it was held that it must be tried in the county in which the defendants or some of them reside at the commencement of the action, and it was stated that: "As defendants Wink and Banta did not reside in this state, they could not move for a change of venue, but that fact did not deprive the other defendants of the right to have the case tried in the county in which they, or some of them, resided at the commencement of the action. It is only when none of the defendants reside in the state that the action may be tried in any county which the plaintiff may designate in his complaint." In Greenleaf v. Jacks, 133 Cal. 506, 65 Pac. 1039, it was not shown that none of the defendants resided in San Luis Obispo county, where the action was brought, and therefore, being a personal action, it was held in line with the decisions cited that the motion for change of venue was properly denied. In the same case, appealed by another party, reported in 135 Cal. 154, 67 Pac. 17, it is held that, since the cause of action arose in San Luis Obispo county and some of the defendants resided therein, "it was the right of the plaintiff to bring and prosecute the action in that county and the consent of the resident defendants to change the place of trial to another county could not take away that right." In Wood, Curtis & Co. v. Herman Min. Co., 139 Cal. 713, 716, 73 Pac. 588, 589, it appeared, as here, that none of the defendants resided in Sacramento county, but some of them appeared voluntarily and requested that the trial proceed in said county, but the court said: "The consent of certain defendants not residing in the county where the action is brought could not take away from the defendants who did not reside there the right to have the cause transferred to the county of their residence. To hold otherwise would be a violation of the provisions of section 395."

The foregoing decisions make it perfectly clear that since the evidence showed that none of the defendants resided in Sacramento county and the moving parties resided in Yuba county, and the character of the action—it being personal or transitory—was such as to be properly tried in said Yuba county, the court below had no discretion, upon the showing made, but was compelled to grant the motion. It is unnecessary to consider the point made by respondents that it has been held that a foreign corporation cannot even demand or oppose a change of place of trial (Thomas v. Placerville G. Q. M. Co., 65 Cal. 600, 4 Pac. 641; Waechter v. Atchison, Topeka & Santa Fé R. R. Co., [Cal. App.] 101 Pac. 41), since if we concede that no distinction should be made between foreign and domestic corporations, it does not aid appellant in view of what we have already noted as to its nonresidence in Sacramento county. We do not think it can be held that respondents waived their motion for a change of place of trial by filing their amended demurrer prior to the hearing of the motion.

The statute provides that the affidavit of merits and the demand in writing for the change of the place of trial be filed at the time the defendant answers or demurs (section 396, Code Civ. Proc.), and section 472, Code Civ. Proc., gives the defendant the right to amend the demurrer of course, and it would be a very harsh rule to hold that by following the statute the defendant waives a privilege conferred by the statute. The amended demurrer relates to the time of the filing of the original, and no more does one than the other manifest an intention to submit to the jurisdiction of the court. It has been held that the affidavit of merits may be amended even after the time for filing the original affidavit has expired and that the amendment relates back to the time of filing said original. Palmer & Ray v. Barclay, 92 Cal. 199, 28 Pac. 226. In the Wood, Curtis & Co. Case, supra, it was held that the defendants did not waive their privilege to have the place of trial changed by moving to strike out portions of the complaint. It is true that the privilege may be waived impliedly as well as expressly, but, in order to do so, there must be some act of the moving party tending to show his intent to invoke the jurisdiction of the court of first instance for the trial of questions of fact or of law. The filing of the amended demurrer does not indicate this intention, although it might just as well have been filed after the cause was transferred. The cases cited by appellant involve different facts, and, as we view them, are of no assistance here.

The objection to the affidavit of merits is that it avers that the defendants "have fully and fairly stated all the facts of the case in the above entitled action to their attorney, W. H. Carlin, of the City of Marysville," whereas it should "have stated that Carlin was their counsel in the case." The principal criticism seems to be that it does not appear but what Carlin was their attorney in fact, but upon reference to the provisions of the Code of Civil Procedure, tit. 5, c. 1 (sections 275–299), it will be found that "attorney," "counselor," and "attorney at law" are used synonymously, and it is undoubtedly true that in the court of common understanding there would be found no dissent from the opinion that the defendants intended to declare and did substantially declare that they had fully and fairly stated all the facts of the case to W. H. Carlin who was their attorney and counselor in said cause, etc. The affidavit seems to be in entire accord with the decisions. McSherry v. Penn. C. G. M. Co., 97 Cal. 637, 32 Pac. 711; Wood, Curtis & Co. v. Herman, supra. As suggested by respondents, we are not concerned with the wisdom of the choice of defendants as to their attorney, but, in answer to appellant's statement that it should appear that the facts had been stated "to some counsel who is skilled in the law," it may be declared that either the counsel from Marysville or the one from Sacramento will measure up to the requirement.

The fourth proposition of appellant has perhaps been sufficiently covered by the foregoing. At the risk of repetition, it is, however, submitted that while Sacramento may be regarded as a proper county, as far as appellant is concerned, for the trial of the action for the reason that, being a foreign corporation, it may be sued in any county of the state, it has no right to demand that it be tried therein. This follows from the consideration that the right to sue appellant in said county is a privilege accorded to plaintiff, and obviously cannot be urged to defeat the right of the other defendants to demand that the action be tried in the county of their residence which is the only proper county for them as well as for appellant. It must be plain that in any view appellant cannot resist the motion on the ground that Yuba is an improper county for the trial of the action. Even if it were a domestic corporation or a natural person, it could not do so under the showing made. There is really no question here of any discrimination between a natural and an artificial person or between a domestic and a foreign corporation, as in the final analysis the decision of the lower court simply means that in a transitory action certain defendants who reside in Yuba county are entitled to have the cause tried in that county as against a defendant not residing in the state.

We see no reason for disturbing the action of the trial court, and the order is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

11 Cal. App. 245

AGGLER, MORRISON, HANSEN CO. v. A. C. DAUPHINY & CO. (Civ. 579.)

(Court of Appeal, Third District, California. Sept. 1, 1909.)

1. Appeal and Error (§ 1002*) — Review — Verdict—Conflicting Evidence.

The sufficiency of conflicting evidence to support a verdict will not be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935–3937; Dec. Dig. § 1002.*]

2. Appeal and Error (§ 1051*) — Review — Admission of Evidence—Prejudice.

Where, in an action for goods sold, defendant admitted that he purchased the goods through the agency of A., who represented plaintiff, and not the B. company, which manufactured the goods, and from which defendant claimed he purchased them, defendant was not prejudiced by the admission in evidence of A.'s letter to plaintiff inclosing the order for the goods.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161–4170; Dec. Dig. § 1051.*]

3. Appeal and Error (§ 1050*) — Review — Admission of Evidence—Prejudice.

Where, in an action for the price of certain stock food, defendant claimed that he purchased the food, not from plaintiff, but from the B. company, defendant was not prejudiced by evidence that plaintiff, during the year in which the sale was made, was the general agent of the manufacturers for the sale of the food, and that the identical food sued for had been purchased and paid for by plaintiff and resold to defendant.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153–4160; Dec. Dig. § 1050.*]

Appeal from Superior Court, Humboldt County; G. W. Hunter, Judge.

Action by the Aggler, Morrison, Hansen Company against A. C. Dauphiny & Co. Judgment for plaintiff, and defendant appeals. Affirmed.

Henry L. Ford and Adam Thompson, for appellant. Mahan & Mahan, for respondent.

CHIPMAN, P. J. Action for the value of certain goods, wares, and merchandise, alleged to have been sold and delivered by plaintiff to defendant. The cause was tried by a jury, and plaintiff had the verdict for $336.30, on which judgment was entered. Defendant appeals from the judgment on bill of exceptions.

The defense on which defendant relies is set out in its answer, and may be thus summarized: That about August 26, 1904, the United Breeders Company and plaintiff, through their agent, one Andrews, gave to defendant the exclusive agency for handling and selling an article called "Baum's Stock Food" in the city of Eureka, Humboldt county, and territory north of said city in said county, and "let the said defendant have one-half car load of said Baum's stock food to sell," and as inducement to defendant to handle said products said Andrews, as such agent, "agreed that he would move (i. e., find sale for) all of said half car load that said defendant would send for"; that, relying on said promises, and that "defendant should be the exclusive agent for the handling and selling of said Baum's stock food (in the territory named), until all said merchandise in its possession was sold or removed," and that said Andrews as such agent "would move the entire half car load of said Baum's stock food" defendant "sent for a half car load of said Baum's stock food in the form of paper writing and manner as made and dictated by said Andrews, the agent of said Breeders Company and plaintiff, and that said stock food was thereafter delivered to the said defendant under the terms as aforesaid, which is the same half car of merchandise mentioned and referred to in plaintiff's complaint"; that it was agreed that said Andrews "should sell the same; and, as long as any of said Baum's stock food and products was in its possession, that the defendant should remain and be the exclusive agent for handling and selling the same in the said territory as aforesaid." It is then averred that the said Andrews did not sell all of said stock food as he agreed to do, but that defendant sold all it could so sell; that without defendant's knowledge or consent plaintiff and said United Breeders Company, through their agent, Andrews, and in violation of said agreement, established another agency in said territory, and placed said stock food on sale therein with their newly appointed agent, and thereupon defendant notified the said United Breeders Company and plaintiff that defendant still held some of said products, and offered it to them and called upon them to take it away; that defendant has paid for all of said merchandise that it has ever sold, and holds the residue subject to the order of said United Breeders Company and plaintiff.

There was evidence from which the jury might well have found that the facts were not as alleged by defendant, but were as claimed by plaintiff, namely and briefly: That plaintiff purchased from the United Breeders Company, and paid for a car load of said products, and took the agency for their sale in Humboldt county for one year; that, finding difficulty in handling all the products, plaintiff, through its agent, Andrews, sold to defendant half of this car load of the goods, and gave defendant the exclusive agency for one year for the territory mentioned in defendant's answer; that defendant purchased the goods from plaintiff, and not from the United Breeders Company, and had its dealings entirely with plaintiff in the matter; that it made payments to plaintiff on account of said sale from time to time, and that no agency other than defendant's was established in said territory until after the year had expired, and after defendant had notified plaintiff that it held the goods on hand subject to plaintiff's order and refused payment therefor. We do not feel called upon to recite the evidence in the case. Defendant's counsel say in their brief: "There was some evidence that the transaction was a completed sale. There was more evidence, however, that the transaction was a conditional sale, and the title remained in the plaintiff. The erroneous admission of the evidence complained of threw so much weight in the balance against defendant, that the jury brought in a verdict in favor of plaintiff." The record presents the usual conflict in the testimony found in most trials; and, as it was resolved in favor of plaintiff, this court cannot go behind the verdict of the jury thereon. The only question, according to defendant's concession, is whether the verdict was influenced adversely to defendant by the introduction of incompetent and irrelevant evidence.

Plaintiff first called the president of plaintiff company, who testified, without objection, to Andrews having made the sale, as plaintiff's agent, of half a car load of the stock food; that the order for the goods was dated October 26, 1904, and was in writing, signed by defendant, and sent in letter written by Andrews. This written order shows that the goods were the Baum's stock food, terms of sale 4 months "2% 10 das" (due in four months, 2% off if paid in 10 days.) It stated on its face that freight to San Francisco was to be deducted, and that defendant was to be allowed "$75.00 per month to pay salary to any salesman they [defendant] choose to select. The amount of said salary to be deducted from bill." The goods were to come from Chicago, and hence the agreement to deduct freight to San Francisco. The witness testified that after making these deductions, there remained due a balance of $336.30. Witness Morrison, vice president of plaintiff company, testified to the receipt of defendant's written order, and that the instructions to Andrews were to sell a half a car load of the goods, giving the purchaser the agency for "the territory of Eureka and north." "The time for which the agency was to be given was for one year, the same as we had the agency for. We allowed Mr. Dauphiny to retain that agency for the full term of one year." He testified that in March, 1905, defendant ordered a car load of the goods, but shortly after canceled the order. "When he canceled this second order, he informed us that he washed his hands of the whole matter. We did not place any other agency in this county during that period. We had the general agency for these goods for a year, and we sublet him the northern half of the county. We bought the goods and paid for them, and then sold him half of the goods and the agency for a year. The paper shown me is the receipt of the manufacturer where he was paid for a car load of goods." Andrews' letter inclosing the order was introduced over defendant's objection. We cannot see how this letter could have had any possible influence in the case one way or the other. Defendant admitted to have given the order through Andrews.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The deposition of Andrews was admitted in evidence, and the testimony which defendant claims was prejudicially erroneous came out in this deposition. The witness testified to his having sold to plaintiff, in October, 1904, a car load of the Baum products for the United Breeders Company of Chicago as its Pacific Coast representative; that the Breeders Company was to allow them to deduct the freight from their bill and allow them $75 per month for four months to pay the salary of a salesman, and gave them the agency for these products for Humboldt county for one year from date. "Mr. Aggler thought that this was a pretty large order, and suggested that I sell for them half of the car at Eureka, and allow the agent at that point half the salary for two months, being $75 per month, * * * and also give them the agency for Baum's products in Eureka and north of Eureka in Humboldt county, for one year from date." The witness identified a duplicate of the order given by plaintiff to the United Breeders Company of Chicago for this car load of goods, and testified to plaintiff having paid in full for the goods, exhibiting the receipt. The bill for the goods, as "Exhibit A," and the receipt showing payment, as "Exhibit B," were attached to the deposition, and returned as part thereof. The witness also testified to the circumstances and facts attending the order given by defendant, fully sustaining the claim made by plaintiff. It is not necessary to set out these facts. The objections now urged go to the competency and relevancy of the facts above narrated. It is claimed that neither defendant nor any of its officers were present or had anything to do with the transaction between plaintiff and the United Breeders Company. The court ruled that the evidence was admissible "upon the question whether A. C. Dauphiny & Co. took one-half the agency and one-half the order upon the same terms that Aggler, Morrison, Hansen Company took the whole products." And again the court remarked: "Of course, the real question is the transaction between the plaintiff and A. C. Dauphiny Company. It is simply to show the relations he sustained [referring to Andrews] to the company that was handling the stock food, as I take it."

It seems to me the evidence tended to rebut the defense set up in the answer which defendant later undertook to maintain by evidence introduced. Defendant claimed that the sale to it was by the United Breeders Company, and not by plaintiff, and this evidence tended to show that these identical goods were sold to plaintiff in the first instance by the Breeders Company, and could not have been sold by that company to defendant. Counsel for plaintiff stated in introducing the deposition that much of the deposition was in rebuttal, but he asked leave to introduce the whole deposition at that time. The testimony was also corroborative of that given by the other witnesses for plaintiff as to the transaction. It was perhaps not very material how or from whom plaintiff obtained the goods, but, even so, it must be apparent that the facts as to the source of plaintiff's ownership could not have been prejudicial to defendant in the minds of the jury. The real question, as was remarked by the court, was the transaction between the plaintiff and defendant, and that question was not, in our opinion, in any degree influenced to defendant's injury by the evidence objected to.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

11 Cal. App. 241

McCOY v. BUCKLEY et ux. (Civ. 603.)

(Court of Appeal, Third District, California. Sept. 1, 1909.)

1. Pleading (§ 129*) — Failure to Deny — Written Instrument.

Where the verified complaint, in an action to foreclose a mortgage securing a note, which alleges the execution of the note and mortgage and nonpayment, is not denied, the execution of the note and mortgage and nonpayment is admitted.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 272; Dec. Dig. § 129.*]

2. Mortgages (§ 277*) — Purchaser from Mortgagor—Liability.

One becoming a purchaser through one who had executed a mortgage on the premises, or through his grantee, takes title subject to the mortgage, and he cannot compel its release without paying the debt secured thereby.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 726; Dec. Dig. § 277.*]

3. Tender (§ 13*)—Pleading—Sufficiency.

Under Civ. Code, §§ 1493–1495, providing that an offer of performance must be made in good faith, free from any conditions which the creditor need not perform, and an offer is of no effect if the person making it is not able to perform, a tender of payment of principal and interest, first made in the answer, in an action to foreclose a mortgage stipulating for attorney's fees in case of foreclosure, unaccompanied by a deposit in court or an averment of ability to make good the tender, does not justify a denial of attorney's fees and costs of the action, but the offer should be to allow judgment for the amount due, with costs, as provided by Code Civ. Proc. § 997.

[Ed. Note.—For other cases, see Tender, Cent. Dig. §§ 29–32; Dec. Dig. § 13.*]

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Sarah Louisa McCoy against I. J. Buckley and wife. From a judgment for plaintiff, defendant I. J. Buckley appeals on the judgment roll. Affirmed.

Frank W. Farrar, for appellant. J. K. Law, for respondent.

CHIPMAN, P. J. This is an ordinary action to foreclose a mortgage executed by defendant I. J. Buckley upon certain land to secure the payment of his promissory note, executed by said defendant and payable to defendant. The usual judgment on foreclosure was entered by the court, from which defendant I. J. Buckley alone appeals on the judgment roll. The court found that defendant Mary Buckley claims and has no interest in the mortgaged premises. The complaint is verified, and the execution of the note and mortgage and nonpayment set forth in the complaint, not being denied, are admitted. The first defense made in the answer is a denial of the reasonableness of attorney's fees claimed in the complaint, and denials of the averments that plaintiff has agreed to pay, and has incurred, any liability for attorney's fees. The answer also alleges that the action, although the complaint is verified by plaintiff, was commenced without the knowledge or consent of plaintiff, and has been prosecuted for the purpose of enabling the attorney for plaintiff to collect a fee. The mortgage provides for payment of attorney's fees in case of foreclosure, and the court found against defendant upon all the foregoing defenses.

As a further defense against the claim for attorney's fees the answer sets forth at much length certain facts, which may be summarized as follows: That in 1895, plaintiff being the then owner of the mortgaged premises, conveyed the same to one Jacobs, who at the same time executed and delivered to plaintiff a deed of trust to the property, to secure the payment of his promissory note given to her, and that the said instrument created a lien on the said premises, and so remains as a cloud upon defendant's title to the land. It is not alleged that the indebtedness so secured has been paid. It is then averred that: "Long prior to the commencement of this action, the defendant offered plaintiff, in writing, if she would satisfy and discharge of record the lien created by said instrument in writing, this defendant would immediately thereafter pay to her the principal and interest due to her on the promissory note set forth in the complaint; * * * but plaintiff refused and neglected to comply with said offer." It is further averred that, "long prior to the commencement of this action, defendant was able and willing to pay to plaintiff the whole amount, of principal and interest due on said promissory note," upon the discharge of said lien, all of which plaintiff well knew. "And this defendant now comes and offers to pay to the plaintiff herein the full sum of principal and interest which is due to her upon said promissory note, set forth in plaintiff's complaint (not including, however, attorney's fees and costs), immediately upon the satisfaction and discharge by her, of record, of the lien and cloud upon his title to the land and premises mentioned and described in the mortgage set forth in said complaint." Defendant prays that plaintiff take no judgment herein for attorney's fees; that defendant recover judgment for $200, as damages for the wrongful prosecution by plaintiff of this action, and for his costs.

The court found that plaintiff conveyed the premises to Jacobs, as alleged in the answer, who contemporaneously executed and delivered to plaintiff "an instrument in writing which created a lien upon said land and premises, mentioned and described in the mortgage set forth in the complaint of plaintiff herein," and that the said lien continued to and at the commencement of this action constituted a cloud on defendant's title. But the court found that defendant never at any time offered, in writing or otherwise, to pay and discharge defendant's said mortgage indebtedness to plaintiff on the condition set out in the answer, or at all, and that plaintiff never at any time "refused or neglected to accept or comply with any offer of payment of the money due her on said note," and also found that defendant was not, prior to the commencement of this action, or at any time, able and willing to pay to plaintiff the whole amount of principal and interest of said note upon the terms and conditions alleged by defendant, or upon any conditions whatever, and, further, that plaintiff never knew at any time that said defendant was ever able or willing to pay said indebtedness on any terms or conditions. The alleged tender of payment prior to the commencement of this action may be dismissed from consideration, as the findings negative these averments. It does not appear when or how defendant acquired title to the premises. His mortgage was executed to plaintiff in 1903, eight years after the transaction between plaintiff and Jacobs, when title appears to have been in plaintiff. As plaintiff's title passed to Jacobs in 1895, defendant became the owner subsequently, either through Jacobs or his grantee, and took title subject to the lien of which he complains, and it nowhere appears that this lien is not rightfully a subsisting incumbrance on the property. We cannot see how defendant would have a right in this or any other action to have it released and discharged, without first showing that the debt, to secure which the lien was created, has been paid.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The only remaining question is whether the tender of payment made in the answer was such as to require the court to deny plaintiff the right to attorney's fees and costs of the action. It will be observed that the tender came for the first time some time after the complaint was filed, and was made in the answer thereto. The court found that the previous alleged tenders were never made. The tender by answer necessarily came after plaintiff had incurred costs, and had become liable for attorney's fees. No money was deposited in court with the tender, and defendant did not aver his ability to make good the tender then or ever. The suit having been commenced, the offer should have been made pursuant to section 997, Code Civ. Proc., and should have been to allow judgment to be taken for the amount then due, with costs incurred. The Civil Code provides that an offer of performance, which this was intended to be, must be made in good faith, and in the "manner as most likely, under the circumstances, to benefit the creditor" (section 1493); and "must be free from any conditions which the creditor is not bound, on his part, to perform" (section 1494); "and is of no effect if the person making it is not able and willing to perform according to the offer" (section 1495). See Horan v. Harrington, 130 Cal. 142, 62 Pac. 400.

We can discover no merit in any of the points made by appellant.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

11 Cal. App. 253

SMITH v. SINBAD DEVELOPMENT CO.

(Civ. 663.)

(Court of Appeal, Second District, California. Sept. 3, 1909. Rehearing Denied by Supreme Court. Oct. 28, 1909.)

1. CORPORATIONS (§ 406*)—OFFICERS—GENERAL MANAGER—AUTHORITY.

Where the by-laws of a corporation expressly designated one as secretary and general manager, such person had authority as general manager to contract for the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1611–1614; Dec. Dig. § 406.*]

2. EVIDENCE (§ 244*)—ADMISSION AGAINST INTEREST.

In an action against a corporation for the value of services, the admissibility of a writing signed as defendant's secretary and general manager acknowledging an amount due plaintiff for services did not depend upon the signer's authority as general manager to make the contract, as it could be considered as an admission against interest by the secretary as to a matter of bookkeeping which was clearly within the scope of the secretary's duties which office the signer admittedly held.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 916–936; Dec. Dig. § 244.*]

3. APPEAL AND ERROR (§ 731*)—OBJECTIONS TO SUFFICIENCY OF EVIDENCE—SUFFICIENCY OF OBJECTION.

A specification on appeal that the evidence does not support a particular finding is sufficient without specifying the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3017–3021; Dec. Dig. § 731.*]

4. APPEAL AND ERROR (§ 837*) — REVIEW — FINDINGS—EVIDENCE CONSIDERED.

In determining on appeal whether the evidence was sufficient to support a finding, only such evidence as was introduced may be considered; the court not being entitled to consider competent evidence which was rejected below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3275, 3276; Dec. Dig. § 837.*]

5. APPEAL AND ERROR (§ 302*)—PRESENTATION BELOW — MOTION FOR NEW TRIAL — OBJECTIONS TO FINDINGS.

In an action to recover for services rendered to a corporation, in which plaintiff sought to put in evidence a writing acknowledging the indebtedness signed by defendant's general manager, an objection of plaintiff on appeal that the court by its language at trial led him to assume that it was satisfied that the authority of the person signing the writing as defendant's general manager had been established, and that contrary findings took him by surprise, cannot be considered as a ground of motion for a new trial made on the stated ground that the evidence did not support the findings, as plaintiff should have presented the question below upon motion for new trial as an irregularity under Code Civ. Proc. § 657, subd. 1, or as an accident or surprise under subdivision 3.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 302.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by G. L. Smith against the Sinbad Development Company. From a judgment for defendant, and an order denying a motion for a new trial, plaintiff appeals. Reversed and remanded for new trial.

M. E. C. Munday, for appellant. Hester, Merrill & Craig, for respondent.

TAGGART, J. Action to recover for services rendered at an agreed salary. Judgment for defendant, and plaintiff appeals from judgment and order denying his motion for a new trial.

Plaintiff was employed by F. G. Downey, claiming to act as secretary and general manager of the defendant corporation, in and about the preparations for oil-well drilling operations in which defendant was about to engage. He rendered three months' services, and at the close of the third month received a paper, which he pleads as an account stated, in the words and figures following: "There is due to G. L. Smith for services performed for the Sinbad Development Company, in accordance with terms of hiring: 3 mos. at $225 per mo. & expenses, $675; Expenses paid out by Smith, $75. Dated Nov. 30, 1907. [Signed] F. G. Downey, Sec. & General Manager of Sinbad Development Co." When this instrument was offered in evidence, it was objected to by defendant on the ground that it had not been shown "that he (Downey) had authority to make the contract." Which objection was sustained by the court and this ruling is assigned as error.

At the time of the tender of the instrument F. G. Downey, who employed plaintiff and who signed the paper in question, was asked: "Were you or were you not general manager of the Sinbad Development Company at the time you employed Mr. Smith?" Whereupon the court said: "There is no question but what he was. The articles of incorporation show that he was at that time, and he states that he didn't resign. That fact was proven that he was general manager." Counsel for defendant then stated that he should contend that there was no office of that kind authorized by the by-laws, to which the court replied: "The articles of incorporation name him as general manager. * * * His duties might be fixed by the by-laws, but he was general manager according to the articles of incorporation until the annual meeting." Counsel for defendant then admitted that Downey was secretary, but contended that there was no such officer as general manager. The witness then stated that he signed the paper in question (designating it as the pay roll) and delivered it to Smith, and the offer of the writing was renewed. Counsel for defendant objected to its introduction without stating any grounds, and the objection was sustained. An excerpt from the articles of incorporation of defendant, which had been read into the record prior to the tender of this evidence by plaintiff, was as follows: "Article 5. The affairs of the corporation shall be conducted by a board of directors and officers to be elected by the same, which said board shall consist of such number and persons as may be elected by and from among the stockholders as provided by the by-laws. Until the first annual meeting of the stockholders and until their successors are elected and qualified, the following named persons shall be the directors and officers: * * * And F. G. Downey secretary and general manager." From the Arizona statute, which was read into the record by the court as part of defendant's case without objection (the corporation defendant being organized under the laws of that territory), it appears that articles of incorporation in that territory must provide (among other things): "5. By what officers the affairs of the corporation are to be conducted and the time at which they are to be elected." Laws 1903, No. 88, § 1. The articles of incorporation were filed in Arizona June 10, 1907, and in this state in October, 1907, and no annual election was held or by-laws adopted until September 21, 1907. The by-laws so adopted make no provision for a general manager, and it was apparently the theory of the trial court that the provision in the by-laws that: "The president shall be the chief executive officer of the company. * * * He shall sign and execute all authorized bonds, contracts or other obligations in the name of the company"—excluded the possibility of any general manager being appointed. Waiving the effect of the provision of the Arizona statute, read by the court, that the articles of incorporation must contain the officers by whom the affairs of the corporation are to be conducted, and accepting the view that notwithstanding this provision the by-laws may provide what officers the corporation shall have, the by-laws were not adopted until September 21, 1907, and during the interval between June 10th and that date, by express provision of the articles of incorporation, Downey was secretary and general manager, and it was at this time that plaintiff was employed by him. The objection to the introduction of the writing in evidence that it had not been shown that Downey had authority to make the contract we think was without support. This objection, however, if good, was not sufficient to exclude the writing from evidence, as its admissibility did not depend upon the making of the contract. Whether considered as an account stated or an admission against interest by the defendant corporation, its contents showed it related to the bookkeeping of the corporation which was a matter clearly within the duties of the secretary of the corporation, and it was admitted by defendant that Downey was the secretary of the corporation at the time it was made and delivered to the plaintiff.

It is admissible either as a "pay roll," a "time sheet," or an "account stated."

The views which we have expressed also operate to determine in favor of appellant the matter urged upon the ground of the sufficiency of the evidence to support the findings made by the court. We think the specifications are sufficient under the rule declared in American Type Co. v. Packer, 130 Cal. 460, 62 Pac. 744, Swift v. Occidental Mining Co., 141 Cal. 161, 74 Pac. 700, and cases following them. The contention of appellant in his attack upon the findings in relation to whether or not an account was stated between the parties is based chiefly upon the exclusion of the evidence which, if it had been admitted, would have sustained his case. The sufficiency of only such evidence as has been introduced can be considered, and it is not competent for this court to say what a finding might or should have been if certain evidence which was rejected had been admitted. We think the evidence shows that Downey was authorized to act for the defendant, and, acting on its behalf, did employ the plaintiff and promise and agree to pay him as alleged.

The objection urged by appellant that the court by its language during the trial led him to assume that it was satisfied that the authority of Downey as general manager had been established, and that the findings of the court inconsistent with such a view were a surprise to him, cannot be considered under the grounds of motion specified by him or the record before us. If there was a change in the ruling of the court to the detriment of appellant's case, he should have presented such a matter to the trial court upon his motion for a new trial as an irregularity of the court under subdivision 1, § 657, Code Civ. Proc. (Hayne on New Trial, § 37; Carpenter v. Small, 35 Cal. 362; Hartson v. Hardin, 40 Cal. 267), or under the head of "accident or surprise," subdivision 3 of section 657 (Cohen v. Alameda, 124 Cal. 504, 57 Pac. 377).

Judgment and order reversed and cause remanded for new trial.

We concur: ALLEN, P. J.; SHAW, J.

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11 Cal. App. 261

HANFORD MERCANTILE STORE v. SOWLVEERE. (Civ. 649.)

(Court of Appeal, Second District, California. Sept. 3, 1909.)

CORPORATIONS (§ 84*)—SUBSCRIPTIONS—CONTRACT — CONSTRUCTION — "ETC." — "ET CETERA."

A subscription to stock of a corporation to be formed for the purposes "of acquiring and carrying on a general produce and merchandising business, etc.," did not bind subscribers to take stock in a corporation formed not only for such purposes, but also for dealing in real estate, bonds, mortgages, etc.; the abbreviation "etc." which as commonly understood stands for "et cetera," meaning "and others," or "other things," not covering such other purposes under the rule of ejusdem generis, and, conceding that by the abbreviation it was intended that other and independent lines of business might be carried on by the corporation, there being no evidence as to what lines of business were intended to be so included.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 301, 302, 308, 317; Dec. Dig. § 84.*

For other definitions, see Words and Phrases, vol. 3, pp. 2511-2512; vol. 8, p. 7655.]

Appeal from Superior Court, Kings County; John G. Covert, Judge.

Action by the Hanford Mercantile Store, a corporation, against Joe S. Sowlveere, sometimes known as Joe S. Salvador. From a judgment for defendant and from an order denying a new trial, plaintiff appeals. Affirmed.

Dixon L. Phillips, for appellant. H. P. Brown, for respondent.

TAGGART, J. Action to collect subscription to contemplated corporation. Judgment for defendant, and plaintiff appeals from judgment and order denying its motion for a new trial.

Defendant with some 50 other persons subscribed a writing whereby they agreed to join in the formation of a corporation under the laws of the state of California, the "purposes to be acquiring and carrying on a general produce and merchandising business, etc., at Hanford, Cal.; and to that end" subscribed and agreed to pay for the number of shares set opposite their respective names, etc.; the subscription of defendant being for 80 shares, amount $2,000. Thereafter some of the other signers of the writing mentioned incorporated and organized the plaintiff corporation, having for its purposes, as set forth in its articles of incorporation: "To acquire, purchase, own, control and manage, and carry on and conduct stores of general merchandise; purchase, own, sell, lease, manage and control goods, wares, merchandise and other kinds of personal property, mixed goods and effects of whatever nature or kind; to own, acquire, control, manage, mortgage and lease real property, wherever situated, and to sell, mortgage, or lease the same; to own, acquire, manage and control bonds, mortgages, accounts, and all and every kind of debts and evidences of debts, and to sell or otherwise dispose of the same, and to carry on, own, acquire and manage, for profit, a general mercantile business, and stores and warehouses and buildings and other houses and improvements, necessary or convenient for the same; to own, acquire, lease, control and manage warehouses for the purpose of storage and depositary for hire."

But one question is presented for solution: Is the "etc.," following the purposes named in subscription paper, sufficient to embrace all the purposes enumerated in the articles of incorporation? This abbreviation, as commonly understood, is for "et cetera," which, as used, means "and others" or "other things." In itself it implies no limitation, and its use is so varied that it is questionable whether it can be said to have any definite use or uniform interpretation. It is sometimes declared to be meaningless and without effect, and in such a case is treated as mere surplusage. Harrison v. McCormick, 89 Cal. 327, 331, 26 Pac. 830, 23 Am. St. Rep. 469. It is implied in this case that it may in some cases be construed as meaning that the contract is not complete in some respect, and that in such cases it is competent to supply the missing term by parol. But the majority of the cases construe the term as relating to correlated matters (Hayes v. Wilson, 105 Mass. 21; Loeser v. Liebmann, 60 Hun, 579, 14 N. Y. Supp. 569; Shuler v. Dutton, 75 Iowa, 155, 39 N. W. 239), or others of like character, things within the rule of ejusdem generis (In re Schouler, 134 Mass. 426; Tefft v. Tillinghast, 7 R. I. 434; Lathers v. Keogh, 39 Hun. [N. Y.] 576).

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Measuring the case before us by either of the constructions given the term, and we are of opinion that the conclusion of the trial court will have to be sustained. If "etc." be treated as mere surplusage in the subscription paper, the defendant cannot be held to be obligated to take stock in a corporation organized for the purpose of dealing in real estate, bonds, mortgages, etc. Neither would he be bound under a construction that the term meant other things of like character or those covered by ejusdem generis. There is no evidence in the case, either of custom or of intent, from which it can be determined that dealing in real estate and bonds is correlated to the business of carrying on and conducting produce and general merchandise stores, or that such dealing is necessary to the acquiring, purchasing, owning, or controlling of such stores or business. If it were assumed that by the use of the letters "etc." it was intended to indicate that other and independent lines of business might be carried on by the corporation to be formed, there is no parol or other evidence as to what lines of business were intended to be so included. Without evidence of what other lines of business were intended to be included, or what others might by custom or otherwise be said to be correlated and thus assumed to have been intended to be included, there would be no limit to the kinds of business which the trial court might have read into the instrument in consequence of the use of the abbreviation in question, if appellant's view were accepted. We think the trial court properly rejected this construction.

The oral testimony introduced was all directed to establishing a waiver or ratification by the defendant and the findings of the trial court, which find support in the evidence, were in favor of defendant.

Judgment and order affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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11 Cal. App. 268

PEOPLE v. ROSS. (Cr. 184.)

(Court of Appeal, First District, California. Sept. 4, 1909.)

1. CRIMINAL LAW (§ 829*) — INSTRUCTIONS — REFUSAL TO GIVE INSTRUCTIONS.

The refusal to give a single instruction is not erroneous where, from an examination of the entire record and the instructions given, it appears that the jury were fairly instructed on the point covered by such instruction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

2. HOMICIDE (§ 300*) — SELF-DEFENSE — INSTRUCTIONS.

Where the killing by accused was admitted, and the only question to which the instructions as to reasonable doubt could apply was whether he acted in self-defense, and the court charged that, if decedent first attacked accused and attempted to assault him under such circumstances as would justify a reasonable man in believing that decedent was about to inflict great bodily injury, accused could act on the appearances and beliefs, and, if necessary for his own protection, he could kill decedent, and that the law presumes every man to be innocent, which presumption attaches to every fact essential to a conviction and that the jury must give accused the benefit of every reasonable doubt, the refusal to charge that, if the jury were not convinced beyond all reasonable doubt that accused did not act in self-defense, the verdict should be not guilty, was not erroneous.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 631; Dec. Dig. § 300.*]

Appeal from Superior Court, City and County of San Francisco; Carroll Cook, Judge.

John S. Ross was convicted of murder in the second degree, and he appeals. Affirmed.

King & Kirk, for appellant. U. S. Webb, Atty. Gen., for the People.

KERRIGAN, J. Defendant was informed against for the crime of murder, and was convicted of murder in the second degree. This is an appeal from the judgment and from an order denying defendant's motion for a new trial.

There is only one point urged in this appeal—the alleged error of the trial court in refusing to give to the jury the following instruction offered by the defendant: "And, finally, if you are not convinced beyond all reasonable doubt and to a moral certainty that the defendant did not act in self-defense, you will return a verdict of not guilty." We must look to the entire instructions given by the court in order to determine the question as to whether or not the refusal to give any single instruction was prejudicial to defendant. Although an instruction may not be given in the exact language in which it was asked, yet, if by an examination of the entire record and the instructions as given by the court it appears that the jury were fairly instructed upon the point concerning which a single instruction was refused, such refusal will not be erroneous. If it be conceded in this case that there was testimony sufficient to have justified the giving of the instruction asked by the defendant, then we think that the court fairly and fully instructed the jury as to the point. The court, at defendant's request, instructed the jury as follows: "If you believe that the deceased made the first hostile demonstration or attack against or upon the defendant by attempting to strike the defendant with an axe, and if you believe that having made such an attack the defendant wrested or took away from him such axe, and immediately thereupon the deceased seized a knife and attempted to assault defendant in such manner and under such circumstances as would have justified a reasonable man in defendant's position in believing that deceased was about to inflict upon him, the defendant, great bodily injury, then the defendant was justified in acting upon these appearances and beliefs, and, if necessary for his own protection, or to prevent great bodily injury to himself, the defendant struck the fatal blow, he was justified in so doing, and your verdict should be one of acquittal."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The court further, at defendant's request, instructed the jury as follows: "The law presumes every man to be innocent until his guilt is established beyond any reasonable doubt, and this presumption attaches at every stage of the case and to every fact essential to a conviction; and you must give the defendant in this case the benefit of every reasonable doubt." Applying the latter portion of the instruction, that the jury must give the defendant the benefit of every reasonable doubt as to every fact essential to a conviction, and reading it in connection with the other instruction given as to the defendant's right to defend himself and act upon appearances and beliefs, it appears the jury were fairly instructed, and fully understood that they must find beyond a reasonable doubt every fact necessary to defendant's conviction before they would be justified in finding him guilty.

Moreover, the killing by defendant being conceded, the only question at issue to which the instruction given by the court on the subject of reasonable doubt could apply was whether defendant killed the deceased in justifiable self-defense.

The judgment and order are affirmed.

We concur: COOPER, P. J.; HALL, J.

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11 Cal. App. 270

MODOC CO-OPERATIVE ASS'N v. PORTER. (Civ. 580.)

(Court of Appeals, Third District, California. Sept. 7, 1909.)

1. Appeal and Error (§ 628*)—Failure to File Transcript in Appellate Court—Excuse.

The pendency of a motion to vacate and modify a judgment appealed from made in the court rendering the judgment under Code Civ. Proc. § 663, authorizing a motion in the court rendering a judgment to set aside the judgment, etc., does not excuse the failure of appellant to file the transcript in the appellate court within the time prescribed by the rule of the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2750; Dec. Dig. § 628.*]

2. Appeal and Error (§ 628*)—Failure to File Transcript—Excuse—Motion to Vacate.

The remedy given by Code Civ. Proc. § 663, authorizing a motion in the court rendering a judgment to set the judgment aside, and enter another judgment and the remedy by appeal from the judgment, are independent, and the former remedy does not affect the latter.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2750; Dec. Dig. § 628.*]

Appeal from Superior Court, Modoc County; John E. Raker, Judge.

Action by the Modoc Co-operative Association against Phear E. Porter. From a judgment for plaintiff, defendant appeals. Appeal dismissed.

Wylie & Wylie and J. H. Stewart, for appellant. N. A. Cornish and F. M. Jamison, for respondent.

HART, J. The respondent has moved to dismiss the appeal taken from the judgment in the foregoing entitled cause under the method authorized by section 941a et seq. of the Code of Civil Procedure upon the grounds: (1) That appellant has not filed the undertaking required by section 953b of the Code of Civil Procedure (St. 1907, p. 751, c. 408), by which the party giving notice that he desires and intends to appeal from any judgment, order, or decree of the court shall undertake and agree to pay to the clerk the cost of preparing said transcript; (2) that appellant has not complied with rule 2 (78 Pac. vii) of this court by causing to be filed a printed or any transcript of the record in this court within 40 days after her said appeal was perfected. The record here on this motion, as certified to by the clerk of the court below, recites the following facts: That judgment was rendered in this action in favor of the plaintiff and against the defendant, Phear E. Porter, on the 13th day of January, 1908, and that notice of said decision and judgment was served on said defendant on the 21st day of January, 1908; that on the 30th day of January, 1908, said defendant filed a notice of intention to appeal from the judgment, and at the same time requested that there be prepared a transcript of the testimony offered and received, rulings, etc., as authorized by section 953a of the Code of Civil Procedure; that on the same day said defendant "filed a purported undertaking to the said clerk to secure the cost of making up said transcript"; that the judge who tried the cause made an order, in compliance with the request of the defendant, requiring the official reporter of the superior court in which the said judgment was rendered to prepare and file said transcript, and that, thereupon, "said transcript was duly prepared and filed by said reporter" in the office of the clerk of said court on the 20th day of February, 1908, and, "after due notice to the attorneys representing said plaintiff and the said defendant, Phear E. Porter, the said transcript was presented to the said judge and was by him, on the 23rd day of March, 1908, approved and allowed." On the 20th day of March, 1908, "the defendant, Phear E. Porter, filed a notice of appeal from the aforesaid judgment, and served said notice of appeal on said plaintiff on said 20th day of March, 1908, acknowledgment of such service having been admitted upon said notice by said plaintiff, through its attorneys," etc. On the 24th day of March, 1908, the said defendant filed an undertaking on appeal in said cause, in the sum of $841.40, being double the amount of the judgment, "and said undertaking is in due form." The certificate of the clerk concludes with the following statement: "The said defendant and appellant, Phear E. Porter, has not requested the said clerk to certify to a correct, or to any transcript of the record of said case, nor has said clerk prepared said transcript of the record of said case or filed same with the clerk of the appellate court." Accompanying the papers filed on this motion is a copy of the undertaking sought to be executed in obedience to the requirements of section 953b of the Code of Civil Procedure.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The defendant, Phear E. Porter, resists the motion to dismiss the appeal upon the single ground that there is now pending in the court which rendered the judgment from which the appeal is taken and yet undisposed of a motion to modify and vacate said judgment, and it is declared in support of the opposition to the dismissal of the appeal, "that, until the said court acts upon said motion to vacate and modify, the appeal to this court cannot be perfected, and therefore a dismissal of appellant's appeal herein would be premature." The motion to "vacate and modify" the judgment is doubtless the one authorized by section 663 of the Code of Civil Procedure, by which it is provided that a judgment may be set aside and vacated by the same court rendering the judgment and another and different judgment entered where it appears that the court has made incorrect or erroneous conclusions of law not consistent with or not supported by the findings of fact, such error materially affecting the substantial rights of the party or entitling him to a different judgment; or where "the judgment or decree is not consistent with or not supported by the special verdict." The notice of motion does not strictly follow the language of the section as to the grounds upon which it is authorized to be made, but we are not here concerned with the question whether the notice of said motion is sufficient to justify its consideration by the court. It is clear that the appellant has not complied with the requirement of rule 2 (78 Pac. vii) of this court with respect to the time within which a transcript on appeal must be filed after the appeal is perfected. Said rule provides that "the appellant in a civil action shall, within forty days after the appeal is perfected, serve and file the printed transcript of the record," etc. The record here shows that the appeal was taken on the 20th day of March, 1908, and that on the 24th day of March, 1908, the appellant filed the stay bond or undertaking required by section 942 of the Code of Civil Procedure. The notice of motion to dismiss the appeal was filed in this court on the 12th day of February, 1909; no transcript of the record having been filed here up to that time. The excuse offered by appellant for failure to file the transcript within the time prescribed by the rule of this court is not a valid one. The proceeding authorized by section 663 of the Code of Civil Procedure has absolutely no connection with an appeal from a judgment, and in no manner or degree affects or controls the latter proceeding. The two remedies are distinct from and independent of each other. Speaking of sections 663 and 663a of the Code of Civil Procedure, the Supreme Court, in Patch v. Miller, 125 Cal. 241, 57 Pac. 986, has this to say in reply to the suggestion that a party's remedy for an inconsistency between the judgment and the findings is under the sections mentioned and not in an appeal from the judgment: "We do not find anything in these added sections to indicate that it was the intention of the Legislature to repeal or in any way modify section 963 of the Code of Civil Procedure, which provides for an appeal from a final judgment. It would therefore seem that an appeal from a final judgment entered in the superior court has the same effect and is to be heard and determined in the same way as before the enactment of the added sections. We hold that those sections were not intended to affect the remedy by appeal already existing, but were intended to provide a remedy in addition thereto." There was, therefore, no necessity for postponing the preparation and the filing of the transcript on the appeal from the judgment until the motion inaugurated upon the authority of section 663 of the Code of Civil Procedure should first be disposed of. While it is obvious that the purpose of section 663 is to furnish a more speedy and summary method for attacking a judgment unsupported by the findings than by an appeal therefrom, yet that remedy is merely cumulative, and was not designed to supersede the remedy by appeal. Spelling on New Trial and Appellate Practice, § 718, and cases cited. Section 663a provides for an appeal from an order granting the motion under section 663, but makes no provision for an appeal from an order denying such motion for the obvious reason that on an appeal from the judgment the very same proposition may be reviewed and a reversal could be ordered and the court below directed to enter the judgment which the findings alone justify.

It is not pointed out wherein the undertaking required to secure to the clerk the cost of preparing the transcript is insufficient, but it is manifest from what we have said that it is unnecessary to consider that point, for the appealing defendant has otherwise been inexcusably derelict in the prosecution of her appeal.

The motion to dismiss the appeal must therefore be granted, and such is the order.

We concur: CHIPMAN, P. J.; BURNETT, J.

11 Cal. App. 265

CLAIRMONTE v. NAPIER MOTOR CO. OF AMERICA. (Civ. 632.)

(Court of Appeal, Second District, California. Sept. 3, 1909.)

1. PRINCIPAL AND AGENT (§ 81*)—EMPLOYMENT OF AGENT—COMPENSATION.

A contract whereby a manufacturer appointed one its exclusive agent for the sale within a territory of its motor cars for a commission on sales in the territory, though construed as entitling the agent to a commission on all cars sold in the territory, does not prevent the manufacturer from making sales in the territory on the payment of the commissions, and a commission due on a sale made by the manufacturer is due and payable when the sale is made.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 199; Dec. Dig. § 81.*]

2. EVIDENCE (§ 80*)—PRESUMPTIONS—LAWS OF OTHER STATES.

In the absence of a showing to the contrary, it will be presumed that the law of a sister state, where a contract for the employment of an agent for the sale of goods within a territory on a specified commission was made, is that declared in Civ. Code, § 1657, fixing the time of performance of contracts.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101; Dec. Dig. § 80.*]

3. BANKRUPTCY (§ 318*)—DEBTS PROVABLE.

A claim for a commission by an agent employed by a manufacturer for the sale of its goods within a specified territory on commissions on all sales made in the territory based on a claim for commissions on a sale made in the territory by the manufacturer is a debt provable in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 481, 482; Dec. Dig. § 318.*]

4. BANKRUPTCY (§ 387*)—PROVING CLAIMS IN BANKRUPTCY—EFFECT.

Where one submitted himself to the jurisdiction of the bankruptcy court by proving his claim against the bankrupt with knowledge of a composition agreement, he became a party to the bankruptcy proceedings, and was concluded by the composition and his receipt of the amount thereof under an agreement that the same settled all claims against the debtor.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 387.*]

Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by J. A. Clairmonte against the Napier Motor Company of America. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Williams, Goudge & Chandler, for appellant. Ward Chapman, for respondent.

ALLEN, P. J. Appeal by defendant from a judgment entered against it and in plaintiff's favor.

The action was submitted upon an agreed statement of facts which may be summarized as follows: The defendant manufacturer had appointed plaintiff its exclusive agent for the sale of motor cars in the district of Los Angeles upon an agreed compensation of 20 per cent. discount. Preceding September, 1906, the business had been conducted in the manner following: When plaintiff ordered a car, he purchased the same of defendant in his own name and the car was shipped to him personally. The bill of lading was accompanied by a draft drawn by defendant upon plaintiff for the list price of the car less 20 per cent. In September, 1906, a lady, who had been solicited by plaintiff to buy a car, was given a letter of introduction by plaintiff to defendant, and this customer purchased a car directly from defendant, paying defendant a third in cash and agreeing to pay the balance upon delivery of car at Los Angeles. Defendant accordingly shipped the car to the purchaser, and through a Boston bank drew for the unpaid balance. The bank purchased the draft in good faith, and credited defendant with the face thereof, and honored defendant's checks until the amount was exhausted. The bank forwarded the draft so purchased to its correspondent in Los Angeles. The purchaser paid to the correspondent the amount of the draft. Whereupon plaintiff, who had before that time commenced an action against defendant to recover 20 per cent. commission upon the sale of the machine, attached the money in the hands of the correspondent, and the Boston bank gave an undertaking for the release of such attachment. Intermediate the sale of the draft and its payment the defendant upon involuntary proceedings was adjudged a bankrupt by the District Court of the United States for the District of Massachusetts. While this adjudication was had before the commencement of plaintiff's action, he had no actual knowledge thereof. After the adjudication in bankruptcy a composition was effected, signed by a majority of the creditors, to which plaintiff was not a party, under the terms of which

33⅓ per cent. of all claims were by the creditors agreed to be received in satisfaction of their demands. This composition was confirmed by the court, and the per cent. due plaintiff was deposited in the registry of the court, of which fact plaintiff received notice. Afterwards, in June, 1908, plaintiff made due proof of his claim in the bankruptcy proceeding, and there was paid to him the pro rata share so on deposit, it being stipulated in the record that plaintiff during the pendency of these proceedings "collected from the funds duly deposited in the United States District Court for Massachusetts out of which the dividend in composition was paid, which settled all claims against the Napier Motor Company of America, his dividend upon his claim which had been theretofore proved, to wit, one-third, which was the same dividend which all other creditors received and that the said Clairmonte now holds the said sum." With these facts before the trial court, judgment was rendered in plaintiff's favor for the full amount of 20 per cent. of the purchase price of the car.

There is nothing in the record indicating fraud, or any reason why the discharge in bankruptcy should not operate as a release from plaintiff's claim as a provable debt. Assuming that under its terms the appointment of plaintiff as agent entitled him to a commission of 20 per cent. upon all machines sold within his territory, nevertheless the defendant possessed the right to make sales conditioned only upon the payment of such commission; in other words, if under the contract a commission was due, it became due and payable when the sale was effected. The agreement for commission being for the payment of money only, it must be performed immediately upon the thing to be done being exactly ascertained. Section 1657, Civ. Code. Nothing to the contrary appearing, it will be presumed that the law of Massachusetts, where the contract was made is the same as that declared in the section of the Code referred to. The amount of this claim, then, was a provable debt at the date of the adjudication in bankruptcy. While plaintiff was not a party to the composition, nevertheless, with full knowledge of such composition, he submitted himself to the jurisdiction of the bankruptcy court when he proved and presented his claim against the estate, and most certainly should he be bound by the composition when he accepts its terms and receives his per cent. under the terms of the stipulation referred to.

We are of opinion that the statement of facts discloses that defendant had and possessed no interest whatever in the draft or its proceeds, and that plaintiff, by becoming a party to the bankruptcy proceedings, is concluded by the composition and his receipt of the amount thereof under an agreement that the same settled all claims against the company.

The judgment is reversed and cause remanded, with instructions to the trial court to render judgment in favor of defendant, and against plaintiff for costs.

We concur: SHAW, J.; TAGGART, J.

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11 Cal. App. 278

JOHNSON v. SOUTHERN PAC. CO.

(Civ. 583.)

(Court of Appeal, Third District, California. Sept. 9, 1909. Rehearing Denied by Supreme Court Nov. 4, 1909.)

1. Railroads (§ 259*)—Fences—Failure to Maintain—Injury to Stock—Liability of Lessee Road.

Under Civ. Code, § 485, requiring railroads to maintain fences beside their tracks, and making them liable for injuries to stock through failure so to do, a lessee of a road in control thereof and operating trains over the same is within the statute.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 814; Dec. Dig. § 259.*]

2. Railroads (§ 103*) — Operation — "Fences"—Duty to Maintain—Gates.

Under Civ. Code, § 485, requiring railroads to maintain fences beside their tracks, a gate is a part of the fence, and the road is under the same duty to erect gates in the first instance and keep them in repair when erected as it is regarding any other part of the fence.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 103.*

For other definitions, see Words and Phrases, vol. 3, pp. 2745–2747; vol. 8, p. 7662.]

3. Railroads (§ 443*)—Operation—Fences—Injury to Animals—Sufficiency of Evidence.

Under Civ. Code, § 485, requiring railroads to maintain sufficient fences, and making them liable for injuries to animals through failure so to do, evidence in an action for injuries to mules that defendant railroad's gate was out of repair, that defendant had notice thereof, that the needed repairs were not made until after the accident, and that the mules escaped through the defective gate without plaintiff's fault, made out a prima facie case of negligence against defendant.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1608–1620; Dec. Dig. § 443.*]

4. Railroads (§ 413*)—Operation—Fences—Gates—Duty of Railroad to Keep Gate Closed—Care Required.

Under said section, a railroad erecting and maintaining a good and sufficient gate is required to exercise only reasonable diligence in keeping the gate closed.

[Ed. Note.—For other cases, see Railroads Cent. Dig. §§ 1459–1473; Dec. Dig. § 413.*]

5. Railroads (§ 441*) — Fences — Defective Fence — Injuries to Animals — Actions — Burden of Proof.

In an action under said section for injuries to plaintiff's mules, where it appeared that defendant railroad knew that a gate was defective and had sufficient time to repair it, defendant had the burden of showing that the mules escaped without its fault; plaintiff not being required to explain how the gate came to be open.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1583–1587; Dec. Dig. § 441.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

6. RAILROADS (§ 413*)—FENCES—DEFECTIVE FENCE—INJURY TO ANIMALS—ACTIONS—DEFENSES.

That in its then defective condition the gate might have been opened by the mules themselves would not excuse defendant from liability.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1464–1472; Dec. Dig. § 413.*]

7. TRIAL (§ 260*)—INSTRUCTIONS.

In an action against a railroad for injury to plaintiff's mules escaping through a defective gate in a fence, where the court instructed the jury not to consider any testimony as to negligence except as to the gate and its condition, and that the only cause of action was for damages through defendant's failure to maintain a sufficient fence, an instruction that a nonsuit had been granted as to the second cause of action alleging carelessness in operating the cars, and that the sole point to be considered was whether defendant had maintained a sufficient fence, was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651–659; Dec. Dig. § 260.*]

8. APPEAL AND ERROR (§ 867*)—ORDER DENYING NEW TRIAL—MATTERS REVIEWABLE.

The action of the court in improperly granting or refusing a nonsuit is an error of law whether made on the opening statement of counsel or after the close of the evidence, and may be reviewed on appeal from an order denying a motion for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3476; Dec. Dig. § 867.*]

Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by E. E. Johnson against the Southern Pacific Company. From an order denying its motion for a new trial, defendant appeals. Affirmed.

Tuttle & Tuttle, for appellant. F. A. Duryea, for respondent.

CHIPMAN, P. J. Action for damages for injury to certain mules by defendant's cars. The cause was tried by a jury, and plaintiff had the verdict on which judgment was entered for $796. Defendant appeals from the order denying its motion for a new trial. The pleadings are verified.

The complaint alleges the corporate capacity of defendant, and "that during all the times herein mentioned the said defendant corporation was in the possession, control, and operation of that certain railroad located and extending from the town of Roseville, county of Placer, state of California, northerly through the western part of said county and beyond, to and through the state of Oregon, and known as the 'California Central Railroad,' and during all of said times the said defendant was engaged in the operation of its engines and cars over and along the said railroad." These averments are not denied. It is further alleged that plaintiff was at all said times "in the possession and occupancy as tenant of that certain farm" (describing it) "and through and over which said farm the said 'California Central Railroad' extended during all the times herein mentioned; that during all of the times herein mentioned it was the duty of said defendant corporation to maintain a good and sufficient fence on either or both sides of the said railroad where the same extended through and over the said farm as aforesaid." It is then alleged that plaintiff was on February 11, 1905, the owner of certain four work mules of the value of $1,000, which were then "upon pasture on the said farm" and that on said day "said defendant, disregarding its duty in that behalf, failed, refused, and neglected to maintain a good and sufficient fence on that side of said railroad on said farm on which the said four mules were at pasture as aforesaid; and by reason of such failure, refusal, and neglect of said defendant to maintain such good and sufficient fence, as aforesaid, and without fault or neglect upon the part of plaintiff, the plaintiff's said four mules on or about said 11th day of February, 1905, escaped from the said premises and strayed upon the track and ground of the said railroad, and the engine and cars of the said defendant, while being then and there operated and run over and along the said railroad by the agents, servants, and employés of said defendant, then and there ran over, against, and upon said four mules, so that two of said mules were then and there killed and destroyed and the other two of said mules were then and there so maimed and crippled that they were from thence and now are almost wholly unfit for use." It is further alleged that plaintiff expended the sum of $21 for medicines and the services of a veterinary surgeon in the care and treatment of said last-named mules. There is a second count in the complaint alleging that the injuries complained of resulted from the negligent and careless management of defendant's cars. A motion for a nonsuit was granted as to this count.

There was evidence that at the times mentioned in the complaint plaintiff was lessee and in the occupancy of land bordering on the right of way and track of the California Central Railroad near the town of Lincoln, Placer county, and that the defendant was at all said times engaged in operating its engines and cars over and along the said railroad. On the evening of February 10, 1905, plaintiff turned out to pasture on said land certain mules, and that during that night four of these mules strayed upon said railroad track, were run down by defendant's engine and cars while on said track, and two were killed and two badly crippled; that these mules escaped through a gate leading from plaintiff's pasture to and across said track to the public highway on the opposite side of said track; that this gate was one, but not the only, means by which plaintiff could reach the highway and was so used by plaintiff. It was what is called a slide gate, not on hinges, and constituted part of the fence built by the railroad company in fencing its track and was placed there for the convenience of the landowner. It was fastened at the end where it was opened by slipping some inches between two upright posts intended to receive it, and to open it the gate was pushed back sidewise and swung around the requisite distance to permit passage through it. The plaintiff testified: "The top board of the gate was broken and one of the rear posts in the back of it was broken off in the top of the ground where the gate swung on, and the top board of the gate itself was about 14 or 15 inches, where nailed on, broken, and it would not shove in between the boards more than a couple of inches. Where it was closed, it would not go in more than a couple of inches. When the gate was open, it would have a tendency to sag in the middle towards the track. The two posts on which the gate was adjusted were so close together on account of this sagging that it could not be shoved between them." He was asked if he had previously called the attention of the company or any of its agents or employés to the condition of the gate, and answered: "I asked the foreman about a month before for a new gate in place of the one that was there. I told him the gate was in a bad condition, and I wanted a new gate in place of it. I think I mentioned it to him several times before the mules were killed. Two or three days after the mules were killed, I noticed there were two ties lying this side of the gate. I supposed they were posts for the rear end of the gate." The day before the accident plaintiff passed through the gate with a team and left it closed; i. e., he pushed the gate between the posts a couple of inches as far as it would go. He did not see the gate again until the next morning, when he found it closed, and was told by the foreman of the section that a couple of mules had been killed, which proved to be plaintiff's. He observed by the tracks, as others did, that the mules escaped through this gate. Witness Kirkham testified for defendant that he was in the employ of the defendant at the time. He testified: "My position was section foreman. My duties were to keep up the tracks, repair fences, and see that everything was kept in shape. * * * The duties of a section foreman are to repair the track, keep the fences in shape, and repair the gates when in bad order." He also testified that the morning after the night when the mules were killed he found the gate "wide open" and closed it. He also testified that he repaired the broken board on top of the gate "about four days before the accident," and that "the gate would slide in between the posts five or six inches." Witness Raner for defendant testified: "I was employed by the Southern Pacific in February, 1905, as trackwalker. My duties were to take care of all switch lines and watch for lost bolts, broken rails, and fences when down. I had to see that gates were closed when not in use. I had occasion to go by the Hemphill ranch (the land in question) every day. I remember the killing of the mules. I walked by the scene of the accident the day before the mules were killed about 11 o'clock in the forenoon. The gate was closed then." He testified further: "I know that repairs were made upon the gate shortly before the accident. These repairs consisted of fastening the top board and latching the gate on the post where the gate goes into it. I was present when it was done by the section foreman, Kirkham. * * * Mr. Kirkham put in new posts and straightened them so that the gate could go in between them." Kirkham in his testimony said nothing about putting in new posts. Plaintiff's witnesses testified that the gate was not repaired before the accident, and the jury must have found that Kirkham and Raner were mistaken in this part of their testimony. There was no direct testimony as to how the gate came to be open. The evidence left no doubt that the mules escaped from the pasture through this gate. There was evidence tending to show that the gate might have been opened by the mules or other animals rubbing or pushing against it. Plaintiff testified (referring to the two posts between which the gate was held when closed): "Those two posts were sloughed around out of their natural and proper position so that they faced out. They were not parallel with the gate. The gate was about 15 feet long. If any mules or stock rubbed against the gate, it would have a tendency to move it from the posts, and the springing of the gate would move it out between the two posts." And this witness testified that an animal could easily rub the gate out where it was fastened between the posts on account of not admitting in far enough to hold itself. Plaintiff also testified: "There were four boards to the gate. With the top board off the gate was still sufficient to turn stock when the gate was properly closed. My complaint was that there were these two posts between which the gates slided that were so tightly closed that it was difficult to slide the gate in and fasten the gate. * * * With the gate in that condition so that the boards would slide between the posts a couple of inches, it was sufficient to hold the gate in place. It would have to be moved back before it would swing one way or the other at least a couple of inches to be free from the posts."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appellant contends that this admission of plaintiff should defeat his claim; that, if the gate was sufficient to turn stock notwithstanding the top board was broken, and, if with the gate closed, as plaintiff testified he closed it, the gate would turn stock, defendant should not be held liable, it being conceded that the mules escaped through the open gate. We do not understand plaintiff's testimony to be that the gate was sufficient to turn stock. What the jury inferred and might properly have inferred from his testimony that so long as the gate kept its position when closed it would turn stock. His complaint was that it could not be securely fastened because of the condition of the posts; that it had so slight a hold that the rubbing of animals against it would cause it to open. The statute law on the subject is found in section 485 of the Civil Code, and provides as follows: "Railroad corporations must make and maintain a good and sufficient fence on either or both sides of their track and property. In case they do not make and maintain such fence, if their engines or cars shall kill or maim any cattle or other domestic animals upon their line of road which passes through or along the property of the owners thereof, they must pay to the owner of such cattle or other domestic animals a fair market price for the same, unless it occurred through the neglect or fault of the owner of the animal so killed or maimed."

Defendant makes the following points: (1) There is no evidence that defendant was the owner of the road; citing Fontaine v. S. P. R. R. Co., 54 Cal. 645. (2) The gate was used for plaintiff's convenience alone, and was a private gate into his own lands and no duty devolved on defendant to maintain the same. (3) The evidence does not show that defendant failed to maintain a good and sufficient fence. Some alleged errors of law are also pointed out.

In Fontaine v. S. P. R. R. Co., supra, the question was whether the company which built and owned the road was liable for injuries to stock committed by the lessee of said company, the Central Pacific Railroad Company. The court held that the owning company was liable, but it did not hold that the lessee was not also liable. Indeed, the cases cited in the opinion hold that both were liable. Mr. Thompson cites several cases holding that the liability extends to the lessee of a railroad. 2 Thompson on Negligence, § 2049. We think the fact being admitted that defendant was in the possession, control, and operation of the railroad—i. e., lessee of the road—and was operating trains and running engines over the track when the animals were killed, the defendant is brought within the statute. It requires no wider interpretation to so hold than that the right of action accrues not only to the owner of the land but also to his lessee, as was held in Walther v. Sierra Ry. Co., 141 Cal. 288, 74 Pac. 840. The gate was part of the fence, and the statute applies to all parts of the fence. The railroad company is under the same duty to erect gates in the first instance and keep them in repair when once erected, as it is in regard to any other part of the fence. 2 Thompson on Negligence, § 2058, and numerous cases there cited. It was proven that the gate was out of repair, and was not "good and sufficient" for the purpose, and that defendant had notice of the fact; and there was evidence that the needed repairs were not made until after the accident. As it was the duty of defendant not only to "make" but to "maintain a good and sufficient fence," and as the injured mules escaped through the defective part of the fence, without fault of the plaintiff, these facts unexplained make a prima facie case of negligence against the defendant. McCoy v. California Pac. R. Co., 40 Cal. 532, 6 Am. Rep. 623. In the case cited it was held that the railroad company operated its road at its peril when left unfenced, and that the adjoining landowner could recover for live stock injured by defendant's cars, although he turned the stock out knowing that the track was not fenced. Had the defendant erected and maintained a good and sufficient gate, it would have been required only to exercise reasonable diligence in keeping the gate closed. Mr. Thompson says: "As these gates and bars are part of the statutory fence, the duty of the railroad company to keep its fence in repair requires it to use due diligence to keep them closed. Reasonable care, however, is all that is required. It is not bound to keep a special patrol sufficient to discover immediately when gates are open. It cannot be charged with negligence until it has had reasonable time to make the discovery, or has failed to take proper action after notification." 2 Thompson on Negligence, § 2059, and cases there cited.

Plaintiff was not called upon to explain how the gate came to be open. Being known by defendant to be defective and sufficient time given it to make the necessary repairs, the burden was upon defendant to show that the mules escaped through no fault of it. There was evidence that in its then defective condition the gate might have been opened by the mules themselves. But this would not excuse defendant from liability. It is strongly urged that the gate could not have been opened by the mules wide enough to account for the tracks to appear the full width, and that the only reasonable explanation is that some person must have opened the gate wide and left it open. Only one witness, Raner for defendant, stated that the tracks showed the full width of the gate, and his testimony on the point was inherently improbable. He testified that he noticed the tracks as he rode along the track on a hand car, 50 feet distant, the next morning after the mules escaped. The other witnesses testified to seeing the tracks, but did not locate them with reference to the space in the opening. At most, it may be said that there is no satisfactory explanation as to how the gate came to be open, and, as it was shown not to have been "good and sufficient," defendant has failed to excuse its negligence.

Defendant requested an instruction informing the jury that a nonsuit had been granted as to the second cause of action alleging carelessness in operating the cars and directing the jury that the sole point they were to consider was "whether defendant has or has not maintained a good and sufficient fence along its right of way." The court gave in lieu thereof the following instruction: "You are not to consider any testimony as to carelessness or negligence except as relates to the gate and its condition." It is contended that the defendant was deprived of a substantial right to its prejudice because the jury were not specifically told that a nonsuit had been granted as to the second cause of action. So far as appears, the motion was made and the ruling of the court announced in the presence and hearing of the jury. The court elsewhere told the jury, at the request of defendant, that "the complaint of plaintiff contains but one cause of action," and explained that the action was brought to recover damages "caused by the failure of defendant to maintain a good and sufficient fence along its right of way across the Quinn Ranch." We cannot see that the jury was left in any doubt of the real issue, or that the instruction complained of "only served to befuddle the jury."

A question was asked of plaintiff's witness whether the track foreman made any statement about the gate. The witness answered that he made no statement. Obviously defendant was not injured by the answer.

The points that a nonsuit should have been granted to both causes of action and that the general demurrer to the complaint should have been sustained rest mainly upon considerations already disposed of. It was not necessary to allege that defendant is the owner of the railroad. The averments of the complaint were sufficient to charge the defendant with liability.

Respondent makes the point that the order denying the motion for a nonsuit cannot be reviewed where there is no appeal from the judgment; citing Merced Bank v. Ivett (Cal. App.) 98 Pac. 383. The syllabus of the case so states. The opinion stated that the order denying the motion for a nonsuit "was made upon the sole ground of the insufficiency of the complaint. But the sufficiency of the complaint cannot be inquired into. Cases, supra. For like reasons we cannot consider the demurrer, as that goes to the sufficiency of the complaint." The syllabus is not borne out by the text, which latter, it must be confessed, is not quite clear as to what was intended to be held. In Green v. Duvergey, 146 Cal. 379, 80 Pac. 234, the court said: "The action of the court in improperly granting or refusing a nonsuit is also an error of law, whether made upon the opening statement of counsel or after the close of the evidence in the case," and may be reviewed on an appeal from an order denying a motion for a new trial.

The order appealed from is affirmed.

We concur: BURNETT, J.; HART, J.

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11 Cal. App. 302

CITY OF LOS ANGELES v. LELANDE, City Clerk. (Civ. 698.)

(Court of Appeal, Second District, California. Sept. 10, 1909. Rehearing Denied by Supreme Court Nov. 4, 1909.)

1. Municipal Corporations (§ 266*)—Street Improvements—Statutes—Repeal.

Sidewalk Act March 6, 1909 (St. 1909, p. 179, c. 115) § 20, expressly declares that it is to be deemed a repeal of the Vrooman act (approved March 18, 1885 [St. 1885, p. 147, c. 153]), and the several acts amendatory thereof and supplemental thereto, so far as the same relate to sidewalks and the construction thereof, and to assessments to be made and the enforcement of payments for the construction of such sidewalks; but, as to all other street improvements, it is declared that the Vrooman act shall not be deemed repealed or affected by the act, which contains a new scheme for constructing sidewalks and assessing the entire cost thereof on the frontage on the side of the street on which the sidewalk is laid. Section 6 (page 171) declares the construction of sidewalks to be of peculiar and special benefit to the property fronting on it, and not to any other property, and the expense of the portion of the work at a street intersection is required to be paid out of the city treasury. Section 19 provides that the act may, at the election of the council, be used in the construction of curbing also. *Held* that, such sidewalk act repeals the Vrooman act as to the construction of sidewalks, and does not merely provide an alternative method for constructing the same.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 712; Dec. Dig. § 266.*]

2. Statutes (§ 170*) — Repeal — Re-enactment.

The Vrooman act having been repealed by the sidewalk act, the re-enactment of section 2 of the Vrooman act (St. 1885, p. 147, c. 153) on April 21, 1909 (St. 1909, p. 1017, c. 676), with the word "sidewalks" therein did not render the act again operative as to sidewalks, the subject of sidewalks not being in any way germane to the purpose of the amendment, which purpose was to strike from the section the clause relating to change of grade, which had been elsewhere provided for, and the restating of the entire section, including such word, being merely in compliance with Const. art. 4, § 24, requiring the amended section to be re-enacted and published at length as amended, and the failure to eliminate the word "sidewalks" might be attributed to inadvertence on the part of the judiciary committee to which the amendment was referred.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 245, 249; Dec. Dig. § 170.*]

3. Statutes (§ 159*) — Repeal by Implication.

The rule that the repugnancy between two statutes should be very clear to warrant a holding that the later in time repeals the other, when it does not in terms purport to do so, has peculiar force in cases of laws of special application, which are never deemed repealed by general legislation, except upon the most unequivocal manifestation of intent to that effect.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 229, 231; Dec. Dig. § 159.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. Statutes (§ 158*)—Repeal by Inadvertence.

The theory of repeal by inadvertence is not to be considered if, by the application of any rule of construction, another result may be arrived at.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 228; Dec. Dig. § 158.*]

5. Statutes (§ 230*)—Construction—Amendatory and Amended Acts.

An unconstitutional amendatory act cannot be considered as affecting for purposes of construction the law as it stood prior to the enactment of such act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 311; Dec. Dig. § 230.*]

Petition by the City of Los Angeles for writ of mandate against Harry J. Lelande, as City Clerk of the City of Los Angeles. Writ denied.

Leslie R. Hewitt, City Atty., and Edward R. Young, Deputy City Atty., for petitioner. Arthur M. Ellis, for respondent.

PER CURIAM. Petition for writ of mandate. This is an application for a writ of mandate to compel respondent, as city clerk of the petitioning city, to certify to the passage of an ordinance, by the common council of that city, ordering certain street work (which includes the construction of sidewalks) under Vrooman Act (St. 1885, p. 147, c. 153). Respondent bases his refusal to do this upon the contention that the Vrooman act, in so far as it was applicable to the construction of sidewalks, was repealed by the sidewalk act, which was approved March 6, 1909 (St. 1909, p. 167, c. 115), and took effect before the date of the passage of the ordinance, to wit, May 11, 1909. Petitioner in response to this contends: (1) That the sidewalk act provides an alternative procedure only; (2) that if it be conceded that it was intended to repeal the Vrooman act with respect to sidewalks, nevertheless, by reason of the re-enactment of section 2 of the Vrooman act on April 21, 1909, which act took effect immediately, with the word "sidewalks" therein, this act again became operative as to sidewalks (St. 1909, p. 1017, c. 676); and (3) that by amending the Vrooman act on March 18, 1909, by adding a new section thereto, numbered 56 (St. 1909, p. 399, c. 261), relating to bids for doing work on sidewalks and curbing, the Legislature evidenced its intent that sidewalks should still be constructed under the Vrooman act. Some question is also suggested as to the propriety of the remedy by mandamus; but, as we read the brief, this is based upon the right of the court to issue a writ in this particular case rather than upon any question as to this being the proper procedure if a case has been made.

The sidewalk act (section 20) expressly declares that it is to be deemed as a repeal of the Vrooman act, "and the several acts amendatory thereof and supplemental thereto so far as said act and the several acts amendatory thereof and supplemental thereto relate to sidewalks and the construction thereof, and to the assessments to be made and the enforcement of payments for the expense of the construction of such sidewalks," but as to all other street work and improvements it is declared that the Vrooman act "shall not be deemed as repealed, amended, or affected by this act." It contains a new and complete scheme for constructing sidewalks, and assessing the entire cost thereof on the frontage on the same side of the street that the sidewalk is laid; the Legislature apparently intending thereby to relieve the property owner on the opposite side of the street from the burden imposed upon him under the Vrooman act as construed in Millsap v. Balfour, 154 Cal. 303, 97 Pac. 668. The construction of sidewalks authorized by the act is declared to be of peculiar and special benefit to the property fronting on it, and not to any other property (section 6), indicating an intention to relieve from the district assessment plan under which the ordinance before us was framed. The expense of the portion of the work constructed upon an intersection or crossing of the street is required to be paid out of the city treasury. These and other provisions of the act, considered in connection with the completeness of the scheme established, are sufficient to justify the inference that it was intended to repeal the Vrooman act in respect to the construction of sidewalks, independent of the express repealing clause above referred to, not so much by implication as by the creation of a substitute method inconsistent with the Vrooman act. Mack v. Jastro, 126 Cal. 130, 58 Pac. 372; Alameda Co. v. Dalton, 148 Cal. 246, 251, 82 Pac. 1050. But as said in Santa Cruz Rock Co. v. Lyons, 133 Cal. 117, 65 Pac. 329, as to the Mack-Jastro Case, this is not a case in which the question of repeal by implication is involved, but a question of enforcing the will of the Legislature last expressed on the very same subject.

The view expressed by one of the members of this court at the oral presentation of this cause, that the sidewalk act should, if possible, be considered as an alternative method for constructing sidewalks, is fully met by the application of the rule "expressio unius," etc., to section 19 of the act. By this section the Legislature expressly provides that the act may at the election of the council be used in the construction of curbing also. The absence of any such provision as to sidewalks clearly indicates that a distinction is drawn in this respect between the construction of curbing and the construction of sidewalks. We do not think the other acts mentioned operate to repeal the sidewalk act, or to restore to the list of improvements authorized to be made under the Vrooman act the street work which is included in the term "construction of sidewalks." The application of the rule that repeals by implication are not favored, invoked by the petitioner with respect to the sidewalk act, makes the more strongly against its position here, in that it relies upon the repeal of a special act by the amendment of a general one. As said by Judge Cooley: "The repugnancy between two statutes should be very clear to warrant a court holding that the later in time repeals the other when it does not in terms purport to do so. This rule has peculiar force in case of laws of special application, which are never to be deemed repealed by general legislation, except upon the most unequivocal manifestation of intent to that effect." Const. Lims. (7th Ed.) 216. Clearly in this connection it is proper to consider the Vrooman act as a general law relating to street work, and the sidewalk act as a special act providing a special method of construction for only such particular street work as is connected with sidewalks.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

This principle was applied by the Supreme Court in People v. Pacific Imp. Co., 130 Cal. 442, 62 Pac. 739. While the facts of that case were such that it may be said the rule adopted supported the position here taken only so far as the question of the repeal of the sidewalk act is to be considered, yet the reasoning upon which the decision was based also sustains our view that the amendment of section 2 by the act of April 21st did not operate to restore sidewalk construction to the improvements authorized to be made under the Vrooman act. Here, as in the case cited, it is apparent that in so far as the amendment to the general law is concerned, the fact that it in any manner mentions the subject-matter of the special act is due to a matter of copying. In the case at bar this may be attributed either to inadvertence or to an oversight on the part of the judiciary committee to which the amendment was referred, who failed to eliminate the word "sidewalks" from the section, and thus make it conform to the other legislation on the same subject at the same session of the Legislature. The evident and apparently sole purpose of the amendment was to strike from the section the clause relating to change of grades which had been elsewhere and otherwise provided for. Compliance with the constitutional mandate that the amended section must be re-enacted and published at length as amended (Const. art. 4, § 24) made it necessary to restate the entire section, leaving out only the part relating to the change of grade; and, as the repeal of the Vrooman act in relation to sidewalks was of such a character that the phraseology of the act remained unchanged, it would be a strained construction of the section to say that by copying the section as it stood the Legislature intended to restore sidewalks to the operation of the act merely because this word was not stricken out. The subject of sidewalks was not in any way germane to the purpose of the amendment. Certainly the theory of repeal by inadvertence is not to be considered if, by the application of any rule of construction, another result may be arrived at. We think the intent with which the act of April 21st was passed is too apparent to require such a construction. The rule declared by section 325 of the Political Code that, where a section or part of one is re-enacted for the purpose of amending it, the unamended part is deemed not to have been changed, but to retain the status it occupied prior to the amendment, also makes for the same interpretation.

We do not lay much stress upon the act of March 18th adding a new section to the Vrooman act. It appears to be conceded that the act is unconstitutional; and, that being so, it cannot be considered as affecting the law as it stood prior to its enactment (Ex parte Sohncke, 148 Cal. 262, 82 Pac. 956, 2 L. R. A. [N. S.] 813, 113 Am. St. Rep. 236; 1 Sutherland, Stat. Cons. [2d Ed.] p. 458), but petitioner contends, nevertheless, that it indicates that at the time of its passage and adoption the Legislature still thought the Vrooman act included the construction of sidewalks in its provisions. Treated as evidence of this, it is not entitled to much weight. If constitutional, its enactment would not be entirely idle, as it may be applied to the matter of curbing, which it includes, as well as sidewalks.

We are of opinion that respondent was justified in refusing to certify the ordinance, and therefore, the writ is denied.

11 Cal. App. 308

LA DOW v. NATIONAL BUILDING & PAVING BRICK CO. (Civ. 659.)

(Court of Appeal, Second District, California. Sept. 11, 1909.)

1. Appeal and Error (§ 920*)—Undertaking in Attachment—Presumptions.

The court, on appeal from an order refusing to vacate a writ of attachment, on the ground that at the time fixed for the justification of the sureties neither the sureties nor others appeared to justify, in the absence of a contrary showing, will presume that the undertaking filed on the day fixed for the justification of the sureties on the original undertaking was in due form, and that the execution thereof and its conditions complied with the law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3718; Dec. Dig. § 920.*]

2. Attachment (§ 138*) — Undertaking — Waiver of Defects.

The filing of an undertaking by a surety corporation on the day fixed for the justification of the sureties on the original undertaking to procure a writ of attachment is the offering a new surety, whom defendant may examine as to its sufficiency; and, in the absence of a showing that the representative of the corporation was not present in court, or that defendant questioned the sufficiency of the surety, or was denied the right to examine the surety, there was a waiver on the part of the defendant of other than the prima facie justification made by presenting and filing an undertaking duly executed.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 387; Dec. Dig. § 138.*]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Charles La Dow against the National Building & Paving Brick Company. From an order denying a motion to vacate and set aside a writ of attachment, defendant appeals. Affirmed.

Woodruff & McClure, for appellant. Walter, Pratt & Ball and Stephen L. Sullivan, for respondent.

SHAW, J. Defendant appeals from an order of court denying its motion to vacate and set aside a writ of attachment. Prior to the issuance of the writ plaintiff filed with the clerk an undertaking in due form, as required by the provisions of section 539, Code Civ. Proc. Within the time provided therefor defendant excepted to the sufficiency of the sureties upon the undertaking, notice of which was duly served upon plaintiff. At the time fixed for the justification of the sureties only one of them appeared and justified. The further hearing was thereupon continued to a subsequent day, when, the other surety not appearing, plaintiff presented and offered to file an undertaking executed by the United States Fidelity & Guaranty Company. Defendant did not question the sufficiency of said Guaranty Company as a surety, but objected to the filing of the undertaking upon the sole ground that it was contrary to law, and that defendant would not be able to collect thereon for costs and damages sustained prior to the date of filing the same, which objection the court overruled. The new undertaking was thereupon received and filed. Thereafter defendant moved the court to vacate and discharge the writ of attachment, upon the ground that at the time and place fixed for the justification of the sureties neither the sureties upon the undertaking nor others appeared and justified thereon. The undertaking is not incorporated in the record, and, in the absence of a contrary showing, it must be presumed that it was in due form, and in the execution thereof and conditions of its terms fully complied with the requirements prescribed by law. Harris v. Frank, 81 Cal. 289, 22 Pac. 856; Ohleyer v. Bunce, 65 Cal. 544, 4 Pac. 549.

The presentation of the undertaking so executed by the Guaranty Company (a corporation) was, in effect, offering a new surety, as to whom defendant was entitled to examine with regard to its sufficiency. Fox v. Hale & Norcross S. M. Co., 97 Cal. 353, 32 Pac. 446; State v. District Court, 58 Minn. 352, 59 N. W. 1055. There is nothing in the record disclosing that the agent and representative of such corporation surety was not at the time present in court; nor is there anything showing that defendant questioned the sufficiency of said surety, or that defendant was denied the right to examine said surety as to its sufficiency. The facts of the case clearly show a waiver on the part of defendant of other than the prima facie justification made by presenting and filing an undertaking duly executed. Bank of Escondido v. Superior Court of San Diego, 106 Cal. 43, 39 Pac. 211; Blair v. Hamilton, 32 Cal. 53.

The order appealed from is affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

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11 Cal. App. 294

ROSENOW v. WIENER. (Civ. 611.)

(Court of Appeal, First District, California. Sept. 10, 1909.)

1. Master and Servant (§ 80*)—Contract of Employment.

Where plaintiff, having previously worked for defendant in a similar capacity, at defendant's request performed services for him as clerk, bookkeeper, and saleswoman in a store for six months, and during the employment she spoke to defendant concerning her pay, to which he replied that he would pay her later, she established a prima facie case, entitling her to recover the reasonable value of her services.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 118; Dec. Dig. § 80.*]

2. Master and Servant (§ 80*)—Action for Services—Value—Evidence.

Where plaintiff went to work for defendant without any agreement as to the amount of her compensation, she was entitled to testify that her services were reasonably worth $15 a week.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 117; Dec. Dig. § 80.*]

3. Master and Servant (§ 73*)—Other Employment.

Where plaintiff performed services for defendant as bookkeeper, saleswoman, etc., it was no defense to defendant's liability for the reasonable value of her services that she also performed certain other services for a corporation during the period for which she sought to recover; such services having been performed principally in the evening, and when it did not unduly interfere with her employment by defendant.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 73.*]

Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Action by Ida Rosenow against Louis Wiener. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, he appeals. Affirmed.

Louis P. Boardman, for appellant. Edwin T. McMurray, for respondent.

KERRIGAN, J. This is an appeal by defendant from the judgment and from the order denying his motion for a new trial. The action was to recover the reasonable value of services rendered to him by plaintiff as a bookkeeper and saleswoman. The findings of the court are as follows: "(1) That on the 11th day of December, 1906, said plaintiff entered defendant's service at his request, and continued in said service at his request until the 11th day of June, 1907; that during said time plaintiff performed various duties for defendant at his request, and rendered service to defendant in and about his business, in the city and county of San Francisco, as bookkeeper, saleslady, and general clerk; that said plaintiff was engaged in the service of defendant as aforesaid for six months, to wit, from the 11th day of December, 1906, to the 11th day of June, 1907; that during said period plaintiff devoted eight or nine hours a day to defendant's service, and occupied a position of confidence and responsibility; (2) that no definite agreement was had between said parties as to the compensation which plaintiff was to receive for her said service, and no agreement was had between said parties that said service was to be rendered gratuitously; (3) that the reasonable value of the said services rendered by plaintiff as aforesaid for the said six months is the sum of $322.50, or the sum of $53.75 per month." Upon these findings the court rendered judgment for plaintiff in the sum of $300 and costs (there being an offset amounting to the balance of $22.50). The appellant makes two points: (1) That his motion for a nonsuit should have been granted; and (2) that the evidence is insufficient to sustain the decision of the court.

The plaintiff testified that at the request of the defendant she performed services for him as clerk, bookkeeper, and saleswoman in his store for some six months, and goes at some length into detail as to those services. She testified that there was no understanding between them as to the amount of her compensation, but that she had previously worked for the defendant in a similar capacity, and thought that he would pay her what was right; that she had during her employment spoken to the defendant about her pay, and had been put off by him because he was short of money, but that he promised to pay her later. She also gave testimony as to the value of her services. In view of this testimony we think the motion for a nonsuit was properly denied.

On the second point, viz., that the evidence is insufficient to sustain the decision of the court, appellant's principal argument is directed to the fact that the only evidence of the value of the services of plaintiff is her own testimony that she considered her services were well worth $15 a week. and objects that upon this evidence the court found that her services were worth the sum of $53.75 per month. There is no reason why the plaintiff should not give testimony as to the value of her services; and, if defendant was dissatisfied therewith, he could have introduced testimony upon the same point, but he neglected to do so, and the plaintiff's evidence stands uncontradicted. It is easy to calculate the value of a month's service when a weekly rate is given; and, if the court found a less amount than would have been warranted by the uncontradicted testimony, the appellant was not injured thereby, and cannot complain of the finding.

On the same point—the insufficiency of the evidence to sustain the findings of the court—the appellant calls attention to some evidence that the plaintiff was, during the period covered by the services forming the basis of this action, employed by a corporation (of which the defendant was president) in another and different capacity, and argues that the two employments were incompatible, and rendered unlikely the one now under consideration. But the evidence discloses that the services rendered under this additional employment were performed principally during the evening, and did not unduly interfere with her duties under her employment by the defendant.

Upon a careful reading of the record we think the findings are amply supported by the evidence, and that the motion for a new trial was properly denied.

The judgment and order are affirmed.

We concur: COOPER, P. J.; HALL, J.

11 Cal. App. 275

PEOPLE v. RIGBY. (Cr. 178.)

(Court of Appeal, First District, California. Sept. 8, 1909.)

1. WITNESSES (§ 290*)—PROSECUTRIX—RE-EXAMINATION.

Whether the court should permit the district attorney, over defendant's objection, to reexamine prosecutrix on matters about which she had been examined in chief, is largely a matter of discretion.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1005; Dec. Dig. § 290.*]

2. WITNESSES (§ 287*)—RE-EXAMINATION—INCONSISTENT STATEMENTS—EXPLANATION.

Where, in a prosecution for rape, prosecutrix on direct examination testified that defendant had inserted his private parts in her private parts, but on cross-examination made statements inconsistent therewith, it was not an abuse of the trial court's discretion to permit the district attorney to cross-examine her as to such matter, by calling her attention to her inconsistent statements, and ask her for an explanation.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1000–1002; Dec. Dig. § 287.*]

3. Criminal Law (§ 1159*)—Appeal—Conviction—Review of Evidence.

A conviction cannot be set aside on appeal for insufficiency of evidence, if it can be fairly said to find support in the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074, 3075; Dec. Dig. § 1159.*]

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Theodore Rigby was convicted of assault with intent to rape, and he appeals. Affirmed.

A. L. Frick, for appellant. Attorney General Webb, for the People.

HALL, J. Defendant was charged with the crime of rape, alleged to have been committed upon a girl 11 years of age. Upon his trial the jury found him guilty of assault with intent to commit rape. From the judgment and order denying his motion for a new trial, he has appealed. But two points are urged as grounds for reversal.

1. The court permitted the district attorney, over the objection of defendant, to re-examine the prosecutrix upon matters about which she had been examined in chief. Whether or not the court should permit such a re-examination is largely a matter of discretion, and the action of the court in so doing will not be disturbed, unless a clear case of abuse of discretion is shown. Rea v. Wood, 105 Cal. 314, 38 Pac. 899; People v. McNamara, 94 Cal. 509, 29 Pac. 953. In the case at bar no such abuse of discretion is shown. On the contrary, the record, in our judgment, discloses a very proper case for the exercise of such discretion. Upon her direct examination the girl had testified that defendant had inserted his private parts in her private parts, but on cross-examination had made statements inconsistent therewith. Her testimony was thus left in a very unsatisfactory condition upon this point. The re-examination was directed to this matter, and seems to have been very fairly conducted by the district attorney, who concluded by calling her attention to the inconsistent answers she had made to defendant's attorney and asking for an explanation. The verdict returned shows that the jury disregarded her statement that defendant penetrated her private parts.

2. It is next urged that the evidence is insufficient to support the verdict. Upon this point the counsel for defendant has reviewed the testimony of the girl, and pointed out what he claims to be inconsistencies therein, as well as contradictions between her testimony and that of other witnesses, who gave testimony as to what occurred between defendant and the girl upon the occasion in question. Doubtless a similar argument was made to the jury, whose province it was to determine the facts, and especially to determine the intent with which defendant committed the acts that the evidence amply proves that he did commit. We find in the record ample evidence tending to show that defendant was guilty of bestial conduct with the girl. The only plausible contention that can be made is that he did not intend to go so far as to actually have sexual intercourse with her, and attempted so to do. But this question was submitted to the jury under fair and full instructions upon these points, and the question was primarily for them to determine. We cannot interfere with their verdict, if it can be fairly said to find support in the evidence. As was said in a very similar case (People v. Johnson, 131 Cal. 511, 63 Pac. 842): "We do not think the crime charged against this defendant, and of which he was convicted, is of such a nature that we should attempt to shield him upon imaginary reasons, or upon a theory that might possibly account for his acts as being done with the intent only to gratify an unnatural desire."

We have not attempted to set forth or discuss in detail the evidence in this case. No good purpose will be subserved by so doing. It is sufficient to say that the evidence to support the verdict that was returned is quite as strong as was the evidence in the following well-considered cases: People v. Johnson, supra; People v. Kuches, 120 Cal. 566, 52 Pac. 1002; and People v. Logan, 123 Cal. 415, 56 Pac. 56—in each of which cases a verdict of guilty was sustained. The record does not present a case of a verdict depending only upon the uncorroborated and improbable testimony of the prosecutrix, and for that reason does not come within the rule laid down in the cases cited by appellant.

The judgment and order are affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

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11 Cal. App. 297

WILLOW LAND CO. v. GOLDSCHMIDT et al. (Civ. 668.)

(Court of Appeal, Second District, California. Sept. 10, 1909.)

1. Appeal and Error (§ 612*)—Record—Authentication.

In the absence of an authentication of the record by a bill of exceptions or otherwise, the papers printed in the transcript constitute no record which can be reviewed by the Court of Appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2694–2696; Dec. Dig. § 612.*]

2. Appeal and Error (§ 373*)—Transfer of Cause—Undertaking.

An appeal is ineffectual where neither the undertaking on appeal nor deposit in lieu thereof expressly required by Code Civ. Proc. § 941, has been given or made, and there has been no waiver thereof.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2001–2004; Dec. Dig. § 373.*]

3. APPEAL AND ERROR (§ 46*)—JURISDICTION—CALIFORNIA COURT OF APPEAL—VALUE IN CONTROVERSY.

Under Const. art. 6, § 4, expressly limiting the jurisdiction of the Courts of Appeal on appeal from the Superior Courts in law cases to actions where the demand exclusive of interest exceeds $300, the court has no jurisdiction where the value of personal property in controversy was $144, and damages for detention thereof $155.99.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 46.*]

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by the Willow Land Company against Max Goldschmidt and another. From an order dismissing an appeal from a justice's judgment, plaintiff appeals. Dismissed.

S. S. Sanders, for appellant. R. Y. Williams, for respondents.

SHAW, J. This purports to be an appeal from an order made by the superior court of Orange county dismissing an appeal had and taken to that court from the justice's court of Huntington Beach township. The action as brought in the justice's court appears to have been for the recovery of certain personal property of the alleged value of $144, and damages claimed for the detention thereof in the sum of $155.99.

The appeal must be dismissed upon several grounds: First. There is no authentication of the record by bill of exceptions or otherwise, in the absence of which the documents and papers printed in the transcript constitute no record which can be reviewed by this court. Second. The appeal is ineffectual by reason of the fact that neither the undertaking on appeal nor deposit prescribed by section 941, Code Civ. Proc., has been given or made, nor was there any waiver thereof. Third. The amount involved being less than $300, this court has no jurisdiction thereof on appeal. Section 4, art. 6, Const. Cal. Fourth. Other reasons.

The appeal is dismissed without the imposition of penalty.

We concur: ALLEN, P. J.; TAGGART, J.

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11 Cal. App. 310

BLODGETT v. SCOTT. (Civ. 658.)

(Court of Appeal, Second District, California. Sept. 13, 1909. Application for Rehearing Oct. 13, 1909. Rehearing Denied by Supreme Court Nov. 12, 1909.)

1. PLEADING (§ 126*) — ANSWER — NEGATIVE PREGNANT.

Where the complaint under the forcible detainer act (Code Civ. Proc. § 1160) alleged plaintiff's possession and right of possession to a tract of land on the date stated and for a long time prior thereto, entry without right thereon by defendant and subsequent withholding of possession from plaintiff, together with service of notice to vacate, an answer merely denying that plaintiff was in the lawful possession of the entire tract at the dated stated, and denying the "entry and withholding without right," was insufficient to raise an issue.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 261, 262; Dec. Dig. § 126.*]

2. APPEAL AND ERROR (§ 542*)—IRREGULARITIES OCCURRING AT THE TRIAL—REVIEW—BILL OF EXCEPTIONS.

An affidavit as to irregularities occurring at the trial, not incorporated in the bill of exceptions, cannot be considered on appeal from an order denying a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2408; Dec. Dig. § 542.*]

3. PLEADING (§ 349*)—JUDGMENT ON PLEADINGS—INSUFFICIENT ANSWER—EFFECT OF INEFFECTUAL EFFORT TO PROVE ALLEGATIONS ADMITTED.

Where plaintiff, without objecting to an answer insufficient to raise an issue, offered evidence to support the sufficient allegations of the complaint, but failed to prove his case, defendant, who offered no evidence contradicting the allegations of the complaint, could not complain of the judgment for plaintiff, since, under Code Civ. Proc. § 462, providing that every material allegation of the complaint not controverted by the answer must be taken as true, plaintiff was entitled to judgment on the pleadings.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1067; Dec. Dig. § 349.*]

4. NEW TRIAL (§ 70*)—INSUFFICIENCY OF EVIDENCE—ADMISSIONS.

The court, in passing on a motion for a new trial on the ground of the insufficiency of the evidence to support the allegations of the complaint, may consider the admissions made by defendant by failure to deny the material allegations of the complaint.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 142, 143; Dec. Dig. § 70.*]

5. PLEADING (§ 349*)—JUDGMENT ON PLEADINGS—ADMISSION BY FAILURE TO DENY.

Under Code Civ. Proc. § 462, providing that every material allegation of the complaint not controverted by the answer must be taken as true, a judgment, sustainable by the complaint under the forcible detainer act (Code Civ. Proc. § 1160), which alleges plaintiff's possession and right of possession to a tract of land on the date stated and for a long time prior thereto, entry without right thereon by defendant, and the subsequent withholding of possession from plaintiff, together with service of notice to vacate, will not be reversed because of the insufficiency of evidence introduced on the trial where the complaint was not denied.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1067–1069; Dec. Dig. § 349.*]

6. PLEADING (§ 409*)—ISSUES—WAIVER.

Where defendant failed to introduce any evidence contradicting a complaint stating a cause of action, the failure of plaintiff to object that the answer was insufficient to raise any issue was not prejudicial to defendant under the doctrine of equitable estoppel applicable where parties proceed to trial in the absence of particular issues.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1375, 1382; Dec. Dig. § 409.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

On Rehearing.

7. APPEAL AND ERROR (§ 867*)—REVIEW ON APPEAL FROM AN ORDER DENYING NEW TRIAL.

The sufficiency of the complaint to sustain the judgment cannot be considered on appeal from an order denying a new trial, but is reviewable only on appeal from the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3478; Dec. Dig. § 867.*]

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Ella E. Blodgett against S. E. Scott. From an order denying a new trial after judgment for plaintiff, defendant appeals. Affirmed.

R. O. Bordner, for appellant. George H. P. Shaw, J. M. Eshleman, Shaw & Brewer, and Eshleman & Swing, for respondent.

ALLEN, P. J. The action was sought to be maintained under the forcible detainer act. Code Civ. Proc. § 1160. The complaint alleges plaintiff's possession, and right of possession, of and to a certain 80-acre tract of land on the date stated, and for a long time prior thereto, entry without right thereon by defendant, and the subsequent withholding of possession from plaintiff, together with service of notice to vacate and surrender possession. The answer denied that plaintiff was in the lawful possession of the entire tract at the date stated, and denied the entry and withholding of possession without right. This answer was insufficient to raise an issue. Doll v. Good, 38 Cal. 287. The plaintiff, however, without demurring, or in any other way raising the question of the insufficiency of the answer, proceeded to trial, and introduced evidence obviously intended to support the allegations of the complaint, both as to plaintiff's possession and the unlawful entry of defendant. This testimony was simply to the effect that on the land in dispute some one, in July of some year, had broken the brush from 50 acres of land, which was desert in its character; that the brush breaker was still upon the land when defendant entered; that there was no inclosure, and no marking of the boundaries, except that the corner stakes had been placed there by some one, upon which were the letters "E.E.B.": that defendant saw these stakes when he entered. Plaintiff did not connect herself with either the breaking of brush, ownership of break, or setting of stakes; nor was there any testimony offered tending to show that there had been any entry upon this desert land with the intention to improve the same under the desert land act. After a motion for nonsuit was denied, defendant introduced evidence tending to show that when he entered upon the land no one was personally upon the property, and that new growth had at that time partially destroyed evidences of brush breaking. This is said to have constituted the evidence offered in the case, and at the close of the testimony defendant was given leave to file an answer to correspond to the proof, but this answer when filed raised no issue. The court thereupon found that plaintiff had, for more than five days before the date stated in the complaint, been in the actual possession of the premises, and was in such actual and peaceable possession when defendant entered; that defendant's entry was without right, and judgment was rendered in plaintiff's favor. This appeal is from an order denying a new trial.

The affidavit relating to irregularities occurring at the trial cannot be considered; the same not being incorporated in a bill of exceptions. Higgins v. Los Angeles Ry. Co., 5 Cal. App. 749, 91 Pac. 344, and cases cited.

Respondent does not contend that the findings have support in the evidence alone, but contends that, there being no issues presented by answer, no findings were necessary, and that, no appeal having been taken from the judgment, the specifications of error in relation to the insufficiency of the findings cannot be the basis for a reversal of the judgment. In passing upon the motion for a new trial the court properly considered the admissions which follow a failure to deny the material allegations of the complaint. Section 462, Code of Civil Procedure, provides: "Every material allegation of the complaint, not controverted by the answer, must, for the purposes of the action, be taken as true." The complaint in its averments is as complete as was the one under consideration in Leroux v. Murdock, 51 Cal. 541, which is there held to be sufficient. The material allegations of the complaint not being denied, plaintiff was entitled to a judgment upon the pleadings. A judgment so sustainable will not be reversed because of insufficiency of evidence introduced upon the trial. The doctrine of equitable estoppel, made to apply in certain cases where parties proceed to trial in the absence of particular issues, should have no application in the case under consideration, for it does not appear by the record that defendant, even upon the assumption that an issue was properly made, introduced any evidence tending to contradict the allegations of the complaint, or to justify his acts in taking possession. Were it to be assumed that he was misled by the failure to object to the sufficiency of the answer in any wise, there is nothing indicating that such omission injuriously affected his interests.

The order denying a new trial is therefore affirmed.

We concur: SHAW, J.; TAGGART, J.

Application for Rehearing.

PER CURIAM. The appeal in this case was from an order denying a new trial. Conceding that the improper refusal of a nonsuit may be considered upon such an appeal as an error of law occurring during the course of the trial, the grounds stated in the record on said motion are not those presented by the brief of appellant's counsel. In so far as the application is based upon the failure of the complaint to sustain the judgment such matter cannot be considered on this appeal, the same being reviewable only on appeal from the judgment. Frey v. Vignier, 145 Cal. 253, 78 Pac. 733; Holmes v. Warren, 145 Cal. 460, 78 Pac. 954. A rehearing is therefore denied.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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11 Cal. App. 298

TIBBALS OAKUM CO. v. MEIGS.

(Civ. 643.)

(Court of Appeal, First District, California. Sept. 10, 1909.)

1. Sales (§ 442*)—Warranty of Quality—Breach—Measure of Damages.

Defendant purchased certain oakum from plaintiff under a warranty of quality, and sold it. In an action for the price, the court found that the value of the oakum delivered was $1,302.57, and that its value, if it had complied with the warranty at the time of delivery, would have been $1,449.43. *Held* that, the court not having found that defendant suffered any additional loss by reason of the breach, the amount defendant was entitled to recoup from the price was the difference between the value of the oakum as it was and the value as it would have been if it had complied with the warranty as expressly provided by Civ. Code, § 3313.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1284–1301; Dec. Dig. § 442.*]

2. Appeal and Error (§ 934*)—Findings—Review.

On an appeal on the judgment roll without a bill of exceptions, the appellate court must consider the findings with reference to supporting the judgment, if possible, and reject all surplus and trivial inconsistencies.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777–3781; Dec. Dig. § 934.*]

Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Action by the Tibbals Oakum Company against Fayette M. Meigs. From a judgment for plaintiff, defendant appeals. Affirmed.

James H. Boyer, for appellant. T. C. Coogan, for respondent.

COOPER, P. J. This action was brought to recover from defendant the balance due for 520 bales of oakum, sold and delivered by the plaintiff to defendant at his request. The case was tried before the court, and findings filed, on which judgment was entered in favor of the plaintiff for $632.55, with costs. This appeal is from the judgment on the judgment roll without a bill of exceptions.

It is claimed that the judgment is not the legal conclusion from the facts found. The defendant pleaded by way of defense that there was a warranty made by the plaintiff as to the quality of the oakum, and that by reason of a breach of said warranty he suffered loss in net profits on the sale of the oakum and other damages in the sum of $574.08, and he asks that this sum be allowed and deducted from the amount that might be found due the plaintiff. The court found that the sale was made with a warranty, and further found as follows: "(6) That all said oakum, sold and delivered as aforesaid, was in bad condition at the time of sale, due to the poor workmanship exercised in its manufacture, and to the further fact that said oakum consisted of extremely short fibers, and could not be sold for the high price it would otherwise have sold for if the same had been of the grade and quality and in the condition warranted by plaintiff; that defendant sold said 520 bales of oakum delivered as aforesaid for, and received for the same, the sum of $1,332.57; that the value of said 520 bales of oakum was, at the time of the delivery thereof to defendant, at said city and county of San Francisco, said sum of $1,332.57; that the excess of the value which said 520 bales of oakum would have had at the time to which the warranty of plaintiff referred, if it had been complied with over their actual cash value at that time was, and is, the sum of $116.86. (7) That by reason of the poor grade and quality and the condition of said oakum defendant has suffered loss in net profits in the sale of said oakum, premiums, cartage, storage, and freight in the sum of $578.08, no part of which has been paid. (8) That, subsequent to the sale of said oakum by plaintiff to defendant as aforesaid, said defendant paid to plaintiff on account of the purchase price of said oakum, the sum of $700, but refused to pay any additional sum because of the poor grade and quality and bad condition of said oakum."

The question for determination is as to the correct rule of damages in sales of personal property where the purchaser retains the property and it is inferior in quality to the warranty. The Civil Code provides (section 3313): "The detriment caused by the breach of a warranty of the quality of personal property is deemed to be the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time." This section lays down a simple plain rule, which eliminates all imaginary claims to damages in such cases. It is intended to do justice to both the seller and the buyer. In fact the Code only recites the rule as long established in England and since adopted in most of the leading cases in the United States. See Benjamin on Sales (5th Ed.) pp. 1017, 1024; 3 Sutherland on Damages, § 670; Hodgman v. S. L. & S. R. R. Co., 45 Ill. App. 395. In cases where the warranty refers to the time of delivery, as in this case, the first question to be determined is, What was the actual value of the property at that time? The court has found (and we cannot here question the finding) that the value was $1,332.57. The court also found that if the oakum had complied with the warranty, it would at the time of delivery have exceeded such value by the sum of $116.86. The latter sum is, by the section of the Code, fixed as the measure of defendant's damages. If the oakum had come up to the quality stipulated in the warranty, it would thus, according to the court's finding, have been of the value, at the time of delivery, of $1,449.43; but it was not of such value, but only of the value of $1,332.57. The plaintiff, although it shipped and delivered goods that did not comply with the warranty, was nevertheless, in case defendant kept the goods and thus affirmed the contract, entitled to the contract price, less the damages suffered by defendant when measured by the Code, caused by the failure of the plaintiff to comply with its contract. As the damages found to be $116.86, and the $700 paid, were deducted from the $1,449.43, we have the balance of $632.57, which is within two cents of the amount of the judgment. The law is just when it allows the party, who has delivered personal property of a different quality from that which it agreed to deliver, to recover the agreed price less the excess of value the property would have had at the time of delivery, if it had equaled the quality warranted over its actual value at that time. In the case at bar, if the oakum in its warranted condition would have been worth $500 more than its value in the condition in which it was delivered, the defendant would have been entitled to have that sum deducted from the price of the oakum.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The defendant contends that he suffered loss in net profits, premiums, cartage, and storage and freight, amounting to $578.08 (and the court so found), and that he is entitled to have such sum deducted from the value of the oakum delivered. We cannot consider the question under the findings in this record. The court has found the actual value of the oakum, and whether it found correctly or not is not now open to question. We must consider the findings with the view of supporting the judgment if possible, and reject all surplusage or trivial inconsistencies. There being no specification of insufficiency of the evidence to support the finding as to the value, and no evidence brought here, we cannot consider the question. It is consistent with the finding of the court to conclude that the defendant kept the oakum much longer than he should have done before selling it, and thus incurred the expense of storage, premiums, and cartage. The findings show that the defendant sold the oakum. They show and state that the value of the oakum at the time it was delivered to defendant was $1,332.57.

It follows that the judgment must be affirmed, and it is so ordered.

We concur: HALL, J.; KERRIGAN, J.

11 Cal. App. 287

BRADLEY v. BUSH. (Civ. 607.)

(Court of Appeal, Third District, California. Sept. 9, 1909.)

1. APPEAL AND ERROR (§ 1096*)—SUBSEQUENT APPEAL—LAW OF THE CASE.

Where the Court of Appeal has announced certain principles as applicable to the case, they will constitute the law of the case upon a second appeal, where the facts are substantially the same.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4353–4357; Dec. Dig. § 1096.*]

2. BILLS AND NOTES (§ 487*) — PLEADING — TRIAL AMENDMENTS.

Courts are liberal in allowing amendments to pleadings at all stages where the rights of the adverse party are not unduly prejudiced, and, in an action against defendant as indorser of notes, where the issue was whether the notes were indorsed and surrendered to plaintiff for cancellation, and not with the intention that they should become plaintiff's property with liability over against defendant as indorser, and the complaint and answer were not verified, it was not error to permit defendant to amend and verify his amended answer to deny the genuineness and due execution of indorsements on the note showing receipt of interest; the original answer having admitted the execution of the notes and defendant's "indorsement" thereof, referring to the writing of his name on the back of them when they were transferred to plaintiff, and the indorsements negatived by the amendment being merely evidentiary as bearing upon the main issue.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1582; Dec. Dig. § 487.*]

3. EVIDENCE (§ 466*) — PAROL EVIDENCE — VARYING WRITTEN INSTRUMENTS.

In an action against defendant as an indorser of notes transferred to plaintiff, evidence of an agreement of the parties that the notes were indorsed and surrendered for cancellation, and not with the intention that they should become plaintiff's property with liability over against defendant as indorser, was not objectionable as contradicting or varying the terms of the notes sued upon, nor of adding any new terms thereto.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2145; Dec. Dig. § 466.*]

4. BILLS AND NOTES (§ 489*)—ACTIONS—ADMISSIBILITY OF EVIDENCE—WANT OF CONSIDERATION.

In an action on notes, want of consideration when pleaded may be shown, though due execution and genuineness of the notes be not denied.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1587–1642; Dec. Dig. § 489.*]

Appeal from Superior Court, Kings County; John G. Covert, Judge.

Action by Richard Bradley, administrator of James A. Bradley, against E. E. Bush. From an order and a judgment for defendant, plaintiff appeals. Affirmed.

See, also, 1 Cal. App. 516, 82 Pac. 560.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

H. Scott Jacobs, for appellant. Charles G. Lamberson and John F. Pryor, for respondent.

CHIPMAN, P. J. The action is to recover judgment against defendant as indorser of two promissory notes for $1,000 each, executed by the Sunset Vineyard Company, payable to defendant, dated January 25, 1892, and falling due on or before January 1, 1898. The notes, not being paid at maturity, were duly protested and notice of nonpayment given defendant. Plaintiff's intestate died December 19, 1894, and the notes came into plaintiff's possession among other effects of deceased. Defendant refused payment, and hence this suit.

The principal contention of plaintiff is that finding 2 is not supported by the evidence. Paragraph 2 of the amended answer set forth the defense to the action as follows: "The defendant denies that he did at any time prior to the 1st day of February, 1894, or at any other time, whatever, or at all, for value received or at all, duly or otherwise, indorse or transfer or deliver said promissory notes set out in the complaint, or either of them, to James A. Bradley, plaintiff's intestate named in said complaint. But, on the contrary thereof, defendant alleges: That long prior to the 1st day of February, 1894, this defendant wrote his name upon the back of said notes, and each of them, and thereupon placed said notes in the possession of M. W. Upton, at the city of San Francisco, and thereafter agreed with the said James A. Bradley and with the Sunset Vineyard Company that the said defendant would surrender and deliver up the said promissory notes to said Sunset Vineyard Company, and thereupon instructed the said M. W. Upton to deliver the two promissory notes set out and described in the complaint herein to the said Sunset Vineyard Company, and that thereafter the said James A. Bradley received the said promissory notes from the said M. W. Upton, acting as the agent of the said Sunset Vineyard Company, and, as defendant is informed and believes, thereafter retained the said notes in his possession until the death of the said James A. Bradley. That said order to the said M. W. Upton for the delivery of said notes to the said Sunset Vineyard Company was made for the purpose of surrendering up to the said Sunset Vineyard Company the said evidence of indebtedness, and for the purpose of canceling the same, and not with the intention that the same should ever become the property of the said James A. Bradley or that said James A. Bradley should have any right or interest therein." The court, in finding 2, finds the facts substantially as averred in the amended answer, and in finding 7 finds "that all the allegations of paragraph 2 of the 'further and separate answer and defense herein' set forth and contained in the amended answer herein are true."

The cause was tried once before, and judgment given for plaintiff. On appeal the First District Court of Appeal reversed the judgment. Bradley v. Bush, 1 Cal. App. 516, 82 Pac. 560. Guided by the principles enunciated by the appellate court, the learned trial judge at the second trial, upon facts substantially the same as those appearing at the first trial, entered judgment for defendant. The Supreme Court denied a rehearing in that court on the first appeal, thus affirming the principles of law involved. We feel relieved, therefore, from an extended discussion of either the facts or the law of the case. Upon sufficient facts the court made the finding complained of, which was as follows: "That said defendant did not at any time indorse or transfer said promissory notes or either of them to one James A. Bradley, but did prior to December 19, 1894, cause said promissory notes to be delivered to said James A. Bradley, but did not cause said delivery to be made with any agreement or intention on the part of said defendant or of said James A. Bradley that the title to or ownership of said promissory notes or either of them should thereby or at all be transferred from the defendant to said James A. Bradley; but, on the contrary thereof, such delivery of said promissory notes and of each of them was made upon the understanding and agreement between said defendant and said James A. Bradley that said promissory notes and each of them were delivered to James A. Bradley as an agent of said Sunset Vineyard Company, a corporation, to be canceled and retired so as to reduce the indebtedness owing by said Sunset Vineyard Company." Speaking of defendant's offer to prove certain facts by witness Upton (he testified at the second trial to, those facts), which the lower court refused to allow on the ground that "there is the same evidence before the court now" and that there cannot "be any dispute as to the facts of the case at all," which ruling was held to be error, the appellate court said: "From this it appears that the court understood the transaction as stated above, but it will be observed that the declarations of Bradley to Upton had not been proved, and that the testimony offered as to these was not only new, but of material importance; for, the transaction being as stated, it would follow that Bush did not indorse, transfer, or deliver the note to Bradley, but to the company, as to which the transfer and indorsement could create no obligation (Civ. Code, § 3116); nor, indeed, could it have any effect other than that of a mere relinquishment or surrender of his title to the company. The ordinary effect of such a transaction would be to extinguish the obligation itself; but here, by agreement between Bradley and the corporation, assented to by Bush—who held the other notes—the note was not to be canceled, but was to be transferred by the latter to Bradley, to be held by him as evidence of its debt, with the benefit of the mortgage security. Such an agreement would doubtless be valid, and its effect would be to keep the note alive and to vest the title in Bradley. But—assuming the facts to be as stated in the offer of proof—his title would come to him from the company, and there would be no contract of transfer or indorsement between him and Bush; nor, indeed, any direct contractual relation whatever. Nor could Bradley acquire from the company any right of action against Bush, since the company itself by the transfer or surrender to it of its own obligation did not acquire such right of action." The principles here announced must be regarded as the law of the case, for they rest upon substantially the same facts in all material particulars as gave rise to the decision at the last trial.

Defendant was permitted to amend his answer at the close of plaintiff's evidence. Plaintiff objected on the ground that there had been an unreasonable delay in making the request, and on the further ground that "in the proposed amended answer some of the matters are denied which, under our contention, were admitted in the first answer in the case"; citing Bank of Woodland v. Heron, 122 Cal. 107, 54 Pac. 537. The complaint was not verified nor was the answer. Defendant asked leave to amend and verify his amended answer "so as to deny the genuineness and due execution of the indorsements." Counsel for defendant stated that the answer had been treated as sufficient at the former trial, but, having some fear that it might not now be so regarded, he sought to make the amendment. In the original answer defendant admitted the execution of the notes and "his indorsement" of the notes set out in plaintiff's complaint—referring, apparently, to writing his name on the back of the notes. There were two indorsements showing receipt of interest, as to which plaintiff offered some evidence, and it was as to these that the proposed amendment related. In the case cited by appellant the lower court refused the proposed amendment. The Supreme Court sustained the ruling on the ground that the proposed amendment was not in the interest of justice (Code Civ. Proc. § 473); and "the defense under the circumstances was highly inequitable." Courts are liberal in allowing amendments to pleadings, and at all stages, where the rights of the adverse party are not unduly prejudiced. In the present instance the amendment was but a specific denial of facts alleged and which plaintiff endeavored to establish by evidence. Furthermore, the indorsements, negatived by the amendment, were merely evidentiary as bearing upon the main issue, namely: Were the notes indorsed and surrendered for the purpose of cancellation, and not with the intention that they should become the property of Bradley with liability over against defendant as indorser? The court, we think, properly overruled the objection to the evidence regarding defendant's agreement with James A. Bradley in the surrender of the notes. Its object was not to contradict or vary the terms of the written instruments sued upon, nor did it have the effect to add any new terms thereto. As was said in Guidery v. Green, 95 Cal. 630-634, 30 Pac. 786, 787: "Its purpose was to show that the agreement had been canceled by consent, and had no longer operative effect." And it was there held that in such case "the objection that the written agreement could be altered only by an agreement in writing or by an executed oral agreement (Civ. Code, § 1698) has no application to the facts offered to be shown."

So also may want of consideration be shown, when pleaded as was done here, even though due execution and genuineness of an instrument be not denied. Brooks v. Johnson, 122 Cal. 569, 55 Pac. 423; Myers v. Sierra Valley, etc., Ass'n, 122 Cal. 669, 55 Pac. 689.

We find no errors of law among those further pointed out which seem to call for notice. In no instance, even conceding error, is a reversal called for, or is there anything which would affect the substantial rights of the appellant. Code Civ. Proc. § 475.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

(156 Cal. 408)

SACRAMENTO SOUTHERN R. CO. v. HEILBRON. (Sac. 1,594.)

(Supreme Court of California. Oct. 29, 1909. Rehearing Denied Nov. 26, 1909.)

1. EMINENT DOMAIN (§ 131*)—COMPENSATION—MEASURE OF DAMAGES.

The measure of damages for land taken by condemnation proceedings is the market value of the land; that is, the highest money price which the land would bring if sold in the open market to one buying with knowledge of all the purposes to which it was adapted, allowing a reasonable time in which to find a purchaser.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 353; Dec. Dig. § 131.*]

2. EMINENT DOMAIN (§ 134*)—COMPENSATION—MARKET VALUE—VALUE FOR PARTICULAR PURPOSE.

The measure of damages for land taken by condemnation is its market value in view of all the purposes to which it is adapted, and, while evidence that it is "valuable" for particular purposes is admissible, its money value for any particular purpose, as for nursery purposes, cannot be shown in determining its market value.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 356; Dec. Dig. § 134.*]

3. TRIAL (§ 295*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

An instruction that, in determining the damage to land not taken in eminent domain proceedings, the jury must consider the purposes for which it was adapted, and determine the market value from what one would then pay for it in cash, not buying for any particular purpose, but having regard to the market value of the property for all purposes, read in view of other instructions of the question which required the market value to be determined by considering, and allowing for, all purposes for which the property was shown to be adapted, could not have misled the jury to exclude from their consideration what sum a purchaser desiring to use the property for a particular purpose would have paid, but must have been understood as merely prohibiting the consideration of the particular purpose for which a buyer might desire to use the property, and requiring its valuation to be based upon its market value for all purposes.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 295.*]

4. EMINENT DOMAIN (§ 222*)—PROCEEDINGS—INSTRUCTIONS—DAMAGES—"MARKET VALUE"—"ACTUAL VALUE."

An instruction that the damages for land not taken should be determined by ascertaining the "market value" of the part not taken as it was when the remainder was taken, and deducting therefrom its market value after the taking, which was pursuant to Code Civ. Proc. § 1249, except that the quoted words were substituted for "actual value" used in the statute, was not objectionable for using the substituted words; the law holding the market value as equivalent to the actual value.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 222.*

For other definitions, see Words and Phrases, vol. 5, pp. 4383–4388; vol. 8, p. 7717; vol. 1, p. 171.]

In Bank. Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

Condemnation proceedings by the Sacramento Southern Railroad Company against Louise R. Heilbron. From a judgment awarding damages and from the order denying a new trial, defendant appeals. Affirmed.

A. M. Seymour and A. L. Shinn, for appellant. Devlin & Devlin, for respondent.

HENSHAW, J. This action was to condemn for railroad purposes a strip of land extending diagonally across a tract owned by defendant. Following the jury's award of damages, defendant appeals; the principal contention upon appeal being that the court erred when instructing the jury upon the law governing their consideration in estimating the damages sustained by defendant. The asserted errors are found in instruction 8, laying down the rule for measuring damages for the land actually taken, and in instruction 9, where the jury is told how to arrive at the damages which may have resulted by the impairment and depreciation in value of the remaining portion of the freehold.

Limiting this consideration for the present to the award by way of damages for the land actually taken, the rule is of universal acceptance that the measure of this damage is the market value; that is to say, the highest price estimated in terms of money which the land would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all of the uses and purposes to which it was adapted and for which it was capable. In varying language the principle has oftentimes been announced. "Some of the cases hold that its value for a particular use may be proved, but the proper inquiry is: What is its market value in view of any use to which it may be applied and of all uses to which it is adapted?" Lewis on Eminent Domain, § 479. "In estimating the damages to be allowed where property is taken for a public use, the recovery is not limited to the value in connection with a particular purpose for which it may be used, but all its capabilities or uses to which it may be adapted should be considered in order to determine the market value." Joyce on Damages, § 2185.

That this is the measure of damages is not disputed. But by appellant it is contended that the rule as laid down in this state permits evidence of value for the use of the land for a particular purpose in terms of money—that is to say, price, to be given in evidence—while respondent insists that the rule does not go so far; that the rule permits evidence to be given of all uses and purposes for which the land is or may become adapted, but that it forbids the opinions of witnesses to be given as to the value in terms of money of the land for any specific purpose, and limits those opinions to the market value of the land, taking into consideration all of the uses and purposes for which it may have been shown in evidence that the land was suitable. Unquestionably the general rule forbids evidence of value in terms of money to be given touching a specific purpose or use. It is to be considered whether, as appellant contends, the rule in this state does so permit. In Gilmer v. Lime Point, 19 Cal. 47, the question was asked of land sought to be condemned, "What was the value of the property as a site for a fortification?" Here was the first effort in this state to have value for a specific use declared in terms of money. The question was ruled out. This court disposed of the claim that this ruling was error by the brief statement that there was no merit in the contention. In C. P. R. R. Co. v. Pearson, 35 Cal. 247, it was ruled that evidence of the value of lands in terms of money directed to the specific use of the land for wharf purposes was inadmissible. In San Diego Land Co. v. Neale, 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83, the land condemned being a portion of a reservoir site, it was held that it was proper to show the value of the property as a reservoir site; the commissioner writing the opinion declaring that this is not "sanctioning a remote or speculative value. It is merely taking the present value for prospective purposes." This decision was by a divided court, one of the justices not participating, two distinctly dissenting upon the ground that the value in terms of money for reservoir purposes could not be shown. The case again came before this court, and is reported in 88 Cal. 50, 25 Pac. 977, 11 L. R. A. 604. There this court felt itself bound by the law of the case as laid down upon the former appeal, saying: "As stated before, it was decided on the former appeal and is the law in the case, that the value of the land for any special purpose may be taken into account as one of the elements tending to show its market value." Proceeding with the consideration, the court again places itself in line with the well-established rule by the declaration: "It is sufficient to say that any facts showing the nature of the land in controversy and its adaptability for reservoir purposes may be shown." In Spring Valley Water Company v. Drinkhouse, 92 Cal. 528, 28 Pac. 681, by a divided court, where land was sought to be condemned for reservoir purposes, it was held, following the case of San Diego Land Company v. Neale, that questions asked of a witness, "Do you know what the value of that land is down there for reservoir purposes? Have you any means of knowing the value of this for reservoir purposes?" should have been allowed. Mr. Justice Harrison in his concurring opinion in this case takes the position that the questions were admissible as tending to show the witness' knowledge of the adaptability of the land for a particular use, and as thus affecting the worth of his testimony upon the market value, which alone is to govern. Reviewing the case of San Diego Land Co. v. Neale, he says: "To the extent that the opinion announces the right to offer evidence of such value (for a specific purpose) as an independent fact to be considered by the jury as a measure of the compensation to be awarded, it is at variance with an almost unbroken line of authorities, and, in my opinion, ought not to be followed." The following case of Santa Ana v. Harlin, 99 Cal. 538, 34 Pac. 224, a department case, quotes Lewis on Eminent Domain, § 479, to the following effect: "The conclusion from the authorities and reason of the matter seems to be that witnesses should not be allowed to give their opinions as to the value of property for a particular purpose, but should state its market value in view of any purpose to which it is adapted." This the department declares it regards "as a correct exposition of the law on the subject." This opinion was concurred in by Justice De Haven, the author of the opinion in Spring Valley W. W. v. Drinkhouse, supra, by Justice Paterson, the author of the opinion in San Diego Land Co. v. Neale, 88 Cal. 50, 25 Pac. 977, 11 L. R. A. 604, and by Justice Harrison; Justice Paterson in his especially concurring opinion, declaring his view that his opinion in San Diego Land Co. v. Neale, in 88 Cal. 50, 25 Pac. 977, 11 L. R. A. 604, was in strict accord with the case of City of Santa Ana v. Harlin. In Kishlar v. Southern Pacific R. R. Co., 134 Cal. 636, 66 Pac. 848, the question again arose; the court saying: "Plaintiff (appellant) concedes in his brief 'that market value is not necessarily the use to the plaintiff for a particular purpose,' but he claims that 'this use to the plaintiff for a particular purpose is a very proper element to be considered by the jury, and should not be taken from the jury in arriving at market value'—citing San Diego Land, etc., v. Neale, 88 Cal. 50, 25 Pac. 977, 11 L. R. A. 604. In Santa Ana v. Harlin, 99 Cal. 538, 34 Pac. 224, which was a proceeding to condemn land, the court said: 'The present market value of the land is the measure of damages, and not its value in use to the owner or to the parties seeking to condemn. There is nothing in the Neale Case indicating a different rule. The availability of the property for any particular use may be shown, and in the present case all the facts bearing on the use to which the building was adapted and for which it was being used were shown."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It is seen, therefore, that this court by its latest utterances has definitely aligned itself with the great majority of the courts in holding that damages must be measured by the market value of the land at the time it was taken, that the test is not the value for a special purpose, but the fair market value of the land in view of all the purposes to which it is naturally adapted; that, therefore, while evidence that it is "valuable" for this or that or another purpose may always be given and should be freely received, the value in terms of money, the price, which one or another witness may think the land would bring for this or that or the other specific purpose is not admissible as an element in determining that market value, for such evidence opens wide the door to unlimited vagaries and speculations concerning problematical prices which might under possible contingencies be paid for the land, and distracts the mind of the jury from the single question—that of market value—the highest sum which the property is worth to persons generally, purchasing in the open market in consideration of the land's adaptability for any proven use.

With this as the rule established in this state, we come to a consideration of the instructions given and attacked. Those instructions, varying somewhat the order of their delivery to the jury, are as follows:

"(6) You are not to consider what the land was worth to the defendant, the owner, for speculation, or merely possible uses, nor what she claims it was worth to her, nor what it may be worth to plaintiff for railroad or other purposes, nor what the land would bring at a forced sale. You are not to consider the price the land would sell for under special or extraordinary circumstances, but its fair, market value, if offered in the market under ordinary circumstances for cash, a reasonable time being given to make the sale. Market value is the amount the strip would sell for if put upon the open market, and sold in the manner in which property is ordinarily sold for cash in the community where it is situated, with a reasonable time being given to find a purchaser and make the sale.

"(7) The location of the property, its surroundings, and all other things are to be considered, but you are not to indulge in speculation or conjecture. The law does not require that the plaintiff, in order to take the land, should pay a value based upon speculation, or what might happen if certain things would occur."

"(1) In ascertaining the market value you may consider the purposes for which the land is adapted, and the price for cash it would bring for any purpose, allowing a reasonable time in which to find a purchaser on February 14, 1906."

"(8) You must take into consideration the purposes for which the property was adapted, and determine the market value from what a person would then have paid for the property, in cash, not buying, however, for any particular purpose, but having regard to the market value of the property, as it then stood for all purposes."

Of instructions 6, 7, and 1 no criticism is made. It is conceded that they do clearly and pertinently declare the law. But instruction 8, it is said, is self-destructive and at variance with instruction 1. Against this instruction it is argued that when the court tells the jury that they are to determine the market value from what a person would then have paid for the property in cash, not buying, however, for any particular purpose, the instruction, in effect, excludes from the jury's consideration the sum which would be paid by any purchaser desiring to use the land for a particular purpose, and that, as, in the nature of things, most, if not all, persons buy land with the design of using it for a particular purpose, the error and injury worked by the instruction become manifest. Upon the other hand, it is insisted that the instruction means no more than that the jury was told that it was to determine the market value from what a person would then have paid for the property in cash, taking into consideration the purposes for which it is adapted, but cautioning the jury that it is not at liberty to consider the particular purpose for which a buyer might desire to use the property, but is to reach its valuation having regard to the market value of the property for all purposes. So construed, the instruction is unobjectionable, is in accord with the instructions previously given, and correctly states the rule. We think, reading all of the instructions upon this point together, and in view of the fact that throughout the jury was properly instructed to arrive at the market value, after due consideration and allowance for all of the purposes for which it was shown that the property was adapted, that the jury could not have been misled, as appellant contends, but would have adopted as the natural meaning and import of the language the construction assigned to it by respondent.

Criticism is also made of instruction 9, which is as follows: "After you have determined the value of the strip of land sought to be condemned for the right of way, you must then ascertain and assess the amount of damages, if any, which accrue to the portion not sought to be condemned by the plaintiff. This damage, if any, will be determined by ascertaining, in the same manner as heretofore stated, the market value of those portions of said tract not taken as it was on February 14, 1906, and by deducting therefrom the market value of said property after the severance and proposed railroad is constructed. The difference between these values, if there shall be any, will be the amount of damage done by the opening of said railroad to the part of said land not taken. The law fixes this method of ascertaining the damages, and it is your duty to follow it. You must exclude in this estimate, however, any estimate of benefits derived from building the road to the property not taken." This instruction is in strict accord with the mandate of section 1249, Code Civ. Proc. It is argued, however, that the instruction uses the term "market value," while the statute employs the phrase "actual value," and that confusion and injury result by not following the precise words of the statute. It is herein said that market value is not the legal measure at all, but a clumsy method frequently and sometimes erroneously adopted for ascertaining actual value, which is the true test. We think this, however, an overrefinement. The law universally has adopted market value as establishing actual value, and, however clumsy the appellant may think that the method is, it is the best one so far known to the law.

The foregoing discussion disposes of certain alleged errors of the trial court in ruling upon evidence. McWilliams' evidence as to the price which he thought would be paid for the land by one desiring it for nursery purposes was not admissible. It was not even contended that McWilliams qualified himself to testify as to the market value, and his testimony amounted to no more than that the land was suitable for nursery purposes, and that for such purposes a purchaser could be found who would pay so much per acre. Here is an excellent view of the domain of speculation which is opened by the introduction of testimony such as this. The next witness might, in turn, testify that he believed the land valuable for oil, and worth, therefore, for that purpose, thousands of dollars per acre. A third witness might find a similar special use and value for town-site purposes and declare his opinion of the value per acre based upon this consideration. We see nothing in the other rulings of the court in admitting and rejecting evidence to call for further statement than that they were correct.

No other matters seem to call for consideration.

For the foregoing reasons, the judgment and order appealed from are affirmed.

We concur: SLOSS, J.; ANGELLOTTI, J.; SHAW, J.; MELVIN, J.; LORIGAN, J.

156 Cal. 401

OWSLEY et al. v. MATSON et al. (S. F. 5,123.)

(Supreme Court of California. Oct. 26, 1909.)

1. Adverse Possession (§§ 71, 74*)—"Color of Title."

A deed conveying land described by metes and bounds and a decree of court distributing to the grantee the land described as in the deed are color of title, under which the grantee may found an adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. §§ 71, 74.*

For other definitions, see Words and Phrases, vol. 2, pp. 1264–1273; vol. 8, p. 7606.]

2. Adverse Possession (§ 100*)—Extent of Possession—Claim Under Color of Title.

Under Code Civ. Proc. § 322, providing that an occupant of some part of a tract of land for five years under a claim of title to the tract founded on a conveyance thereof holds the tract adversely, a possessor of the major part of a tract under a deed and cultivating the same within section 323 for more than five years acquires title to the boundaries set forth in the deed.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 547–574; Dec. Dig. § 100.*]

3. Adverse Possession (§ 106*)—Title Acquired.

Under Civ. Code, § 1007, providing that occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar an action for the recovery of the property confers a title thereto, adverse possession as defined in the Code of Civil Procedure when continued for a period exceeding five years vests in the possessor a title in fee simple.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 604–623; Dec. Dig. § 106.*]

4. Adverse Possession (§ 94*)—Payment of Taxes.

A redemption of land sold for delinquent taxes made by the occupant thereof while he was in undisturbed possession and in good faith is a payment of the taxes within Code Civ. Proc. § 325, providing that adverse possession shall not be considered established unless the person in possession or his predecessor paid the taxes on the land.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 94.*]

5. Adverse Possession (§ 90*)—Payment of Taxes.

One in possession and cultivating the major part of a tract of land claimed under a deed describing the tract by metes and bounds listed the tract for taxes and paid the taxes. The adjoining owner listed for taxes in his own name parcels of the tract. Each party had the land assessed, and paid the taxes thereon in good faith, and in ignorance of the conflicting boundaries of their respective title deeds. *Held*, that the fact that the adjoining owner had parcels of the land assessed to himself and paid the taxes thereon did not operate to defeat the effect of the adverse possession of the former.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 90.*]

6. Reformation of Instruments (§ 45*)—Mistake—Evidence.

To justify a reformation of a deed because of a mistake in the description therein, it is sufficient that the circumstances proved induce the conviction in the mind of a reasonable man that there was a mutual mistake, and in showing clearly in what such mistake consisted, though no witness testified to personal knowledge of how it occurred.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 157–193; Dec. Dig. § 45.*]

Department 1. Appeal from Superior Court, Humboldt County; G. W. Hunter, Judge.

Action by Marie M. Owsley and another against Isaac Matson and another. From a judgment for plaintiffs, defendants appeal. Reversed.

Henry L. Ford and Denver Sevier, for appellants. Mahan & Mahan, F. A. Cutler, and Frank Sweasey, for respondents.

SHAW, J. The defendants have appealed from the judgment within 60 days after its rendition and entry, and the evidence is set forth in a bill of exceptions. The contention of the appellants is that the decision is not supported by the evidence.

The plaintiffs sued to recover possession of two tracts of land, constituting parts of a larger tract of 43.33 acres, all of which is claimed by the defendants. The pleadings are not verified. The answer denies all the allegations of the complaint, and avers that the action is barred by the provisions of sections 318 and 319 of the Code of Civil Procedure. The defendants also filed a cross-complaint, averring that they were the owners of the 43.33 acres described, and also that the claim of the plaintiffs is based on a deed to one Boeing, plaintiffs' predecessor in interest, by Jesse C. Greenlaw, defendants' predecessor in interest, dated March 14, 1887, whereby the land claimed by plaintiffs appeared, by mutual mistake, to have been transferred to Boeing, contrary to the intention of the parties, and praying that the deed be reformed, and that the title of defendants be quieted. The claim of the defendants that they were the owners of the 43.33-acre tract was based upon an asserted adverse possession and upon the alleged mistake.

Upon the question of adverse possession the court found that the defendants had gained title by that means to a part of the land in dispute and gave judgment in favor of the defendants for that part. As to the remainder of the two overlapping parcels, the findings and judgment were in favor of the plaintiffs. The defendants' contention is that the findings on the subject of the mistake and as to the ownership of the parcels adjudged to the plaintiffs are contrary to the evidence. It is unnecessary to consider at length the question of the alleged mistake. We are of the opinion that the court should have found that the defendants had gained a prescriptive title to the entire tract of 43.33 acres by adverse possession thereof under color of title. L. B. Matson does not appear to have any interest. She was evidently made a party defendant because she is the wife of Isaac Matson. On November 29, 1897, Mary E. Greenlaw and Alfred Greenlaw conveyed to one Edward Greenlaw the 43.33 acres in controversy, describing it accurately by metes and bounds. On June 24, 1898, the decree of distribution of the estate of Jesse C. Greenlaw, deceased, was entered in the superior court, and by its terms the 43.33-acre tract in question was distributed to Edward Greenlaw; the tract being accurately described as in the deed last mentioned. On July 15, 1905, Edward Greenlaw conveyed the 43.33 acres by the same description to the defendant, Isaac Matson. From the time of the execution of the deed to Edward Greenlaw in November, 1897, up to the time of the execution of the deed from said Greenlaw to Isaac Matson in 1905, Edward Greenlaw was in the actual possession of and was occupying and cultivating a large part of the 43.33 acres, and was claiming title to the whole thereof under the aforesaid deed and decree, up to the boundaries described. When the deed was made to Matson, Greenlaw delivered his possession thereof to Matson, who continued in possession as Greenlaw had been, from that time until shortly before this action was begun, claiming title to the entire tract. Neither the plaintiffs nor their predecessors in interest were ever in actual possession of any part of the tract. The action was begun on February 15, 1906. It is further shown that for the years 1899 to 1905, inclusive, this tract was assessed to Edward Greenlaw and that he had paid the taxes thereon. The evidence did not show an actual occupation, cultivation, or inclosure by Greenlaw or Matson of the whole of the parcels awarded to the plaintiffs. It does show, however, an actual occupation and cultivation by them of a considerable part thereof, and that they each claimed title to the entire tract up to the limits described in the deed and decree. It is clear that under these circumstances actual possession and occupancy of the entire tract was not necessary in order to give title by adverse possession. That the deed of November 29, 1897, and the subsequent decree of distribution in 1898, constitute color of title cannot be disputed. Wilson v. Atkinson, 77 Cal. 485, 20 Pac. 66, 11 Am. St. Rep. 299. Section 322 of the Code of Civil Procedure provides that when it appears that an occupant of land enters into possession thereof "under claim of title, exclusive of other right, founding such claim upon a written instrument, as being a conveyance of the property in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the property included in such instrument, decree, or judgment, or of some part of the property, under such claim for five years, the property so included is deemed to have been held adversely." By section 323, Code Civ. Proc., it is further provided that, for the purpose of constituting an adverse possession by a person claiming under such deed or judgment, the land is deemed to have been possessed and occupied where it has been usually cultivated or improved, or where, although not inclosed, it has been used for the supply of fuel, or of fencing timber for the purpose of husbandry, or for pasturage, or for the ordinary use of the occupant. The evidence to the effect that the major part of the 43.33-acre tract was occupied and possessed in this manner was ample and sufficient to prove the fact, and it was without contradiction. Under the provisions of section 322 such possession of a part of the property in this manner is sufficient to extend the claim of adverse title up to the boundaries set forth in the instrument under which the occupant claims. Webber v. Clarke, 74 Cal. 16, 15 Pac. 431; Christy v. Spring V. W. W., 97 Cal. 26, 31 Pac. 1110; Hicks v. Coleman, 25 Cal. 135, 85 Am. Dec. 103; Davis v. Perley, 30 Cal. 639; Walsh v. Hill, 38 Cal. 487; 1 Cyc. 1125. Adverse possession, as defined in the Code of Civil Procedure, if continued for a period exceeding five years, is not only sufficient to bar a claimant under a legal title, but it is also sufficient to create a title. Such possession so continued vests in the possessor a title in fee simple against all other claimants. Civ. Code, § 1007.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The tax for the year 1903 upon the assessment of this land to Edward Greenlaw was not paid when it became due. The land was sold therefor, and in July, 1905, long before this action was begun, it was redeemed by Edward Greenlaw. The same thing occurred with respect to the taxes in 1904, and the redemption was made by Greenlaw at the same time. It is claimed that this was not a sufficient payment of the taxes; that, in order to make his possession adverse within the law (Code Civ. Proc. § 325), the party in possession must pay the taxes, either before they become delinquent, or, at all events, before the property is sold therefor under the law. There is a dictum to this effect in McDonald v. McCoy, 121 Cal. 73, 53 Pac. 421. In that case, however, it appeared that the person in possession had failed to pay any taxes during his possession, and that the redemption took place after he had ceased to have possession or to claim any right thereto. In such a case there may be good ground for saying that a subsequent payment of the taxes by way of redemption from such sale would not relate back to and aid the previous possession so as to make it adverse from the time of the tax sale to the time of such redemption. In order that a possession may be sufficient to constitute title in fee simple, it would seem reasonable to hold that all the elements necessary thereto must have been in existence at the time the five years are running, and that a redemption of taxes after the adverse possession had ceased could not relate back so as to make it a payment during such period. But where, as in the present case, the tax has been allowed to become delinquent and a sale has taken place, and, so far as appears, a redemption has been made thereof, while the party or his successor in interest was in undisturbed possession, and all this is done in good faith, we see no reason why the same should not be held to operate as a payment, and we think it is sufficient to bring the occupant within the terms of the statute which requires him to pay the taxes upon the property claimed. The evidence also showed that during the same period, while Greenlaw was in possession of the land in the manner above stated, the plaintiffs and their predecessor in interest also listed for taxation in their own names the parcels claimed by plaintiffs and paid the taxes thereon. So far as the record shows, each party had his land assessed and paid the taxes thereon in good faith, and in ignorance of the conflicting boundaries of their respective title deeds. It is altogether probable that the lands were listed by each party upon the supposition that the boundaries in the deed coincided with the line surveyed, and to which the possession of the defendants extended, or without taking into consideration the overlap.

In Cavanaugh v. Jackson, 99 Cal. 672, 34 Pac. 509, it appeared that during three of the years that were required to constitute the adverse possession the land had been separately assessed to each party and the tax paid upon each assessment by the party to whom the assessment was made. The court said, referring to the person in possession: "Having had the land assessed to him, and having paid the taxes levied thereon, we think he has fulfilled the conditions of the statute, and it is immaterial as to the number of times the land may have been assessed to and the taxes paid by other parties." And the opinion expressly declined to hold that "priority of payment by the true owner of itself nullifies the time which has actually run and starts anew the statute." It was remarked that: "If such were the law, upon the first day that taxes became due and payable, it would result in a scramble at, or a race to, the tax collector's office, by the respective parties, to secure priority of payment. The destruction of old titles and the creation of new ones would thus be dependent upon the strongest man or fleetest horse." This was a department decision, and only two justices, Garoutte, J., and Beatty, C. J., joined in this opinion. Harrison, J., concurring, was of the opinion that, when the taxes on the land had been once paid by the true owner, a subsequent payment by one in adverse possession would give him no right, but that, as the record did not show which party succeeded in making payment first, it would be presumed, in support of the judgment below, that the adverse occupant first paid. A similar question arose in Carpenter v. Lewis, 119 Cal. 18, 50 Pac. 925. In that case, however, there were not separate assessments. The tax was assessed each year to the true owner, who paid the tax each year, but the adverse occupant also paid the tax each year upon the assessment to the owner. In two of the years his payment was prior to that of the owner, in the other years subsequent thereto. The statement in the concurring opinion of Justice Harrison in Cavanaugh v. Jackson that, if when the adverse occupant offers to pay the tax the same has already been paid by the true owner, a second payment by the adverse occupant will not give him any right, was approved, as applied to the facts involved in the Carpenter Case. This opinion also was signed by only two justices. Justice Garoutte concurred only in the judgment, and, it being also a department decision, the opinion of the majority is not authority. We are therefore at liberty to adopt the rule which we believe to be most just and most in accord with the spirit and purpose of the statute. We think the reasoning of the majority opinion in Cavanaugh v. Jackson is the more satisfactory in its application to the facts in the case at bar. Under the circumstances here appearing, we do not think that the fact that each party had the land separately assessed to himself and paid the taxes upon that assessment would operate to defeat the effect of the adverse possession of Matson and Greenlaw in gaining for them a title by prescription.

All the circumstances indicate very strongly that there was a mistake in drafting the deed executed by Jesse C. Greenlaw to Boeing in 1886, and that both parties then and for a long time afterwards supposed and believed that the line described in the deed was the line surveyed along the foot of the hill bounding the land of which Greenlaw retained possession. But owing to the rule that, where different inferences may reasonably be drawn from the circumstances proved, the decision of the trial court is conclusive upon this court, we cannot interfere with the finding on that point. It is said that the court below made this finding because the evidence gave no explanation as to how the mistake occurred in drawing the deed. There was no explanation by any direct evidence. Greenlaw and the attorney who drew the deed were both dead at the time of the trial, and there were no means of proving the facts attending immediately upon the writing and execution of the deed. It may be said, however, that direct evidence of the manner in which a mistaken description became incorporated in a deed is not an indispensable requisite to a reformation thereof. If the circumstances proven are sufficient to induce the conviction in the mind of a reasonable man that there was a mutual mistake in drawing the deed and to show clearly in what such mistake consisted, a reformation may be decreed, although no witness testifies to personal knowledge of how it occurred.

Because of the finding on the subject of ownership by adverse possession, the judgment is erroneous and cannot be allowed to stand.

The judgment is reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.

(156 Cal. 379)

KIMIO v. SAN JOSE-LOS GATOS INTERURBAN RY. CO. et al. (S. F. 5,016.)

(Supreme Court of California. Oct. 25, 1909. Rehearing Denied Nov. 22, 1909.)

1. Carriers (§ 316*)—Injury to Passenger—Negligence—Presumptions.

Where a passenger on a street car was injured in a collision between the car and the car of another street railroad at a crossing, a presumption of negligence on the part of the latter did not arise from the mere fact of the collision.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1261-1294; Dec. Dig. § 316.*]

2. Carriers (§ 320*)—Collisions—Negligence.

Whether a motorman was negligent who approached a crossing of another street railroad while a car of the latter was approaching on a level track, and within a few feet thereof, and in plain sight, in such manner and at such speed that he could not stop in time to avoid a collision if the other car continued to advance, depends on whether an ordinarily prudent man, having a due regard for the safety of the passengers on the other car, as to whom he owed the exercise of ordinary care, would have done what he did, though under an established custom of the two railroads his car had the right of way and the other car should stop, and, since a reasonable man might conclude that under the circumstances ordinary care required the motorman to approach the crossing in such a manner that he could stop in time if the other car did not stop, and that failure to do so was negligent as to a passenger on the other car, regardless of whether the motorman on the other car was also negligent, the issue of the motorman's negligence was for the jury.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 320.*]

3. Negligence (§ 136*)—Question for Jury.

Negligence is a question of fact, though there is no conflict in the evidence, where different conclusions on the subject can be rationally drawn from the evidence; but, where but one conclusion can reasonably be reached, it is a question of law.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-306; Dec. Dig. § 136.*]

4. Carriers (§ 306*)—Collisions—Companies Liable.

Where the negligence of two street railroads contributed to the injury of a passenger of one of them, the passenger could recover from both railroads, or either.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1249-1251; Dec. Dig. § 306.*]

5. Carriers (§ 318*)—Collisions—Negligence—Evidence.

In an action against a street railroad for injuries to a passenger of another street railroad in a collision between the cars of the two railroads, evidence *held* to support a verdict of negligence of the motorman in charge of the car which collided with the car in which the passenger was riding.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 318.*]

6. Damages (§ 216*)—Personal Injuries—Instructions.

Where, in an action for personal injuries, the testimony was conflicting on the issue whether plaintiff was afflicted in a particular manner by reason of the injuries received, and whether such condition was permanent, an instruction that plaintiff claimed that the injuries caused a particular condition, and that the jury were the judges as to the extent of the injuries and as to the existence of the condition complained of, and that, if the injuries received did not cause such condition, they should not allow plaintiff any damages on account thereof, and that the burden was on plaintiff to show the result of the injuries, was not objectionable as allowing damages for such future loss as the jury might think would possibly or probably follow from the injuries.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548-555; Dec. Dig. § 216.*]

7. Appeal and Error (§ 1050*)—Harmless Error—Erroneous Admission of Evidence.

Where, in a personal injury action, plaintiff testified without objection that his business was worth before the accident from $10 to $12 a day, and that his earning capacity before the accident was from $10 to $12 a day, and that he had not been able to attend to business since the accident, the error, if any, in permitting him to state that since the accident he had not been able to earn $10 or $12 a day in his business, was not prejudicial, as he did not thereby intimate any amount by which his earning capacity had been decreased.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4166; Dec. Dig. § 1050.*]

8. Witnesses (§ 269*)—Cross-Examination—Extent.

Where, in an action against two street railroads for injuries to a passenger of one of them in a collision with a car of the other at a crossing, the motorman of the latter testified on direct examination as a witness for plaintiff as to the custom between the two railroads under which the cars of the latter had the right of way, without referring to any order from any officer of the latter railroad as to the right of way at the crossing, a question on cross-examination as to what orders he had received as to the right of way at the crossing was not proper cross-examination, but was an attempt to bring before the jury orders which had been given by the latter railroad to its servants out of hearing of plaintiff and codefendant.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 949-954; Dec. Dig. § 269.*]

9. Trial (§ 55*)—Evidence—Exclusion on Court's Own Motion.

Where proposed evidence is inadmissible for any purpose, the court may exclude it on its own motion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 130; Dec. Dig. § 55.*]

10. Trial (§ 74*)—Evidence—Party Entitled to Object.

In an action against two street railroads for injuries to a passenger of one of them in a collision with a car of the other at a crossing, the former might object to a question asked a witness on cross-examination by the latter, where the question called for evidence incompetent for any purpose.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 170; Dec. Dig. § 74.*]

11. Witnesses (§ 270*)—Cross-Examination for Impeachment.

Where, in an action against two street railroads for injuries to a passenger of one of them in a collision with a car of the other at a crossing, the motorman of the latter testified on direct examination that seven or eight minutes after the collision he spoke to the servants of the former company, and stated that he had not discussed the accident since its occurrence with any one, a question on cross-examination as to what he stated to the servants of the former company was not proper cross-examination, in the absence of any intimation that the object of the proposed evidence was to impeach the motorman by proving an inconsistent statement.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 955–957; Dec. Dig. § 270.*]

12. EVIDENCE (§ 123*)—DECLARATIONS—"RES GESTÆ."

A statement of a motorman, made seven or eight minutes after a collision between cars at a crossing, as to the cause of the accident, is not a part of the res gestæ, and is not admissible for or against his employer.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 351–368; Dec. Dig. § 123.*

For other definitions, see Words and Phrases, vol. 7, pp. 6130, 6136; vol. 8, p. 7787.]

13. EVIDENCE (§ 536*)—OPINION EVIDENCE—COMPETENCY OF WITNESS.

A graduate nurse of five years' experience is competent to testify why he gave a patient strychnine and brandy.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2343–2347; Dec. Dig. § 536.*]

14. WITNESSES (§ 287*)—REDIRECT EXAMINATION—GIVING WHOLE TRANSACTION.

Where, in a personal injury action, a nurse on direct examination testified from memory as to the condition of plaintiff during the time he acted as nurse, and stated on cross-examination that he had burned his charts; that, when he left plaintiff's home, he asked plaintiff if he wanted the charts, and that plaintiff said that he would not need them; that there would be no lawsuit—it was proper on redirect examination to elicit the other portion of the conversation between the nurse and plaintiff to the effect that plaintiff stated that the reason there would be no lawsuit was that an officer of one of the defendants had promised to do the right thing, and that plaintiff thought that the officer would do so.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 930, 1000–1002; Dec. Dig. § 287.*]

15. WITNESSES (§ 291*) — RECROSS-EXAMINATION.

Where, in a personal injury action, a nurse on direct examination testified from memory as to the condition of plaintiff during the time he acted as nurse, and on cross-examination stated that he had burned his charts, and that he always did so unless the patient wanted them, and that, when he left plaintiff's home, he asked plaintiff if he wanted the charts, and that plaintiff replied that he would not need them, that there would be no lawsuit, and on redirect examination testified without objection to the remainder of the conversation between himself and plaintiff, saying that plaintiff told him that the reason there would be no lawsuit was that an officer of one of the defendants had promised to do the right thing, a question on recross-examination as to the conversation between plaintiff and such officer was improper, because the subject-matter was not covered by anything previously testified to.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1006, 1007; Dec. Dig. § 291.*]

16. WITNESSES (§ 260*)—EXAMINATION.

Where, in a personal injury action, a physician testified that he had no opinion to offer as to whether plaintiff was shamming any symptoms, it was proper to permit him to testify whether he intended to intimate that plaintiff was shamming, and to explain that he meant that from a medical standpoint it was difficult to say as to the shamming, though he might have an opinion if he could take plaintiff and his personal knowledge of him into consideration.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 898; Dec. Dig. § 260.*]

17. EVIDENCE (§ 528*)—OPINION EVIDENCE—COMPETENCY.

Where, in a personal injury action, the evidence showed that plaintiff at the time of his injury was 62 years old, that a muscle or a blood vessel was ruptured, and there was an extravasation of blood amounting to a quart, a physician might give his opinion as to whether there would probably be a permanent injury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2335–2337; Dec. Dig. § 528.*]

18. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR — ERRONEOUS ADMISSION OF EVIDENCE.

Where, in a personal injury action, plaintiff, over objection, was permitted to testify that he supposed that his expenses for medical attendance were somewhere in the neighborhood of $500 or $600, and the trial court ordered plaintiff to remit $600 of the verdict as a condition to a denial of a new trial, on the ground that the evidence was insufficient to justify an allowance for expenses for medical attendance, the error, if any, in admitting the evidence was not reversible.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1050.*]

19. NEW TRIAL (§ 140*)—GROUNDS—AFFIDAVITS.

An affidavit on motion for a new trial on the ground of misconduct of the jury cannot be considered when made solely on information and belief.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 289; Dec. Dig. § 140.*]

20. NEW TRIAL (§ 143*)—MISCONDUCT OF JURY—IMPEACHMENT OF VERDICT.

A juror may not impeach the verdict except on the single ground as authorized by Code Civ. Proc. § 657, subd. 2, that the verdict was the result of a resort to the determination of chance.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 290–296; Dec. Dig. § 143.*]

21. NEW TRIAL (§ 140*)—MISCONDUCT OF JURY—DECLARATIONS OF JURORS.

Affidavits of declarations and admissions of jurors showing misconduct impeaching the verdict cannot be considered on a motion for new trial on the ground of misconduct of the jury.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 284–306; Dec. Dig. § 140.*]

22. NEW TRIAL (§ 144*)—MISCONDUCT OF JURY—AFFIDAVITS OF JURORS IN DENIAL.

A juror may not deny the prejudicial influence on his mind of knowledge acquired by misconduct.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 298; Dec. Dig. § 144.*]

23. NEW TRIAL (§ 144*)—VERDICT—IMPEACHMENT.

Affidavits of jurors may be used to disprove or explain alleged misconduct.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 298; Dec. Dig. § 144.*]

24. NEW TRIAL (§ 56*)—GROUNDS—MISCONDUCT OF JURY.

A new trial will not be granted on the ground of misconduct of the jury where the misconduct was of such trifling nature that it could not have been prejudicial to the party complaining, or where the fairness of the trial was not in any way affected thereby.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 116–119; Dec. Dig. § 56.*]

25. NEW TRIAL (§ 44*) — GROUNDS — MISCONDUCT OF JURY.

Where, in an action for injuries to a passenger in a collision between cars of two street railroads, the issues so far as one of the railroads was concerned were whether its motorman was warranted in assuming that the car of the other railroad would not be at the crossing at the time he reached it, and whether he approached the crossing at such speed that he could not stop in time to avoid anything thereon, however well adapted to all purposes the brake on the car was, the misconduct of the jury in examining the brake of a car and the mechanism thereof while on the car going to the place of the accident for a view did not warrant a new trial on the ground of such misconduct.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 80–85; Dec. Dig. § 44.*]

26. NEW TRIAL (§ 56*)—GROUNDS—MISCONDUCT OF JURY.

Where, in an action for injuries to a passenger on a street car in a collision between his car and the car of another street railroad at a crossing, the issue was whether the motorman of the latter railroad was warranted in assuming that the car of the former would not be at the crossing at the time he reached it, and whether he approached the crossing at such speed that he could not stop in time to avoid anything thereon, the refusal to grant a new trial for the misconduct of a juror while inspecting the scene of the accident in stating at the time a car of the latter railroad approached the crossing that that was the way the passenger was injured, and that if the tracks were wet the car could not have been stopped before the crossing, was warranted, as the trial court could find that the juror was not prejudiced, and that his statement did not prejudice the other jurors.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 116–119; Dec. Dig. § 56.*]

Department 1. Appeal from Superior Court, Santa Clara County; John E. Richards, Judge.

Action by Charles Kimic against the San Jose-Los Gatos Interurban Railway Company and another. From a judgment for plaintiff, defendant the San Jose & Santa Clara County Railroad Company appeals. Affirmed.

See, also, 104 Pac. 312.

E. M. Rea, for appellant. Leo B. Archer, for respondent.

ANGELLOTTI, J. This is an appeal by defendant San Jose & Santa Clara County Railroad Company (hereinafter designated as the appellant) from a judgment in favor of plaintiff against it and its codefendant, San Jose-Los Gatos Interurban Railway Company (hereinafter designated as the Interurban Company), for damages for personal injuries, and from an order denying its motion for a new trial. The general facts of the case are stated in the opinion filed September 20, 1909, in the matter of the appeal of the Interurban Company from the same judgment and from an order denying its motion for a new trial (S. F. No. 5020) 104 Pac. 312.

1. At the close of plaintiff's case, appellant made a motion for a nonsuit upon the ground that plaintiff had failed to prove any negligence on appellant's part. The granting of this motion was objected to by both plaintiff and the Interurban Company, and the motion was denied. It is urged that this ruling was erroneous. We are of the opinion that the evidence introduced by plaintiff was sufficient to warrant the denial of the motion. It is true that as the plaintiff was a passenger on the Interurban Company car, and not on appellant's car, no presumption of negligence on the part of appellant arose from the mere fact of collision. Harrison v. Sutter St. Ry. Co., 134 Cal. 549, 66 Pac. 787, 55 L. R. A. 608; Tompkins v. Clay St. R. R. Co., 66 Cal. 163, 4 Pac. 1165. But there was evidence as to other facts that warranted the trial court in concluding that there was a sufficient case on the question of appellant's negligence to go to the jury. It may be conceded that the evidence showed very clearly that appellant's cars had the right of way over said crossing, and that it was the duty of the Interurban car operatives to come to a stop before crossing Tenth street whenever one of appellant's cars was approaching, and to allow such car to pass before crossing. The well-established custom of appellant's cars was to slow up on approaching the crossing and then to cross without stopping. Appellant's motorman, W. B. Plimpton, called by the plaintiff, testified that in conformity to this custom on the occasion in question he did shut off his current and pull back on his brake when approaching the crossing, and that he was going at the rate of four or five miles an hour when fifteen feet from San Carlos street, he saw the Interurban car standing still on the east side of the crossing, and only then released his brake and threw on his current, and at that moment the Interurban car shot out in front of him at full speed. He said that he immediately shut off his current and put on his brake, but that it was impossible to stop in time. His conductor, also called by plaintiff, corroborated him by testifying that the car slowed down to about four miles an hour when near San Carlos street; that, when it was about 20 feet from the crossing, he saw the Interurban car standing on the east side of Tenth street; and that this appellant's motorman turned on his current and dashed ahead. But there was other testimony on the part of witnesses of plaintiff from which the jury might properly conclude that the Interurban car, which was that day being operated by a new motorman and a new conductor, did not come to a stop before attempting to cross at Tenth street. It did slow down to allow a passenger, the only passenger other than plaintiff, to alight, but he stepped off the car

before it stopped, and testified that he did not know whether it stopped after he alighted. The plaintiff testified quite clearly and positively that this passenger prepared to alight by getting down on the step with his hand on the bar; that the car slowed down and he swung off while it was moving slowly; that just as he swung off the conductor rang the bell and the car shot ahead very fast; and that the motorman of the Interurban car did not look to the north at all, but was apparently engrossed in the passenger who was alighting. There was nothing improbable in this evidence, and it was sufficient to support a conclusion on the part of the jury that the Interurban car did not come to a stop at or near Tenth street until stopped by the collision. Appellant's car struck the Interurban car, a car 33 feet long, near the front wheel of the rear truck, knocking such rear truck some 2 feet off the track. Appellant's car weighed about 15 tons. The motorman of appellant's car testified that he saw the Interurban car approaching on San Carlos street when it was about 100 feet from the crossing. The crossing at Tenth street and San Carlos street is a level crossing, and both of said streets are level. It had been raining on the day of the accident, and the tracks were a "little damp" by reason thereof. Appellant's car was being operated on the easterly of its two tracks on Tenth street, the track nearest the Interurban car approaching on San Carlos street. The accident occurred between 12 and 1 o'clock of the afternoon. There was nothing to indicate whether any warning signal was given by either car on approaching the crossing. In all this evidence there was certainly sufficient to support a conclusion that appellant's motorman, having under his absolute control an electric street car of great power and weight, approached the intersecting track of another street railroad while a car of such other road was approaching such intersection on a level track and was within a few feet thereof and in plain sight, in such manner and at such a rate of speed that he could not stop his car in time to avoid a collision in the event that the other car continued to advance upon its track to the intersection. Would an ordinarily prudent man having a due regard for the safety of those who were passengers on the other car and as to whom he was held to the exercise of ordinary care do this under like circumstances, even though he knew that, under an established custom of the two roads, his car had the right of way and the other car should stop and allow him to pass, and even although the other car had slowed down? We do not feel that this question can be answered in the affirmative as a matter of law, and, if it cannot be so answered, it cannot be said as a matter of law that he was not negligent. "The rule is that negligence is a question of fact for the jury, even when there is no conflict in the evidence, if different conclusions upon the subject can be rationally drawn from the evidence. * * * If but one conclusion can reasonably be reached from the evidence, it is a question of law for the court; but, if one sensible and impartial man might decide that the plaintiff had exercised ordinary care, and another equally sensible and impartial man that he had not exercised such care, it must be left to the jury. Our ideas as to what would be proper care vary according to temperament, knowledge, and experience. A party should not be held to the peculiar notions of the judge as to what would be ordinary care. That only can be regarded as a standard or rule which would be recognized or enforced by all learned and conscientious judges, or could be formulated into a rule. In the nature of things no such common standard can be reached in cases of negligence, where reasonable men can reach opposite conclusions upon the facts." Wahlgren v. Market St. Ry. Co., 132 Cal. 656, 663, 62 Pac. 308, 64 Pac. 993, and cases there cited. See, also, Seller v. Market St. Ry. Co., 139 Cal. 268, 271, 72 Pac. 1006. A reasonable man might well conclude that, under the circumstances shown here, the exercise of ordinary care required appellant's motorman to approach the crossing in such a manner that he could stop in time to avoid a collision if the other car did not stop, and that, if he did not do this, he was guilty of negligence as to plaintiff, regardless of whether the motorman of the Interurban car was also guilty of negligence. Where the negligence of the managers of both vehicles contribute to the injury, the party injured may recover from the proprietors of either or both. Tompkins v. Clay St. R. R. Co., 66 Cal. 163, 4 Pac. 1165. It might reasonably be concluded that in the exercise of ordinary care appellant's motorman could not act upon the assumption that the moving Interurban car would be stopped before reaching the intersection, notwithstanding that he had the right of way, and that, until it had actually come to a full stop, he was called upon to assume that there was danger of a collision if he went rapidly ahead, and to so manage his car as to avoid the same. Of course, if he neglected to observe that the Interurban car had not stopped when he could have observed that fact by the exercise of ordinary care, he was negligent in failing to observe it and in acting accordingly.

2. It is claimed that the evidence was insufficient to sustain the conclusion of the jury that there was negligence on the part of appellant. This claim requires very little notice in view of our discussion of the alleged error in denying the motion for a nonsuit. The case of the plaintiff was strengthened on the question whether or not the Interurban car stopped before coming to the crossing by the testimony of the motorman thereof, called as a witness by the Interurban Company, who testified that the car did not stop, but simply slowed down, while the case of appel-

lant was strengthened by the testimony of a passenger on its car, who testified that the Interurban car did stop. There was also the testimony of the motorman and the conductor of the Interurban car to the effect that as they reached the crossing they for the first time saw appellant's car 125 to 150 feet away coming at a rate of 15 to 20 miles an hour. There was, taking all the testimony on this point, simply a conflict of evidence. For the reasons stated in discussing the motion for a nonsuit, there was sufficient evidence to support the verdict.

3. It is contended that the damages awarded are excessive. The verdict was for $7,000. Six hundred dollars was remitted from this in consequence of the order of the trial court on motion for new trial, making the judgment one for $6,400. The record on this appeal shows practically the same evidence on the question of damage as did the record on the appeal of the other defendant (S. F. No. 5020). This question was fully discussed in the opinion filed on that appeal, and it was concluded that it could not be held that the damages awarded were excessive in amount. For the reasons stated in that opinion the same ruling must be made here.

4. It is contended that the trial court erred in giving the following instruction at the request of the other defendant: "He (plaintiff) also claims that the physical injuries in question caused a condition of disease known as neurasthenia or traumatic neurosis and that such condition is possibly, or probably permanent. You are the judges of the fact as to the extent and severity of the injuries sustained by the plaintiff, and also as to the fact of the existence of neurasthenia, or traumatic neurosis, as well as of the degree of such disease, and of the probability of its permanency. If you find that the injuries received by plaintiff in the collision in question did not cause neurasthenia or traumatic neurosis, you will not allow plaintiff any damages because of the existence of such disease." The instruction then went on to say that the burden was on the plaintiff to show such result from the injuries, and that, if he had failed to do so, he could not recover damages therefor. The theory of learned counsel for appellant apparently is that the jury were practically told by this instruction that they might allow damages for such future loss as they thought might "possibly or probably" follow on account of the injuries; the true rule in this regard being, as stated in Melone v. Sierra Ry. Co., 151 Cal. 117, 91 Pac. 522, that plaintiff can recover only "such damages as by the evidence it is reasonably certain he will suffer in the future." We do not so construe the instruction. It was not an instruction on the subject of damages at all. The testimony of the witnesses was conflicting as to whether the plaintiff was then afflicted in the manner stated by reason of the injuries received, and, if so, as to the permanency of such condition. The whole purpose and effect of this instruction was to impress upon the jury that they were the sole judges as to the extent and severity of the injuries sustained, the then condition of the plaintiff in the respect specified and the probability of its permanency, and that in all these matters the burden was on the plaintiff to establish his case by a preponderance of evidence. It was nowhere intimated to the jury that they might award damages for future losses which were only possible or probable and not reasonably certain to ensue. The only instruction as to the damages that might be awarded was carefully limited, so far as future damage was concerned, as follows: "If the injury has impaired the plaintiff's power to earn money in the future, such sum as will compensate him for such loss of power." At the request of appellant the court instructed the jury that they could allow "only such actual damages as the evidence shows to a reasonable certainty he has sustained by reason of the accident," and that, "if you find that the injury is of a permanent nature, then plaintiff is entitled on account of the damages to compensation; that is, to such sum as will compensate him for his loss of power to earn money in the future."

5. Plaintiff, having testified without objection that his time and business (which was a "wall paper business") was worth before the accident from $10 to $12 a day, that his earning capacity before the accident was from $10 to $12 a day, and that he had not been able to attend to business since the accident, was asked: "Since the accident have you been able to earn that amount of money in your business?" An objection to this question was overruled, and the witness answered: "I have not." If we assume this ruling to have been technically erroneous, we nevertheless cannot hold it prejudicial. The answer of the witness to the question did not intimate any amount by which his earning capacity in the business had been decreased, but simply that it had been decreased, that he had not been able to earn the full amount stated. So far as any specific damage was concerned, which under the instructions of the court must be shown by the plaintiff before any recovery therefor could be had, plaintiff's case practically stood after the answer the same as it did before, upon the evidence that had already been admitted without objection. The answer did not materially add to the effect of such previous testimony.

6. Appellant's motorman, called by plaintiff as a witness, testified fully on direct examination as to the custom between the two companies under which appellant's cars had the right of way. He fully substantiated the claim of appellant in regard thereto. No testimony was given by him on direct examination as to any statement or order made or given him by any officer of the ap-

pellant in regard to the right of way at such crossing. On cross-examination by appellant's counsel he was asked: "What orders did you have from your office in regard to the right of way at that crossing?" This was objected to by the other defendant as incompetent, irrelevant, immaterial, and not proper cross-examination. No objection was interposed by plaintiff. The objection was sustained. We cannot conceive of any theory upon which it can be held that the supposed evidence was competent for any purpose. It was not cross-examination regarding any matter covered by the direct examination, and was simply a plain attempt to bring before the jury statements and instructions which had been made and given by appellant to its servant out of the hearing of plaintiff and the other defendant. Even if there had been no objection upon the part of any party to the question, the proposed evidence being incompetent and inadmissible for any purpose, the court had the right to exclude it of its own motion. See Davey v. Southern Pac. Co., 116 Cal. 330, 48 Pac. 117; People v. Wallace, 89 Cal. 166, 26 Pac. 650; Parker v. Smith, 4 Cal. 105. It is therefore unnecessary to consider whether the objection made by appellant's codefendant alone was effectual for any purpose. However, we can see no reason why it was not entitled to make and insist on the objection if the question called for evidence incompetent for any purpose.

7. On his direct examination appellant's motorman testified that some seven or eight minutes after the collision he "spoke" to the men on the other car. He further testified that he had not discussed the accident since its occurrence with any one. On cross-examination by appellant he was asked if it was not a fact that immediately after the accident he discussed this matter with the motorman of the Interurban car, and answered "Yes." He was then asked: "What did you say to that motorman?" An objection on the part of the other defendant that the same was not proper cross-examination was sustained. This ruling was correct. It was not suggested or intimated to the trial court that the object of the proposed evidence was to impeach the witness by showing any statement by him to the Interurban motorman which was inconsistent with his present testimony as to the circumstances of the accident, and, of course, it is apparent that there was no such object. The witness had testified as favorably to appellant's cause as could be desired, and, according to his testimony, the negligence was wholly on the part of the Interurban car. The question was not proper cross-examination. The only possible object thereof was to elicit from the witness evidence that some seven or eight minutes after the accident he had made a statement to the other motorman favorable to his own employer and unfavorable to the other defendant as to the cause of the accident, which statement was in no way inconsistent with his present testimony. Under elementary rules, such statements constituting no part of the res gestæ, were incompetent and inadmissible as against the other defendant.

8. On his direct examination the same witness testified that about seven minutes after the accident the motorman of the Interurban car made a statement as to the cause of the accident. He was then asked what that statement was, and an objection of the other defendant that the same was not a part of the res gestæ, in that it occurred after the transaction, and was clearly hearsay, and not binding on the Interurban Company, was sustained. The proposed evidence was clearly incompetent. The statements of the Interurban motorman proposed to be shown constituted no part of the res gestæ, and any statement made by him as to the cause of the accident which was not a part of the res gestæ was not admissible against his employer or for any other purpose of which we can conceive. See Luman v. Golden, etc., Co., 140 Cal. 700, 709, 74 Pac. 307, and cases there cited.

9. It is conceded in the reply brief of appellant that a motion to strike out certain evidence given by Dr. Saph was too general and was properly denied.

10. L. A. Mcquaide, a graduate nurse of five years' experience, who attended plaintiff for four weeks following the accident, was a witness in his behalf. He testified that on both the first and second days he gave the patient some strychnine and brandy. He was asked why this was given, and, over objection of defendant that this called for expert testimony which the witness had not shown himself qualified to give, answered that it was because he was weak. There can be no doubt that one who is shown to be a graduate nurse and to have been constantly engaged in the calling of a professional nurse for five years may properly be called upon as an expert to give evidence of the character of that elicited by the question asked. See generally Estate of Toomes, 54 Cal. 509, 514, 35 Am. Rep. 83.

11. The nurse on direct examination testified to the condition of plaintiff during the time he acted as nurse from memory. On cross-examination by appellant he testified that he had burned his charts; that he always did so unless the patient wanted them; that when he left plaintiff's home he asked him if he wanted the charts; and that plaintiff said he would not need them, that there would be no lawsuit. On redirect examination by plaintiff in response to questions and without objection he testified as to the remainder of the conversation between himself and plaintiff, saying that plaintiff told him therein that the reason there would be no lawsuit was that Mr. Hale, the vice president of the Interurban Company, had promised to do the right thing by him and

give him everything he wanted, and that he thought Mr. Hale would do the right thing by him. Being asked if Mr. Hale did not call on plaintiff while the witness was nursing him, the witness answered "Yes; he did." On recross-examination by appellant, the witness was asked if he, the witness, was present when the original conversation between plaintiff and Mr. Hale took place, and an objection of the other defendant that the same was not proper cross-examination, and that it assumed something not testified to by the witness, was sustained. It will be observed that the witness had not anywhere testified as to any conversation between Mr. Hale, the Interurban vice president, and plaintiff, or even that any conversation had taken place between them except in so far as it was to be implied from the fact that Mr. Hale had called on plaintiff. Except for the latter statement, his testimony had been confined to a statement of a conversation between himself and the plaintiff at which Hale was not present, in the course of which plaintiff told the witness what Mr. Hale had said to him. This latter portion of the conversation plaintiff was entitled to elicit on redirect examination because appellant had elicited the other portion on his cross-examination, and plaintiff was entitled to the whole conversation on redirect examination in order that he might explain thereby the admission intimated by the first portion, viz., that he had said that there would be no lawsuit because, perchance, he had no just claim. Appellant had the right on recross-examination to fully question the witness as to this alleged conversation between himself and plaintiff, and also as to whether Mr. Hale had in fact called on plaintiff, but he was not entitled on cross-examination to go into the question of the original conversation between plaintiff and Mr. Hale, for that subject-matter was in no degree covered by anything he had previously testified to. If the witness was present at any conversation between Mr. Hale and plaintiff wherein plaintiff by conduct or words made any admission inconsistent with his claim asserted in this action, or which conversation was of such a nature as to make it apparent that plaintiff's statement to the witness was untrue and that he desired the charts destroyed for the purpose of suppressing evidence, it was for appellant to introduce the evidence in regard thereto as a part of his own case. We do not think that the evidence that appellant suggests might have been elicited had evidence as to the conversation between Hale and plaintiff been allowed could have substantially affected or impaired the evidence of the witness as to his own reason for burning the charts. He testified he always burned his charts unless they were desired by the patient. We do not know that the witness was in fact present at the conversation between Hale and plaintiff, and, were the case to be reversed on account of the sustaining of the objection to the question asked, the witness might answer that he was not present. The trial court might well have allowed this preliminary question. We have discussed this matter upon the assumption that he was present, and that the question before us is whether appellant was entitled to elicit on cross-examination of the witness the conversation between Hale and plaintiff. This we are satisfied he was not entitled to do except in so far as it might tend to affect the weight to be given the evidence of the witness as to his reason for destroying his charts, and we are satisfied that as to this it could have had no substantial effect, so that in so far as it might have been erroneous at all, the ruling was not prejudicial. As suggested by respondent's counsel, it is apparent that the real purpose of the question was to get before the jury an admission of the vice president of the other defendant that his company was the one at fault.

12. There was no error in allowing plaintiff to ask his witness Dr. Gerlach certain questions for the purpose of obtaining from him an explanation of certain testimony theretofore given by him. He had previously testified that he had no opinion to offer as to whether plaintiff was now shamming any symptoms, and was asked substantially if he intended thereby to intimate to the jury that he was shamming. He answered that he did not. He was then asked substantially what he did mean by his testimony, and explained that he meant that from a medical standpoint it was difficult and probably impossible to say in regard to the shamming, although he might have an opinion if he could take plaintiff and his personal knowledge of him into consideration. Both questions were legitimate. The witness did not by his answers, as claimed by appellant, express his personal opinion as to plaintiff and his character, or his views as to his shamming based on such opinion.

13. Dr. Pierce, a medical expert called by plaintiff, was asked as to the probability of an injury to the muscles being a lasting and permanent injury in a man of 62 years of age, which was plaintiff's age. He proceeded to answer that it would depend entirely on the extent of the injury, of which he knew nothing except what he had heard in the report of the case, but that if the muscle was ruptured or a blood vessel ruptured, and there was an extravasation of blood amounting to a quart, as he understood there was, the chances were ——. At this point appellant objected that it was unfair to allow the witness to base his answer on any understanding that he had with reference to reports, and the objection was overruled. The witness then finished his answer by saying that the chances are that there would probably be a permanent injury. The answer was substantially that in the case of a man 62 years of age, if the muscle was ruptured or if a blood vessel was ruptured, and if

there was an extravasation of blood amounting to a quart, as to all which there was evidence, the chances were that there would probably be a permanent injury. The matter elicited by the answer was material and competent.

14. A question asked the plaintiff as to his expenses for medical attendance, medicine, etc., was objected to on the ground that the matter was not within the issues. The objection was overruled, and the witness answered: "I suppose somewhere in the neighborhood of $500 or $600." A motion to strike out the answer as too indefinite was denied. If there was any error in either of these rulings, the effect thereof was obviated by the ruling of the court on motion for new trial, whereby the sum of $600, the largest sum that the jury under the evidence could have awarded on this account, was ordered remitted as a condition to the denial of a new trial. The order was expressly made upon the ground that the evidence was insufficient to justify the verdict so far as it included any allowance on this account. The remission was made accordingly.

15. A point is made in the closing brief in regard to alleged misconduct of plaintiff's counsel in his argument to the jury, but we cannot conceive that the defendants could have been prejudiced thereby, and do not deem the matter of sufficient importance to warrant discussion.

16. There remains for consideration the claim that a new trial should have been granted because of misconduct of the jury. It was originally claimed that there was misconduct in the means adopted by the jurors in determining the amount of the verdict, but this ground has been expressly abandoned in this court, appellant conceding that it has made no legal showing in regard thereto. The only misconduct now alleged is misconduct on the part of jurors when visiting the scene of the accident under order of court. During the trial it was stipulated that the jury might be taken by the bailiff to the scene of the accident to inspect the premises. It was suggested by counsel that, as two railroad companies operated cars to that point, they might go on the car of one company and return on the car of the other company, so that they might have a better conception of the cars. The court said that the jury was to be taken out not to inspect the cars, but merely to inspect the scene of the accident, and that the cost of transportation would amount to $1.30. A juror asking if they could talk about the location of the cars while on the ground was told that they could not, that they were simply to inspect the scene, and not to indulge in discussion among themselves. They were further admonished that it was their duty not to converse with or suffer themselves to be addressed by any other person, and not to form or express an opinion until the case was finally submitted to them. The affidavit of the bailiff shows that he accompanied the jury to the scene of the accident; that they went on one of appellant's cars; that some of the jurors rode on the front platform or open part of the car; that they remained at the scene for about 15 or 20 minutes; that thereupon a car of appellant approached the scene and stopped before the crossing and a car of the other defendant also approached; that he said to the jurors "Let's not spend all of our money with one company"; and that thereupon they boarded the car of such other defendant, and returned to town. The affidavit of W. F. Carroll, who was the motorman on the car of appellant that took the jurors to the scene of the accident, showed that on the trip out all of the jury except two or three sat on the front part or open part of the car on each side of him, "that said jurymen examined the brake of said car as the same was being operated by defendant and the mechanism thereof"; that after the jurors alighted he proceeded to the end of his run; that when he returned the jury was still at the scene of the accident; that he stopped before passing the crossing and about nine of the jurors boarded his car; that, one of the other company's cars then approaching, a juror said, "Let's ride back on the other car. I have never examined those cars"; that some one then said, "Yes; let's not spend all of our money with one company"; that all the jurors then boarded the other car, and that as he approached the crossing one of the jurors said: "That is the way Kimic was injured. If the tracks were wet, he could not have stopped his car before said crossing." The affidavit of C. P. Simpson, who was the conductor on the same car of appellant, was substantially the same as that of the motorman. None of the matters thus alleged in these affidavits was denied.

The foregoing is all the evidence that can be considered in determining the question of misconduct. Other affidavits were presented, and there were other statements made in some of the affidavits already mentioned, but these other affidavits and statements cannot be considered. The affidavits of the motorman and conductor contained certain statements made solely on information and belief. Such statements are unavailing for any purpose in such a proceeding as this. See Gay v. Torrance, 145 Cal. 144, 151, 78 Pac. 540, and cases there cited; People v. Feld, 149 Cal. 478, 86 Pac. 1100. The affidavits of two of the jurors were presented for the purpose of showing misconduct. These, of course, were unavailing for any purpose, a juror not being permitted to impeach the verdict except upon the single ground that the verdict was the result of a resort to the determination of chance. Code Civ. Proc. § 657, subd. 2; Siemsen v. Oakland, etc., Ry. Co., 134 Cal. 497, 66 Pac. 672, and cases there cited. Affidavits of others than jurors detailing conversations with jurors after the verdict and showing statements made by the jurors in such conversations tending to impeach their verdict were also unavailing. While these affidavits were not, in terms, affidavits by jurors impeaching their own verdict, they were affidavits of admissions made by jurors to the same effect. "If the juror himself would not have been permitted to make affidavit directly to these facts, clearly the affidavit by another of his declarations and admissions, offered for the same purpose would be equally inadmissible. What the juror could not do directly could not thus indirectly be effectuated." Siemsen v. Oakland, etc., Ry. Co., supra. See also, People v. Murphy, 146 Cal. 506, 80 Pac. 709. The statements in the counteraffidavits of 11 of the jurors "that he was governed entirely in his deliberation and in reaching said verdict by the evidence introduced at the trial thereof, and that no outside fact or circumstance influenced him in his deliberation or verdict," were ineffectual for any purpose. It is thoroughly settled that jurors cannot be heard to deny the prejudicial influence on their minds of knowledge acquired by misconduct. People v. Stokes, 103 Cal. 193, 37 Pac. 207, 42 Am. St. Rep. 102; People v. Chin Non, 146 Cal. 562, 80 Pac. 681. Affidavits of jurors may be used to disprove or explain the alleged misconduct, but cannot, admitting the misconduct, be used to show that the verdict was not influenced thereby. People v. Stokes, supra. There being nothing in the affidavit of the bailiff tending to show misconduct, we are left solely to the statements contained in the affidavits of the motorman and conductor which we have already set forth.

By these affidavits it appears that on the ride out to the scene of the accident the jurors who were seated on the outside of the car "examined the brake of said car as the same was being operated by deponent and the mechanism thereof." This was the statement of the motorman, and the conductor said that being passengers and sitting in front on each side of the motorman the jurymen "examined the brake of said car, and the mechanism thereof, while on said car." This it is urged, was a taking of evidence by the jurors out of court contrary to the instructions of the court, of such importance that it constituted prejudicial misconduct. To us it seems that the statements of the motorman and conductor cannot be reasonably taken as meaning that the jurors made the critical investigation and examination of the brake and its mechanism suggested by counsel for appellant. They were riding on the outside of the car, and they saw the portion of the brake and its mechanism that was in plain sight, as it was being operated by the motorman, and that was practically all. They saw only what the parties to the action must have known they would naturally see if they rode on the outside of the car at all. Assuming that this was a technical receiving out of court of evidence, was it important enough to warrant a reversal? However strictly the decisions may lay down the rule as to the effect of misconduct of the jury that may well have prejudiced the parties, it is settled in this state that a new trial will not be granted on that ground where the misconduct was of such trifling nature that it could not in the nature of things have been prejudicial to the moving party, and that, where it appears that the fairness of the trial has been in no way affected by such impropriety, the verdict will not be disturbed. Siemsen v. Oakland, etc., Co., 134 Cal. 494, 498, 66 Pac. 672. Counsel for appellant concedes that, if the evidence thus received was immaterial to any issue in the case, the misconduct was not prejudicial error. It is clear to us that the evidence alleged to have been received here was absolutely immaterial to any real issue in the case as the same was presented for determination. Nobody claimed that there was anything wrong with the brakes or their mechanism, or that the accident was due to any defect therein. The real issue in the case so far as defendant's liability was concerned was whether defendant's motorman was warranted in assuming that the Interurban car would not be at the crossing at the time he reached it. That he approached the crossing at such a rate of speed that he could not stop in time to avoid anything thereon, however well adapted to all purposes was his brake, appears to be undenied by any evidence. Under these circumstances, we cannot see that the so-called "examination" of the brake and its mechanism was a matter of any importance or that it could have been prejudicial to defendant's cause.

The other incident shown by these affidavits and relied on as prejudicial misconduct was the remark made by one of the jurors during the inspection of the scene of the accident at the time appellant's car approached the crossing: "That is the way Kimic was injured. If the tracks were wet, he could not have stopped his car before said crossing." It must be conceded that the juror was guilty of a violation of the instructions of the court and of his duty as a juror in making the statement. But we cannot go with appellant's learned counsel to the extent of holding that the statement necessarily showed "a prejudiced mind." It may well have been a statement made on the spur of the moment, caused entirely by an honest conclusion as to the speed at which the car had just approached the crossing. We cannot conceive that the incident could have ultimately affected the minds of intelligent jurors as we must assume the jurors who heard the statement to have been, to the prejudice of defendant's cause. It is claimed by appellant and alleged in the affidavits of both motorman and conductor that the car was under perfect control as it approached the crossing, and could have been stopped even if the tracks had been wet. The manner of approach was as patent to the other jurors as it was to the juror making the statement, and any conclusions in regard thereto by such other jurors would naturally be based on their own observations rather than on any statement made by another juror. But the manner of approach of this car under the control of other employés on a single occasion more than six months after the accident was so absolutely irrelevant to the real question at issue, the question whether another employé many months before had used proper care in approaching the same crossing, that, as we have said, we cannot conceive that it could have affected in the slightest degree the minds of any ordinarily intelligent juror in the determination of this case. And, as we have also said, we must assume that these jurors were men of at least ordinary intelligence. So far, therefore, as the other jurors are concerned, there is nothing that would warrant us in holding that the misconduct of the juror who made the statement may have operated prejudicially to defendant's cause. As to the juror who made the statement a somewhat different question is presented. It does appear from the statement itself that the manner of approach of appellant's car at that crossing on the day of the visit was such as to convince him that the motorman could not have stopped at the crossing if the track had been wet, and that he hastily concluded for the moment that the situation must have been the same at the time of the accident, and stated accordingly. The trial court was fully warranted in holding that the making of this statement did not necessarily show a prejudiced mind or a desire to influence other jurors against appellant, but that it was simply the expression of a hasty conclusion caused by what he believed he then observed in the presence of the other jurors. Are we compelled to assume, contrary to the conclusion of the trial court, that the proof as to the making of this statement by him shows that in so far as he was concerned the appellant may not have had a fair and impartial jury, and a determination reached solely on the evidence introduced on the trial? In view of what we have heretofore said, we believe that this question must be answered in the negative. The trial court was warranted in holding that the conclusion thus hastily reached and expressed, based as it was upon an absolutely irrelevant fact, could not have operated, in the nature of things, to affect the juror's mind in reaching a verdict. The case is very different on its facts from the cases cited and relied upon by appellant.

The foregoing disposes of all the points made for reversal.

The judgment and order denying a new trial are affirmed.

We concur: SHAW, J.; SLOSS, J.

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SPANGLER v. SPANGLER. (Civ. 660.)

(Court of Appeal, First District, California. Sept. 16, 1909.)

1. LANDLORD AND TENANT (§ 76*) — COVENANTS—ASSIGNMENTS OF LEASE.

A covenant in a lease that it shall not be assigned without the consent of the lessor is not broken by one of the lessees assigning his interest to the other lessee.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 228; Dec. Dig. § 76.*]

2. LANDLORD AND TENANT (§ 76*) — COVENANTS—WAIVER OF BREACH.

Where a lease may be forfeited for breach of covenant against assignment, the breach was waived where no objection was made to the assignment at the time, and payment of the rent was demanded and suit brought for the recovery thereof.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 230; Dec. Dig. § 76.*]

3. LANDLORD AND TENANT (§ 85*)—RENEWAL —ASSIGNABILITY.

Unless restricted, the right of a tenant to renew his lease as provided therein is assignable.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 277; Dec. Dig. § 85.*]

4. LANDLORD AND TENANT (§ 85*)—RENEWAL OF LEASE—ASSIGNMENT.

Where a lease provides for an extension of term at the option of the lessees, and one of the lessees assigns his interest to the other lessee, the latter may exercise the option.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 277; Dec. Dig. § 85.*]

5. LANDLORD AND TENANT (§ 134*)—COVENANTS—PERSONAL OCCUPATION.

A covenant in a lease providing that lessees shall personally occupy, till, and cultivate the premises is not breached by the removal of one lessee from the premises.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 483, 485; Dec. Dig. § 134.*]

6. LANDLORD AND TENANT (§ 134*)—COVENANTS—PERSONAL OCCUPATION—WAIVER.

Where a lease contains a covenant that the lessees shall personally occupy, till, and cultivate the premises, any breach thereof by the removal of one of the lessees from the premises is waived by receiving and suing for rent accruing after such removal.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 483, 485; Dec. Dig. § 134.*]

7. INTERPLEADER (§ 11*) — CONFLICTING CLAIMS TO RENT.

Where conflicting claims are made of a lessee for rent, he has the right to interplead the parties.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. § 24; Dec. Dig. § 11.*]

Appeal from Superior Court, Santa Clara County; John E. Richards, Judge.

Action by Margaret Spangler against James Spangler to recover possession of land. From an order denying plaintiff's motion for a new trial, plaintiff appeals. Affirmed.

Wm. P. Veuve, for appellant. S. G. Tompkins, for respondent.

KERRIGAN, J. This appeal is from an order denying plaintiff's motion for a new trial in an action under section 1161, Code

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Civ. Proc., to recover the possession of certain orchard land in Santa Clara county.

The defendant went into possession under a written lease from his mother, the plaintiff, to himself and to his sister, Annie Leal. The term was for five years, to commence November 1, 1902, with the privilege of an additional five years, provided that the lessees elected to avail themselves of the privilege prior to July 1, 1907. The rent reserved was $600 per annum, payable annually on the 1st day of October. The lease provided that the lessees should personally occupy and cultivate the premises and should not underlet any portion thereof, nor assign the lease, without the written consent of the lessor, under penalty of forfeiture. May 8, 1905, without the consent of the lessor, Annie Leal made an assignment to the defendant of all her interest in the lease; and in June, 1907, by a notice in writing, the defendant notified the plaintiff of this assignment, and also that he elected in his own name to renew the lease for an additional term of five years.

The important question in this case is: Was there a breach of the conditions of the lease, and a consequent forfeiture thereof, by its assignment, without the consent of the lessor, by Annie Leal to the defendant? The covenant is that the lessees shall not assign, and only one of them has done so. It does not provide that neither of the lessees shall assign, nor that one may not assign to the other; and construing this covenant strictly against the lessor, as the law requires us to do, it should be presumed to mean that the lease shall not be assigned by both. As the assignment was by one only of the lessees, there was no breach of the covenant, and therefore there was no forfeiture. This conclusion is sustained by the case of Randol v. Scott, 110 Cal. 595, 42 Pac. 977. There one of the covenants alleged to have been broken was as follows: "And the said lessees do hereby covenant * * * not to assign this lease, or permit any assignment thereof to be made, by bankruptcy or otherwise, without the written consent of the lessor." The breach alleged was a transfer or assignment of the interest of one of the tenants by proceedings in insolvency. The restriction there was stronger in several respects than the one here, and especially in that it provided that the lessees should not permit any assignment to be made. Yet the court held that the covenant not to assign was joint by two lessees, and was not broken by an assignment by one of the lessees of his interest therein. The court said: "When, therefore, under these circumstances, it was covenanted merely that the lessees should not assign the lease, the meaning of the parties is presumed to be that the lease should not be assigned in the only way in which it could have been assigned, namely, by the joint act of the lessees. The lease therefore was not assigned within the meaning of the contract. The covenant does not provide that the lease should be forfeited upon the assignment by one of the tenants in common of his interest. * * * Of course, it is unnecessary to cite authorities to the points that covenants in restraint of alienation are barely tolerated, and that contracts looking to penalties and forfeits must be strictly construed." See, also, 24 Cyc. 968.

Even if there had been a breach of the covenant in the particulars claimed by plaintiff in the present case, the evidence tends to show that she waived it, for she was notified of the assignment in June, 1907, but she made no objection to it at that time, and upon the rent becoming due for that year she demanded its payment, and later affirmed the continuance of the lease by bringing suit for the recovery of the rent. Randol v. Tatum, 98 Cal. 397, 33 Pac. 433. The right of a tenant to renew his lease is, unless restricted, assignable. 2 Wood, Landlord and Tenant (2d Ed.) § 413. As just seen, Annie Leal's right to assign was not restricted, and, even if it were, such restriction was waived. Therefore her assignee became entitled to all her rights and privileges under the lease, one of which was the right to an extention thereof for the term of five years, and it was not necessary, as suggested by plaintiff, that both tenants should exercise this option.

As there was no joint failure of the lessees to personally occupy, till, and cultivate the premises, there was, for reasons already stated, no forfeiture of the lease by reason of the fact that Annie Leal, one of the tenants, removed from the premises; but, if there were a breach of the covenant, it was waived, for Annie Leal left the premises immediately after the assignment by her to defendant in May, 1905, and did not thereafter return, yet the lessor, knowing of her absence, made no objection thereto, and received the rent as usual in October, 1905, in 1906, and demanded and sued for it in 1907.

The plaintiff further contends that she was entitled to possession of the property on the ground that the defendant continued to hold after default in the payment of rent for the year 1907, and after statutory notice and demand. June 22, 1905, Margaret Spangler, the plaintiff, made and executed to Annie Leal a deed of gift, conveying approximately 20 acres of the land in question, and when the rent for the year 1907 was about to become due Annie Leal, basing her claim upon this deed, demanded the sum of $200 as her proportion of the rent for that year. Upon the making of this claim defendant tendered to plaintiff the sum of $400, and thereafter commenced an action in the proper court against the plaintiff and Annie Leal, requiring them to interplead and litigate their claim to the $200, the balance of the rent, which action is still pending and undetermined. Conflicting claims having been made on the defendant for the rent, he had a right to require the claimants to interplead. Schluter

v. Harvey, 65 Cal. 158, 3 Pac. 659; McDevitt v. Sullivan, 8 Cal. 593.

The order appealed from is affirmed.

We concur: COOPER, P. J.; HALL, J.

11 Cal. App. 343

AHLERS et al. v. SMILEY et al. (Civ. 643.)

(Court of Appeal, Second District, California. Sept. 18, 1909.)

1. PLEADING (§ 310*) — COMPLAINT — SUFFICIENCY—EFFECT OF EXHIBITS.

Whatever is an essential element to a cause of action must be presented by a distinct averment, and cannot be left to an inference to be drawn from the construction of a document attached to the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 945; Dec. Dig. § 310.*]

2. PLEADING (§ 18*)—CERTAINTY.

A pleading which leaves essential facts to inference or argument is bad.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 39; Dec. Dig. § 18.*]

3. PLEADING (§ 11*)—MATTERS OF EVIDENCE.

Where the complaint in an action for breach of contract alleged a prior action, and copies of the findings and judgment therein were attached to the complaint and made a part of it, the copies were mere evidence as to the questions adjudicated in the former action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 31; Dec. Dig. § 11.*]

4. PLEADING (§ 11*)—MATTERS OF EVIDENCE.

A complaint merely stating the evidence from which the ultimate facts are deducible is bad, as the office of the complaint is to aver material, issuable facts constituting a cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 31; Dec. Dig. § 11.*]

5. JUDGMENT (§ 948*)—RES JUDICATA—PLEADING.

The rule that to render evidence available in support of a defense, based on matters of estoppel, such matters must be pleaded, does not apply to the statement of a cause of action by plaintiff, and plaintiff, to avail himself of the conclusiveness of facts established in a prior action need not plead the former recovery as it operates by way of estoppel to the defense set up.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1787; Dec. Dig. § 948.*]

6. JUDGMENT (§ 728*) — "RES JUDICATA" — COLLATERAL MATTERS.

As a general rule a judgment in a former action is not conclusive of any matters which only come collaterally in issue, nor of any matters incidentally cognizable, nor of any collateral facts offered in evidence to establish facts in issue.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1258; Dec. Dig. § 728.*

For other definitions, see Words and Phrases, vol. 7, pp. 6126-6130; vol. 8, pp. 7786, 7787.]

7. JUDGMENT (§ 585*)—RES JUDICATA—DETERMINATION.

To determine whether the issues involved in a former suit constitute a bar to a second action, reference will ordinarily be had to a comparison of the records in the two cases.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1092-1094; Dec. Dig. § 585.*]

8. JUDGMENT (§ 590*)—RES JUDICATA—MATTERS EXCEPTED.

A judgment which determines that, on account of the insufficiency of the pleadings to sustain a judgment for damages for breach of contract, the matter of damages is reserved and excepted from the operation of the judgment, does not bar a subsequent action for damages.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1102; Dec. Dig. § 590.*]

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by J. L. Ahlers and another, formerly copartners, doing business under the firm name of Ahlers & East, against A. J. Smiley and another, copartners, doing business under the firm name of Smiley & Walls. There was a judgment granting relief, and plaintiffs appeal from an order denying a new trial, and defendants appeal from a like order and from the judgment. Judgment and orders reversed, with instructions.

E. E. Keech, for plaintiffs. F. O. Daniel, for defendants.

SHAW, J. Both parties prosecute appeals in this action. Plaintiffs appeal from the order of the court denying their motion for a new trial, and defendants appeal from a like order denying their motion for a new trial, and also from the judgment rendered against them.

Plaintiffs were manufacturers of ice in Santa Ana, and defendants were retailers of ice. On March 15, 1905, plaintiffs and defendants entered into a written contract whereby the former agreed to sell and the latter agreed to buy and take from plaintiffs all the ice which defendants might require in supplying their trade for a period of two years at a price per ton stipulated in the contract. On July 24th following defendants refused to longer buy ice from plaintiffs, but from that date to March 15, 1906, purchased ice from other manufacturers with which they supplied their customers. The action is to recover damages alleged to have been sustained by plaintiffs on account of such alleged breach of the contract.

It appears that some four or five days after defendants began buying ice from others than plaintiffs the latter instituted an action to enjoin defendants from obtaining ice from such other parties with which to supply their customers. This action was tried on March 15, 1906, and an order made enjoining defendants as prayed for, which judgment had become final at the time the action at bar was instituted. By their complaint filed in this action plaintiffs allege the filing of the complaint, answer thereto, the findings and judgment in the former suit, copies of all of which are attached to and made a part of the complaint herein. The contract for the breach of which this action is instituted is not set out or otherwise pleaded in the present action; nor is it alleged in the complaint herein that the plaintiffs ever executed or made any contract whatsoever to supply defendants with ice. Defendants filed a general demurrer to the complaint, and also moved to strike out of said complaint the several allegations referring to the complaint, answer, findings, and judgment in the former suit, as well as to strike out the copies of such documents attached to the complaint herein and made a part hereof. The court overruled the demurrer and denied the motion. In so doing we are of opinion the court erred. It must be noted that the action is not one upon a judgment, but to recover damages for a breach of a contract no description of which appears in the complaint, and in the absence of any allegation in the complaint to the effect that plaintiffs ever executed such contract. "Whatever is an essential element to a cause of action must be presented by a distinct averment, and cannot be left to an inference to be drawn from the construction of a document attached to the complaint." Burkett v. Griffith, 90 Cal. 532, 27 Pac. 527, 13 L. R. A. 707, 25 Am. St. Rep. 151. An allegation to the effect that plaintiffs had entered into the contract was a matter of substance without which the complaint did not state a cause of action. Here the execution of the instrument on the part of plaintiffs is left to inference or argument based upon the findings in the former case, wherein the court found that plaintiffs and defendants entered into a certain contract therein set out. The defect was not cured by such reference. Los Angeles v. Signoret, 50 Cal. 298; Ward v. Clay, 82 Cal. 505, 23 Pac. 50, 227. At most, these documents so attached and therein referred to constitute mere evidence as to the questions adjudicated in the former suit. "Where a complaint merely states the evidence from which ultimate facts are deducible, a demurrer lies." McCaughey v. Schuette, 117 Cal. 223, 46 Pac. 666, 48 Pac. 1088, 59 Am. St. Rep. 176; Thomas v. Desmond, 63 Cal. 426; Fredericks v. Tracy, 98 Cal. 658, 33 Pac. 750.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The record in the former suit, being evidentiary only, had no place in the complaint, and should have been stricken out. The office of the complaint is to aver material, issuable facts which constitute the cause of action, and not the evidence to prove those facts. Jones v. Petaluma, 36 Cal. 233; Willson v. Cleaveland, 30 Cal. 192. Plaintiffs contend that by the former action certain facts were conclusively established, but that it devolved upon them, in order to avail themselves of the conclusive character of such facts, to plead the judgment roll in such former action, together with such additional facts necessary to constitute a cause of action; that, in the absence of such pleading, the complaint would contain no allegation under which, if the issues rendered it material, the judgment and proceedings in the former case could be admitted in evidence. While as a general rule, in order to render evidence available in support of a defense based upon matters of estoppel, such matters must be pleaded, the rule does not apply to the statement of a cause of action by plaintiff. Indeed, under our system of pleading, no opportunity is afforded for such pleading on the part of plaintiff. Nevertheless, the record may be given in evidence with the same conclusive effect as if it had been specially pleaded. The record in the former case could have no place in the complaint to recover damages on account of the breach of the contract. As said in Wixson v. Devine, 67 Cal. 341, 7 Pac. 776: "It was not necessary or proper for plaintiff to plead his former recovery. It operated by way of estoppel to the defense set up by the defendant, and, as we have in our system of pleadings no replication to the answer, the estoppel could not properly be pleaded." To the same effect is Riverside Land, etc., Co. v. Jensen, 108 Cal. 146, 41 Pac. 40; Clink v. Thurston, 47 Cal. 30; Flandreau v. Downey, 23 Cal. 354.

While the judgment and orders must be reversed for the foregoing reasons, it is proper, in view of the fact that a new trial may be had, to notice another point which defendants assign as reversible error. Defendants in their answer allege "that the matter of said damages, alleged to have been suffered by plaintiffs from said alleged failure of these defendants to comply with said alleged contract, has been once adjudicated and determined, and that it cannot now be litigated in this action, and that plaintiffs are, and each of them is, estopped by reason thereof to maintain this action"; and they contend that such allegation is conclusively proven by the documents contained in the record in the former case. As a general rule, a judgment in a former case is not conclusive of any matters which only come collaterally in issue, nor of any matters incidentally cognizable, nor of any collateral facts which are offered in evidence to establish facts in issue. Lillis v. Ditch Co., 95 Cal. 553, 30 Pac. 1108. For the purpose of determining whether the issues involved in a former suit constitute a bar to a second action reference will ordinarily be had to a comparison of the records in the two cases. Here, however, the judgment in the former action which defendants attempt to plead as a bar solemnly adjudges and decrees "that, on account of the insufficiency of the pleadings * * * in this action to warrant or sustain a judgment for damages which may have accrued to the plaintiffs, the matter of damages is hereby reserved and excepted from the operation of this judgment, to be determined by a separate action to be brought by the plaintiffs for that purpose if necessary." Without regard to the rule, this judgment, so long as it stands, presents an insurmountable obstacle to defendants' contention on the grounds stated.

There is no merit in defendants' contention that electing to sue for an injunction was a waiver of plaintiffs' right to assert a claim for damages in a subsequent action.

Under the views herein expressed, it does not appear necessary to discuss other points argued by counsel.

The judgment and both orders are reversed, with instruction that the court sustain the general demurrer interposed by defendants, and grant their motion to strike from the complaint the parts thereof designated in said motion, and grant leave to the parties to file such amended pleadings as they may be advised.

We concur: ALLEN, P. J.; TAGGART, J.

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11 Cal. App. 314

SAN FRANCISCO TEAMING CO. v. GRAY et al. (Civ. 618.)

(Court of Appeal, First District, California. Sept. 15, 1909.)

1. EVIDENCE (§ 314*) — HEARSAY — BASIS FOR EXCLUSION.

The exclusion of hearsay evidence is based on the principle that every person has the right to face the witness against him and to test him by cross-examination.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1168; Dec. Dig. § 314.*]

2. EVIDENCE (§ 318*)—HEARSAY—MEMORANDA FROM ORAL STATEMENTS.

In an action for the use of teams and drivers furnished by plaintiff to defendant, a book of items made by plaintiff's bookkeeper from memoranda made by him from oral statements by the drivers as to their work, and afterward copied into the book, is inadmissible because mere hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1195, 1198; Dec. Dig. § 318.*]

3. EVIDENCE (§ 354*) — DOCUMENTARY EVIDENCE—BOOKS OF ACCOUNT.

A ledger to which items of account had been transferred from other books and memoranda is not admissible as a book of original entries.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1432–1483; Dec. Dig. § 354.*]

4. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

That there was other evidence that plaintiff furnished teams and drivers, and that they did certain work for defendant, without giving the items of such work, does not render harmless the error of admitting in evidence a book containing items of such work made from hearsay memoranda.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161–4170; Dec. Dig. § 1051.*]

Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Action by the San Francisco Teaming Company against Harry N. Gray and another. Plaintiff had judgment, from which, and an order denying a new trial, defendants appeal. Reversed.

Ames & Manning, for appellants. Arnold W. Liechti, for respondent.

COOPER, P. J. This action was brought to recover a balance claimed to be due for the use of teams and teamsters furnished by plaintiff to defendants at their request Plaintiff recovered judgment, and this appeal is from the judgment and the order denying defendants' motion for a new trial.

There is only one question discussed in the briefs, and that is as to the ruling of the court in admitting, over the objection of defendants, a certain book called a "work book," containing the names of certain teamsters, the dates and number of loads hauled, the place from which and to where the loads were taken, and the name of the persons for whom the hauling was done; the account in this case being a charge against defendants.

Plaintiff called as a witness one Milestone, who testified that he was in the employ of the plaintiff as bookkeeper during the time the teams were claimed to have been furnished, and that he kept the accounts and a full set of books—a work book, ledger, cash book, journal, and check book; that the work book shown him contained entries of the work performed entered from a memorandum paper into the work book, and that the work book was correctly kept so far as he knew; that it was his custom to leave the barn between 4 and 5 o'clock of each day, and go from the barn out to the camp at Fourteenth street and catch the different teamsters as they came in, and get an oral statement from each teamster as to what work had been done by him during the day; that he procured such oral statements from the teamsters and put them down on a memorandum paper, and took back such memoranda to his office and the same evening or the following morning he would enter in the work book "the name of the teamster, the number of loads from where and where to." The witness clearly showed that the facts were obtained first by the oral statements of the various teamsters, then transferred by him to a memorandum or temporary paper, and then afterwards entered by him into the work book, which was the book offered and received in evidence. The book was objected to upon the ground that it was irrelevant, immaterial, and incompetent and hearsay, and that no proper foundation had been laid for its introduction. The court overruled the objection, and allowed the book in evidence. After the book was so admitted, the attorneys for defendants moved to strike out the testimony contained in the pages which were read as to the account against defendants, upon the ground that the book was hearsay and the court denied the motion. No teamster was called, nor was any attempt made to account for the absence of such teamsters as witnesses. The first entry or memorandum made by the witness on paper was but the oral statement of the teamsters. Such teamsters were not under oath, and were not brought into court so that their statements could be tested by cross-examination.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It was long ago laid down by the courts of England that, on account of the necessity of the case and to prevent a failure of justice, the books of original entries, or the shop books as they were called, in certain cases might be introduced in evidence. The entry must have been made in the ordinary course of business and by a person since deceased or beyond the jurisdiction of the court. It was necessary to prove that the merchant or tradesman whose books were offered kept correct books of account, and that the entry was made in the usual course of business by one who had knowledge of the facts. These entries were admitted by the courts as exceptions to the general rule excluding hearsay evidence, in order to prevent a total failure of justice. It was said in the early case of Lefebure v. Worden, 2 Ves. 38: "So far the courts of justice have gone (and that was going a good way, and perhaps broke in upon the original strict rules of evidence) that where there was such evidence (entries) by a servant known in transacting the business, as in a goldsmith's shop by a cashier or bookkeeper, such entry, supported on the oath of that servant that he used to make entries from time to time and that he made them truly, has been read. Further, where that servant, agent or bookkeeper has been dead, if there is proof that he was the servant or agent usually employed in such business, was intrusted to make such entries by his master, (and) that it was the course of trade, on proof that he was dead and that it was his handwriting, such entry has been read (which was Sir Biby Lake's case). And that was going a great way; for there it might be objected that such entry was the same as if made by the master himself; yet by reason of the difficulty of making proof in cases of this kind the Court has gone so far." Applying the principles and rules laid down by the able judges of the higher courts of England and of this country, we do not think the evidence was admissible, but that it was purely hearsay.

The fact that it became necessary for plaintiff to prove was that he furnished certain teams and certain drivers to defendants at their request, and the amount and nature of such services, or a contract fixing the amount which was to be paid. Plaintiff does not appear to have kept any timekeeper or person who knew of his own knowledge the number of teams and teamsters furnished, and the number of days that they were employed by defendants. The fact which plaintiff did prove was certain oral statements by the various teamsters. The essential witnesses—the parties who did the work and knew the facts—were not called. The witness who was called did not testify to the truth of the facts, but to its having been asserted on the extrajudicial occasions on which the various oral statements were given. The evidence of the teamsters was conveyed by the witness, who told in court what other parties had told him. The exclusion of hearsay evidence is based upon the principle that every litigant who comes into a court of justice has a clear right to have the witness against him brought into court face to face, so that he may be tested by cross-examination as to every fact concerning which he has given evidence. It has been said that a person who relates a hearsay is not obliged to enter into any particulars, to answer any questions, to solve any difficulties, to reconcile any contradictions, to explain any obscurities, to remove any ambiguities. He entrenches himself in his simple assertion that he was told so and so, and leaves the burden upon his dead or absent author. In this case the witness testified only to having made an entry of what was told him by the teamsters. He does not even give a single name of any one of the persons whose statement he received, nor does he give a single segregated fact as being told him by any one person. He only in effect says: "I was told by the various teamsters the various statements I entered in the work book."

We have examined the various cases cited by counsel for respondent, but we do not find any case which supports the rule as broadly as contended for here. On the contrary, in our opinion, the great weight of authority, both in England and in this country, supports the rule as we have given it. It is said by Greenleaf (volume 1, § 120a [16th Ed.]): "The entries must have been in the ordinary course of business * * * fairly contemporaneous with the events recorded * * * must be produced in its original form * * * and of a fact within the personal knowledge of the declarant." In Underhill on Evidence, § 60, it is said: "Upon the question whether entries made in the books of a party to the suit are admissible as evidence in his own favor, under the proposition that such entries constitute a part of the res gestæ, the cases are at considerable variance. If the entry was made by an employé of the party, having personal knowledge of the fact, in the usual course of his employment, in books which were kept for such entries, and if it was made at or near the date of the transaction and is illustrative of it, then there can be no objection to its admission upon the principles already laid down. It is really hearsay evidence, however, because the bookkeeper or other person making the entry was not on oath or cannot be produced, or, being produced, has wholly forgotten the circumstances attending the transaction." In a very exhaustive note to Post v. Kenerson (Vt.) 52 L. R. A., the question is discussed, and many authorities cited. On page 595 the rule is thus summed up by the author of the note: "As a general rule, although there are cases holding otherwise, it is essential to the admissibility of entries made by a living witness that he should be able to state that or about the time the entries were made he knew their contents, and knew them to be true, so that the entries and the testimony of the witness concurrently shall be equivalent to a present affirmation of the truth of their contents."

In Swan v. Thurman, 112 Mich. 416, 70 N. W. 1023, it appeared that the only testimony to support the books was that of the bookkeeper, who merely transcribed the entries from slips handed to him by salesmen and had no personal knowledge of the sale and delivery of the articles charged. The court said: "It is sometimes proper to admit books of account as evidence of the acts of those who keep them where the entries are contemporaneous with the acts recorded. But where the book is, as in this case, the record of the acts of others not within the personal knowledge of the bookkeeper, but made up from the statements of others, such book is hearsay. From the earliest cases the admission of entries by third persons has proceeded upon the theory that such persons had personal knowledge of the facts stated in the entry." In the late case of Chicago Lumbering Co. v. Hewitt, 64 Fed. 314, 12 C. C. A. 129, the Circuit Court of the United States held that a book in which one person set down the total amount of logs scaled from memoranda furnished him by another person who did the work is not admissible to prove the amount of logs scaled, unless supplemented by the testimony of the person furnishing the original data. The court said: "That McFadden was able to testify that his additions were correct and that he had correctly entered the amounts thus ascertained is not enough. The fact which it was important to the plaintiffs to prove was the lumber contents of the logs placed in the river above the defendant company's boom from the camp of which McFadden was foreman. What McFadden knew was that Foley, whose duty it was to scale the logs put in the river each day from that camp, had by his tally board memoranda reported a given number of logs, containing when aggregated a given number of feet, as having been set afloat on a particular day. If McFadden had made his entries from oral statements made by persons having knowledge of the number and contents of logs floated each day, such entries would not have been competent without calling the persons who knew the facts and on whose authority the entries had been made. Is there any distinction in the evidential value of entries made on the oral statement of clerks or servants who know the facts and memoranda made for convenience in aiding memory of such clerks or servants? We can see none." See, further, the following cases: Dodge v. Morrow et al., 14 Ind. App. 534, 41 N. E. 967, 43 N. E. 153; Bouldin v. Atl. Rice Mills Co. (Tex. Civ. App.) 86 S. W. 795; Chisholm v. Beaman Machine Co., 160 Ill. 101, 43 N. E. 796; Chaffee v. U. S., 95 U. S. 516, 21 L. Ed. 912; Gould v. Hartley, 187 Mass. 561, 73 N. E. 656; Van Name v. Barber, 115 App. Div. 593, 100 N. Y. Supp. 987. The book, which was afterwards offered by plaintiff, called the ledger was inadmissible for the reasons above stated, and further for the reason that it was not a book of original entries. It does not in any way appear where the data were obtained in the charges of "April 2, Bill J. 4, $711.70," and of "May 1, Bill J. 4, $747.40," except by the reference to the journal.

The claim of respondent that, if the admission of said books was error, such error was harmless, upon the ground as contended that sufficient other evidence was offered to support plaintiff's claim, cannot be upheld. It is true there was other evidence that plaintiff furnished to defendant teams and teamsters, and that they did certain work for defendants; but the amount of such labor and the number of days the teams were in the employ of defendants can only be ascertained from the entries in the work book. Not only is this true, but the defendant offered and read in evidence without objection a time book kept by one Heisler, their timekeeper, who had charge of the business of keeping accounts of the teams furnished to defendants by plaintiff. This book was in direct conflict with the work book offered in evidence by plaintiff as to many items, and made the amount of the plaintiff's claim much less than the amount for which judgment was given. We are aware that cases arise, and will continue to arise, in which much difficulty is found in proving the many items of original entries taken from clerks, agents, or employés, particularly where there is a large number of such clerks, agents, or employés. But the rule we have adopted appears to us to be the correct one on principle. If the rule contended for by respondent in this case were followed, it would lay the foundation for gross frauds. Books might be intentionally filled with overcharges based upon hearsay. The defendant would have no opportunity to investigate the truth of the alleged hearsay evidence. It is better that the rule be certain and not extended so as to include hearsay evidence, than that it be overturned to avoid the hardships of some particular case.

It follows that the judgment and order must be reversed, and it is so ordered.

We concur: HALL, J.; KERRIGAN, J.

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11 Cal. App. 337

SAMUELS v. LARRIMORE. (Civ. 647, 648.)

(Court of Appeal, First District, California. Sept. 17, 1909. Rehearing Denied Oct. 15, 1909.)

1. Money Lent (§ 6*)—Pleading—Indebtedness.

A complaint to recover money loaned, alleging that no part of the debt had been paid, and that there was now due, owing, and payable by defendant on account of such debt a specified sum, with interest, sufficiently alleged nonpayment.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Money Lent, Cent. Dig. § 8; Dec. Dig. § 6.*]

2. Money Lent (§ 6*) — Complaint — Demand.

A complaint for money loaned was not objectionable for failure to allege a demand.

[Ed. Note.—For other cases, see Money Lent, Dec. Dig. § 6.*]

3. Money Lent (§ 2*)—Agreement to Repay—Time—"When Convenient"—"When Business Picked Up."

Where plaintiff's assignor loaned money to defendant to be repaid "when convenient, or when business picked up," defendant was bound to repay within a reasonable time, and was not entitled to hold the money indefinitely at his election.

[Ed. Note.—For other cases, see Money Lent, Dec. Dig. § 2.*

For other definitions, see Words and Phrases, vol. 2, pp. 1556–1558.]

4. Money Lent (§ 2*) — Payment — Time — "Reasonable Time."

One year was a "reasonable time" for the repayment of money loaned to be repaid by defendant "when convenient, or when business picked up."

[Ed. Note.—For other cases, see Money Lent, Dec. Dig. § 2.*

For other definitions, see Words and Phrases, vol. 7, pp. 5977–5983; vol. 8, p. 7780.]

Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Action by Charles Samuels against Grover B. Larrimore. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, defendant prosecutes separate appeals. Affirmed.

Jos. J. Webb, for appellant. Leon Samuels, for respondent.

COOPER, P. J. These two appeals are in separate records; but they will be considered together, as one is an appeal by defendant from the judgment against him, and the other from the order denying his motion for a new trial, and the questions are all considered together in the briefs filed by counsel. The complaint is as follows: "That within two years last past said defendant became indebted to one Frank A. Whitman in the sum of $635.86 for so much money loaned and advanced to said defendant by said Whitman at various times during said period at the special instance and request of said defendant. That prior to the commencement of this action said Whitman assigned, transferred, and set over unto plaintiff said claim, demand, and cause of action against said defendant. That no part of said indebtedness has been paid, and that there is now due, owing, and payable by said defendant to said plaintiff on account of said indebtedness said sum of $635.86, together with interest thereon at the legal rate from the date of such loans and advances." The complaint concludes with the usual prayer for judgment for the amount claimed.

The first contention of appellant is that the court erred in overruling his demurrer to the complaint. His argument is that the complaint does not allege nonpayment. The contention is entirely devoid of merit. After alleging the facts as to how the indebtedness arose and the amount thereof, the allegation is "that no part of said indebtedness has been paid." The word "indebtedness" is not here used as it has sometimes been in the body of a pleading, in which the courts have said that it was a conclusion of law. As it is here used in the last paragraph of the complaint it refers to the said sum of $635.86, which it is alleged had been loaned and advanced to defendant at his special instance and request. Any person of ordinary understanding would know that the pleader, by the word "indebtedness" as here used in said paragraph, refers to the sum which he had alleged had been advanced to defendant by plaintiff's assignor.

Nor is there any merit in appellant's claim that the plaintiff should have alleged a demand of payment. The complaint is of itself a demand; and not only this, but the answer of defendant shows that a demand would have been unavailing. Defendant in one part of his answer denies the indebtedness, and in another and separate part he alleges that the money was advanced to him by plaintiff's assignor upon the understanding that he was to repay it only when convenient to him, and that "it has not been convenient for said defendant to repay any portion thereof to said Whitman."

The appellant further urges that the evidence is insufficient to sustain the findings because, as he contends, the money was to be repaid only "when convenient, or when business picked up." This question was passed upon by the trial court, and in our opinion the evidence justifies the findings. It certainly is not the ordinary way of doing business for one man to advance money to another upon an express understanding that the one receiving the money will be allowed to repay it or not according to his own idea as to "convenience," or as to "business picking up." It would require a very clear case, we apprehend, to satisfy any court that such a bargain was made. In fact, in all cases where there is a general conversation by the party advancing money, or delivering property as to "taking your own time to pay," or "use your own convenience to pay," or "you can pay me when able," the courts as a general thing hold that the payment should be made within a reasonable time. When a friend advances money to another, and uses such expressions, he does not intend to give the money. He expects the party to act honorably, and not to repudiate the debt, but to repay it within a reasonable time. It is not to be presumed that a man would receive money under such circumstances from a friend, and when the money is sought to be recovered use the very expressions of confidence, kindness, and friendship as means to defeat a recovery.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

There are cases in which it has been made clearly to appear that the intention of the party or parties furnishing the money was to leave it entirely at the option of the party receiving it to repay it or not; in other words, to the sense of honor of the party receiving it. Such is not this case. The moneys were advanced to defendant about a year before this action was commenced. Defendant cannot complain that he did not have a reasonable time within which to repay it.

The judgment and order are affirmed.

We concur: KERRIGAN, J.; HALL, J.

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11 Cal. App. 340

CURTIN v. INGLE. (Civ. 661.)

(Court of Appeal, First District, California. Sept. 17, 1909. Rehearing Denied Oct. 15, 1909; Denied by Supreme Court Nov. 15, 1909.)

APPEAL AND ERROR (§ 1195*)—DISPOSITION—LAW OF CASE ON REMAND.

A decision of the appellate court construing a contract is binding upon the trial court on remand if the evidence as to the contract and the conduct of the parties thereunder is the same on retrial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661, 4665; Dec. Dig. § 1195.*]

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by D. A. Curtin against J. W. Ingle. From a judgment for defendant and an order denying a motion for new trial, plaintiff appeals. Reversed, and remanded for further proceedings as directed.

See, also, 155 Cal. 53, 99 P. 480.

Cannon & Freeman and E. F. Treadwell, for appellant. Wal J. Tuska, for respondent.

HALL, J. Appeal from judgment in favor of defendant and order denying plaintiff's motion for a new trial.

Plaintiff sought to recover for 11,519 grain bags, being a portion of 14,500 alleged to have been delivered by Moore, Ferguson & Co., the assignors of plaintiff, to defendant, to be filled with grain and shipped to Moore, Ferguson & Co. or accounted for, and if not accounted for to be paid for at 7 cents each. It is alleged that 11,519 of the 14,500 bags were never accounted for. In a separate count plaintiff also sought to recover $34.50 for money had and received by defendant to the use of said Moore, Ferguson & Co. The court found that defendant had duly accounted for all of said 14,500 bags, and also that defendant did not have or receive to the use of Moore, Ferguson & Co. the sum of $34.50, or any other sum of money. Appellant in his brief attacks these findings as not supported by the evidence.

The case has been before the Supreme Court upon two former appeals. Upon the first appeal judgment in favor of plaintiff and the order denying defendant a new trial were reversed for error in excluding material evidence offered for defendant. Curtin v. Ingle, 137 Cal. 95, 69 Pac. 836, 1013.

Upon the second appeal the court had before it substantially the same evidence concerning the principal cause of action as in the record before us. The plaintiff then relied upon the very same writings as constituting the contract with defendant as are relied upon now. The court held that under the contract upon which the bags were delivered to defendant he was not required to account directly to Moore, Ferguson & Co., but could account to one Crosby, and that the evidence showed without conflict that he did account to Crosby for the bags. Curtin v. Ingle, 143 Cal. 354, 77 Pac. 74. The court there said: "There is no evidence in the record tending to show that it was ever agreed that any of these bags should be returned empty by defendant to plaintiffs at San Francisco. The contract left it optional with defendant to use and pay for any of these bags that he did not ship filled with grain to the plaintiffs at San Francisco, or to account for any and all of the unused bags. The evidence shows without conflict that the defendant did account to Crosby for the bags, and it appears from the undisputed evidence that the defendant was warranted in reaching the conclusion that such was his duty. He had been told in two letters from plaintiffs that he was dealing in reference to these same bags with Crosby, and not with plaintiffs, and also that he must continue to deal with Crosby."

The evidence in the record before us shows without conflict that defendant did account to Crosby for all unreturned bags, and that Crosby accepted the bags and subsequently offered them for sale. Upon this evidence the trial court could not do otherwise under the decision upon the last appeal than to find for the defendant and render judgment accordingly.

As to the action for the $34.50 for money had and received, it appears that Moore, Ferguson & Co. advanced to defendant through Crosby, upon a shipment of oats that defendant made to said firm. Moore, Ferguson & Co., under defendant's letter of instructions, sold the oats for Ingle's account, and credited him with the net proceeds thereof, against the advance of $246 and promptly rendered to Ingle a correct account of sale, showing a balance of $34.50 to his debit. Respondent, concerning this matter, contents himself with saying: "The judge of the superior court hearing the evidence found against the plaintiff's contention as to the

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

$34.50, and there being a conflict of evidence his decision is final"—but fails to point to any evidence in the record in conflict with that above adverted to by us. We have diligently searched for any such and have failed to find it. Though defendant gave testimony, he does not in any way refer to the transaction about the oats. Upon the former appeal it was held that the evidence sustained the finding in favor of plaintiff as to the $34.50, and it appears to us that such evidence in the record before us is without conflict. A new trial should be had as to the issues under the count seeking to recover $34.50 for money had and received; but, as the findings upon the issues presented under the other counts are fully supported by the evidence, no retrial is necessary as to such issues.

The judgment is reversed, and the cause remanded, with directions to the court to retry the issues of fact arising under the last count in the complaint and to make findings thereon, and thereupon to enter such judgment as shall be warranted by the findings so made and the findings heretofore made upon the issues arising under the other counts of the complaint.

We concur: COOPER, P. J.; KERRIGAN, J.

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11 Cal. App. 348

SHERMAN v. GRAY et al. (Civ. 662.)

(Court of Appeal, First District, California. Sept. 18, 1909. Rehearing Denied Oct. 15, 1909; Denied by Supreme Court Nov. 15, 1909.)

1. DAMAGES (§ 163*)—LIQUIDATED DAMAGES—STATUTES — CONSTRUCTION — BURDEN OF PROOF.

Civ. Code, § 1670, provides that every contract by which the amount of damages to be paid, or other compensation to be made for a breach, is determined in anticipation thereof, is void, except as expressly provided in section 1671, which declares that contracting parties may agree on an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage. *Held* that, where a contract for grading fixed $1,000 as liquidated damages for breach thereof by either party, the burden was on defendants to show that the clause was valid and enforceable.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 458; Dec. Dig. § 163.*]

2. DAMAGES (§ 85*)—LIQUIDATED DAMAGES—ACTUAL DAMAGES—ASCERTAINMENT.

Defendants contracted to remove 7,000 cubic yards surplus sand from plaintiff's block and pay therefor 6¼ cents per cubic yard, to level and grade the block and streets to the official grade, and cover the entire surface with two inches of clay; the contract allowing $1,000 for liquidated damages for breach thereof by either party. Defendants moved 4,388 cubic yards of sand in excess of the quantity specified, but did nothing on the other part of the contract. It was shown that plaintiff, in order to bring the land to the official grade, would be required to place thereon 4,388 cubic yards of earth at an expense of $1,090.17, and that there was a balance due for sand removed of $517.23. *Held* that, from such evidence, it was practical to ascertain plaintiff's actual damages, and that the liquidated damage provision did not limit the extent of plaintiff's recovery.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 179–181, 183–187; Dec. Dig. § 85.*]

3. DAMAGES (§ 85*)—PENALTY—ELECTION.

Where a contract contains a penalty provision for breach, plaintiff has his election to sue for the penalty or for breach of contract, and, in the latter event, his damages are not limited to the penalty.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 179; Dec. Dig. § 85.*]

4. DAMAGES (§ 140*) — ALLOWANCE — DOUBLE DAMAGES.

Where defendant contracted to remove a certain amount of sand from plaintiff's block and pay a specified price per cubic yard, and in fact removed 4,388 cubic yards in excess of the quantity specified, a judgment requiring defendants to pay the contract price for the excess, and also to pay the cost of restoring to the lot an equal amount of filling, was erroneous for allowing double damages for the same item.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 140.*]

Appeal from Superior Court, City and County of San Francisco; M. C. Sloss and Geo. A. Sturtevant, Judges.

Action by Lucia H. K. Sherman against George F. Gray and another. Judgment for plaintiff, and, from an order denying defendants' motion for a new trial, they appeal. Affirmed.

Fisher Ames and Ames & Manning, for appellants. Myrick & Deering, for respondent.

KERRIGAN, J. This is an action for damages for breach of contract. Plaintiff owned a piece of land in San Francisco known as "block No. 39," bounded by Van Ness avenue, Polk street, North Point, and Bay street, and on February 21, 1901, entered into a contract with defendants, by the terms of which the defendants were to remove 7,000 cubic yards of surplus sand from said block and to pay therefor 6¼ cents per cubic yard. They were also to level and grade said block and streets to the official grade, and to cover the entire surface of said block and one-half the streets fronting thereon with clay to the depth of two inches, all of which was to be done on or before August 31, 1902, and without any expense to the plaintiff. It appears from the findings (which are supported by the evidence) that the defendants removed from the said block 11,388 cubic yards of sand, being 4,388 cubic yards in excess of the quantity specified in the contract; that they did not grade or level to the official grade the said block and streets, nor cover said block and one-half of said streets with clay to the depth of two inches or at all. The court further found that plaintiff, in order to bring her said land to the official grade and level, will be obliged to place thereon 4,388 cubic yards of earth, which will cost her the sum of $1,090.17; that the defendants have paid the plaintiff only $144.52 on account of the amount due to her for the sand removed from her said block, leaving a balance due thereon of $567.23. In accordance with these findings, a judgment was entered for the plaintiff for the sum of $1,657.47. The appeal is from that judgment and from an order denying defendants' motion for a new trial.

The contract contained the following provision: "For any violation of or default in the stipulations or covenants of either of the parties to this agreement, the defaulting party shall pay to the aggrieved party the sum of $1,000 as liquidated damages." The court below held this clause of the contract void under section 1670, Civ. Code, and awarded the plaintiff the actual damages. That section reads: "Every contract by which the amount of damages to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section." The next section (section 1671) is as follows: "The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damages sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage."

Defendants assert that there is no evidence whatever upon the question whether it was practicable or not to fix the actual damages suffered by the plaintiff, and that therefore the finding of the court that this provision of the contract is void cannot be sustained. If there was no evidence on the subject, still defendants' position cannot be maintained, for, under the sections just quoted, and under the decisions, the burden was upon the defendants to show by competent evidence that the clause of the contract arbitrarily fixing the damages was valid. This point was considered in Patent Brick Co. v. Moore, 75 Cal. 205, 209, 16 Pac. 890, where there was a stipulation in a building contract to pay the owner a specified amount as liquidated damages for each day's delay in completing the building. The court held that this provision in the contract was not of itself, in the absence of all other evidence on the subject, sufficient to sustain the clause. The court further said that while there might be contracts which from their very nature would warrant parties in anticipating and fixing damages to be recovered on a breach, yet, said the court, "It must always, it seems to us, be demonstrated by satisfactory evidence that the case is one where such liquidated damages may, under the statute, be contracted for and recovered." In Long Beach, etc., Dist. v. Dodge, 135 Cal. 401, 405, 67 Pac. 499, 501, it is said: "It is clearly incumbent upon the party seeking to recover upon such agreement (liquidated damage clause) to show by averment and proof that his case is within the exception." In Montana the law on this subject is in the same language as ours, and there, in Deuninck v. West G. I. Co., 28 Mont. 255, 72 Pac. 618, the court said: "If a suit be brought on a contract for the actual, and not the liquidated, damages, it is for the defendant to show the court by proper answer and competent proof that the contract for stated damages is valid."

But we think the findings complained of are supported by the evidence. An expert civil engineer, called on behalf of plaintiff, testified that it would take 4,388 cubic yards of earth to bring the block to the official grade established at the time the contract was made. Two other witnesses were called by the plaintiff, who for 41 and 25 years, respectively, had been engaged as contractors in grading and leveling blocks and streets, and they testified that it would cost a certain fixed sum per cubic yard to fill and grade the block, and another certain sum per cubic yard to cover the described area with clay. From the testimony of these witnesses it appears that it was not an impracticable, but, on the contrary, a simple, matter, to ascertain plaintiff's actual damages. This case in one respect is like Pacific Factor Co. v. Adler, 90 Cal. 110, 120, 27 Pac. 36, 38, 25 Am. St. Rep. 102, for, "when the plaintiff rested, the 'nature of the case' * * * was such that the court could decide as a fact that it was neither extremely difficult nor impracticable to fix the actual damage sustained by the plaintiff by reason of defendant's breach of the contract."

Defendants suggest that, "even if the provision as to liquidated damages be void as to the fixing of the amount of damages, it may still be of effect as setting the limit of damages." To sustain this position People v. Central Pacific Ry. Co., 76 Cal. 38, 39, 18 Pac. 90, 95, is cited, where the court said: "The statement of a penalty in a contract is of very little importance; its only consequence being to limit a recovery of actual damages, so that no more perhaps can be recovered than the sum named in the penalty." But in that case the question was not before the court whether the amount stated in the contract was the limit of the recovery, and what the court said in that regard was purely by way of dictum. Treating, however, the provision as a penalty, still the amount named would not be the limit of plaintiff's recovery. In Noyes v. Phillips, 60 N. Y. 408, there was an agreement for an exchange of land with this clause, "and the parties to these presents each agree to give a good and sufficient deed for their respective pieces of property on or about the 1st day of April, 1873, or forfeit the sum of $500," and defendants' counsel asked the court to charge that the jury could not under any circumstances go beyond the sum of $500, or that sum and interest from April 1, 1873. The court declined so to charge, and defendants' counsel excepted. The jury found a verdict for $1,000. Appellant contended that "the recovery could not exceed $500." The appellate court (Chief Justice Church) said as follows: "The second point is not tenable. It being a penalty and contained in an agreement inter parties, the plaintiff has his election to sue for the penalty or for a breach of the contract. In the latter event he is not limited in the amount of damages to the penalty"—and the judgment below was affirmed. This ruling was followed in Matter of Carter, 21 App. Div. 118, 123, 47 N. Y. Supp. 383. So, also, the Supreme Court of Florida, in Smith v. Newell, 37 Fla. 147, 20 South. 249, after discussing the question whether the sum was liquidated damages or penalty, says that, if the sum mentioned in the contract is construed to be merely a penalty, the plaintiff "must prove the actual damage that he has sustained, and he cannot in such a case recover any greater sum as damages than his proof shows him to have actually sustained in consequence of the breach of the contract. In such cases plaintiff is entitled to recover all such damages as he proves himself to have exactly sustained in consequence of the breach, whether they exceed the amount of the penalty mentioned in the contract or not. The amount of the penalty does not, in such cases, limit the amount of the recovery."

The court in its judgment required the defendants to pay the plaintiff 6¼ cents per cubic yard for the 4,388 cubic yards of sand removed, and at the same time compels them to pay what it will cost to restore to the lot this amount of sand, thus for the one item of injury giving to the plaintiff double damages.

The judgment is therefore hereby modified by deducting therefrom the sum of $274.25, the amount allowed for the 4,388 cubic yards of sand at 6¼ cents per cubic yard, and, thus modified, the judgment and order appealed from are affirmed; appellants to recover costs of this appeal.

We concur: COOPER, P. J.; HALL, J.

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11 Cal. App. 357

UNION ICE CO. et al. v. ROSE, City Justice of the Peace and Ex Officio Police Judge, et al. (Civ. 640.)

(Court of Appeal, Second District, California. Sept. 22, 1909. Rehearing Denied Oct. 22, 1909; Denied by Supreme Court Nov. 19, 1909.)

1. CRIMINAL LAW (§ 27*) — STATUTORY OFFENSE—"FELONY" OR "MISDEMEANOR."

The Cartwright act (St. 1907, p. 984, c. 530, § 1), defining "trusts," and providing that for a violation of the section any person engaged shall be punished by fine of not less than $50 nor more than $5,000, or be imprisoned not less than six months nor more than a year, or by both such fine and imprisonment, prescribes a "misdemeanor," since under Pen. Code, §§ 16, 17, a "felony" is a crime punishable by death or by imprisonment in the state prison, and every other crime is a "misdemeanor."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 29–31; Dec. Dig. § 27.*

For other definitions, see Words and Phrases, vol. 3, pp. 2736–2744; vol. 8, p. 7662; vol. 5, pp. 4533–4535; vol. 8, p. 7722.]

2. STATUTES (§ 92*)—SPECIAL LEGISLATION—CLASSIFICATION.

The power to classify, conferred by Const. art. 11, § 6, so far as cities are concerned, is not limited strictly to purposes of incorporation and organization.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 101; Dec. Dig. § 92.*]

3. STATUTES (§ 98*) — GENERAL OR SPECIAL LAW—POLICE COURTS—MISDEMEANORS.

Pol. Code, § 4426, gives police courts in cities exclusive jurisdiction of misdemeanors punishable by fine not exceeding $500 or by imprisonment not exceeding six months. St. 1901, p. 95, c. 81, § 2, creating police courts in cities of the 1½ class, gives such courts exclusive jurisdiction of all misdemeanors punishable by fine or imprisonment, or by both. Const. art. 6, § 1, provides that the judicial power of the state shall be vested in certain designated courts and such inferior courts as the Legislature may establish in any incorporated city, and section 13 empowers the Legislature to fix by law the jurisdiction of such inferior courts as may be established. Const. art. 4, § 25, provides that the Legislature shall not pass local or special laws regulating the jurisdiction of police judges. *Held*, that St. 1901, p. 95, c. 81, § 2, is not in conflict with Const. art. 4, § 25, since it is a general law applicable to all cities included in that class.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 110; Dec. Dig. § 98.*]

4. CRIMINAL LAW (§ 84*)—CITY COURTS—JURISDICTION—STATUTES.

St. 1901, p. 95, c. 81, § 2, creating police courts in cities of the 1½ class, and conferring on them jurisdiction of all misdemeanors, is a general law, and hence is repugnant to Pol. Code, § 4426, limiting such jurisdiction, and repeals it so far as it relates to courts in cities of the class named.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 84.*]

5. CRIMINAL LAW (§ 90*)—POLICE COURTS—JURISDICTION — MONOPOLIES—CARTWRIGHT LAW.

St. 1901, p. 97, c. 81, § 12, gives police courts of cities of the 1½ class exclusive jurisdiction in misdemeanors and is a general law. The Cartwright law (St. 1907, p. 984, c. 530), defining a "trust," and making a violation of the act a misdemeanor punishable by fine and imprisonment, or both, does not name a place of punishment. *Held*, that to sustain the jurisdiction of a police court, in a city of the class named the provision of St. 1901, p. 97, c. 81, § 12, prescribing that imprisonment for misdemeanors should be in the city jail, would be read into the Cartwright law.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 90.*]

Application by the Union Ice Company and others against H. H. Rose, City Justice of the Peace and Ex Officio Police Judge of Los Angeles, and others, for a writ of prohibition. Application denied.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Sidney J. Parsons, O'Melveny, Stevens & Millikin, Wm. J. Variel, J. N. O. Rech, and Gray, Barker & Bowen, for petitioners. U. S. Webb, Atty. Gen., George Beebe, Deputy Atty. Gen., J. D. Fredericks, Dist. Atty., and Frank W. Blair, Deputy Dist. Atty., for respondents.

SHAW, J. This is an application for a writ of prohibition to prevent the police court of the city of Los Angeles and H. H. Rose, a judge thereof, from proceeding further in the prosecution of an action of the people of the state of California against the petitioners upon a criminal charge of violating the provisions of an act of the Legislature of the state of California, approved March 23, 1907 (St. 1907, p. 984, c. 530), commonly known and designated as the "Cartwright Law."

Petitioners base their application upon two grounds: First, that the act in question fails to designate the offense described therein as a misdemeanor, and likewise fails to specify the place of confinement on conviction. Second, conceding the violation of the provisions of said act to constitute a misdemeanor only, the act of 1901, establishing the police court of Los Angeles, approved March 5, 1901, in so far as it attempts to confer jurisdiction upon said court, is unconstitutional. St. 1901, p. 95, c. 81. Section 1 of the Cartwright act defines a "trust," and declares every such trust to be unlawful, against public policy, and void. There is no express designation of the offense, and whether such violation of the acts prohibited constitutes a misdemeanor or a felony must be determined by reference to the punishment prescribed for a violation of its provisions. By section 4 of the act it is declared: "Any violation of either or all of the provisions of this act shall be and is hereby declared a conspiracy against trade, and any person who may become engaged in any such conspiracy or take part therein, or aid or advise in its commission, or who shall as principal, manager, director, agent, servant or employé, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, or furnish any information to assist in carrying out such purposes, or orders thereunder or in pursuance thereof, shall be punished by a fine of not less than fifty ($50) dollars nor more than five thousand ($5,000) dollars, or be imprisoned not less than six months nor more than one year, or by both such fine and imprisonment. Each day's violation of this provision shall constitute a separate offense." Under the provisions of this section the acts with which petitioners are charged with doing constitute a public offense or crime. Section 15, Pen. Code. By section 16 of the Penal Code, crimes are divided into two, and only two, classes: (1) Felonies; (2) misdemeanors. Section 17 of the Penal Code defines these two classes of crimes as follows: "A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime is a misdemeanor." The law does not define misdemeanors as those offenses punishable by fine or imprisonment in the county or city jail, but as those for which the penalty imposed, whatsoever it may be, is other than death or imprisonment in the state prison. The conclusion would therefore seem irresistible that, since the offense is clearly a crime for which a penalty is imposed, the punishment for which, however, is not that prescribed for a felony, it must necessarily and logically follow that it is a misdemeanor. As said in Pillsbury v. Brown, 47 Cal. 480: "A misdemeanor is an act or omission for which a punishment, other than death or imprisonment in the state prison, is denounced by law."

Conceding the offense designated to be a misdemeanor, petitioners, nevertheless, insist that the police court of cities of the 1½ class, to which the city of Los Angeles belongs, is without jurisdiction to try the case. This contention is based upon the claim that, while the right of the Legislature to create the court is unquestioned, the act of 1901, under which such court was established, in so far as it purports to confer upon the court exclusive jurisdiction of all misdemeanors committed in the city, is not only in conflict with section 4426, Pol. Code, but is an attempted exercise of power not warranted by the Constitution. Said section 4426, Pol. Code, provides that: "The police court has exclusive jurisdiction of the following public offenses committed within the city boundaries: * * * (3) Breaches of the peace, riots, affrays, committing willful injury to property, and all misdemeanors punishable by fine not exceeding five hundred dollars or by imprisonment not exceeding six months, or by both such fine and imprisonment." Under the provisions of this section, it would seem clear that the police court has not jurisdiction of misdemeanors committed under the Cartwright law, for the reason that such offenses are punishable by fines and imprisonment in excess of that over which such courts are thereby given jurisdiction. Section 2 of the act of 1901, creating police courts for cities of the 1½ class, provides: "Said police court shall have exclusive jurisdiction of all misdemeanors punishable by fine or by imprisonment, or by both such fine and imprisonment, committed in the city where such police court is held; and in all such cases to try and determine the same, convict or acquit, pass and enter judgment and carry such judgment into execution as the case may require, according to law." Say petitioners in their brief: "Obviously, if this statute is constitutional, the police court has jurisdiction in the present case." Section 1, art. 6, of the Constitution, provides that the judicial power of the state shall be vested in certain designated courts, "and such inferior courts as the Legislature may establish in any incorporated city or town, or city and county." Section 13 of the same article empowers the Legislature to fix by law the jurisdiction of any inferior courts which may be established in pursuance of section 1 thereof.

It is contended by petitioners that by section 4426, Pol. Code, the Legislature did, pursuant to section 13 of article 6, fix by law the jurisdiction of police courts throughout the state, and that the jurisdiction attempted to be conferred by section 2 of the said act of 1901 is contrary to the provisions of section 25, art. 4, of the Constitution, which provides: "The Legislature shall not pass local or special laws in any of the following enumerated cases; that is to say: First. Regulating the jurisdiction and duties of justices of the peace, police judges, and of constables." In our judgment, there is no merit in this contention. Section 2 of the act of 1901, whereby jurisdiction to try all misdemeanors committed in cities of the 1½ class is conferred upon police courts of such cities, is a general law applicable to police courts of all cities included in such classification. The power to classify conferred by section 6, art. 11, so far as cities are concerned, is not limited strictly to purposes of incorporation and organization. As said by the Supreme Court in Rauer v. Williams, 118 Cal. 401, 50 Pac. 691: "It is entirely too narrow a view to say that the power to classify cities conferred upon the Legislature in article 11, § 6, means the power to classify them only for the purpose of regulating their incorporation and organization." And quoting further from the same case: "The power to classify, which is thus conferred, would be meaningless unless the classifications made were to be employed by the Legislature for the purpose of supplying the general laws required by the varying needs of the municipalities so classified." In People v. Henshaw, 76 Cal. 436, 18 Pac. 413, the same court says: "That cities containing a large population require different legislation from those composed of a few hundred inhabitants, is evident. To so classify them that general laws applicable to these separate classes will meet the necessities of the case was a wise provision, and a law which applies to one or more, but not to all, of these cases, is not for that reason special legislation." To the same effect is Cody v. Murphey, 89 Cal. 522, 26 Pac. 1081.

Now, while a law which applies to one class only is not for that reason obnoxious as special legislation, nevertheless, to constitute it a general law sufficient reason must appear to justify such application. Rauer v. Williams, supra. With reference to section 2 of the act in question, the reasons for holding it a general law are both apparent and cogent. The Constitution (section 5, art. 6) provides that the superior court shall have jurisdiction of all cases of misdemeanor not otherwise provided for. It is thus left with the Legislature to provide inferior courts upon which it may confer jurisdiction in all cases of misdemeanor when the necessity therefor arises. The superior courts of one county might be sufficient to dispose of all the litigation, including all misdemeanors brought before it, while like courts of another county, by reason of the density of population, or owing to the volume of litigation, might afford wholly inadequate facilities for the disposal of business. Hence an exercise of the power vested in the Legislature is necessary to relieve the superior courts by conferring upon inferior courts jurisdiction to try either all or only part of the misdemeanors committed within their respective jurisdictions, as the exigencies of the case may demand. In Green v. Superior Court, 78 Cal. 556, 21 Pac. 307, 541, the court, in discussing a like contention urged against a law conferring jurisdiction upon a police court of San Francisco in cases of conspiracy which were punishable by fine of $1,000 and imprisonment for one year, said: "In counties like San Francisco, or other counties in which large cities are situated, where the superior court in all its departments is necessarily crowded with business, the necessity may exist for the transfer of misdemeanors and petty offenses to inferior courts, with a view of relieving the higher courts of the burden of trying the same, while in other counties no such necessity exists; and it may be for this very reason that the Constitution provides for the establishment of inferior courts in cities, towns, and cities and counties, and not generally throughout the state." It is apparent that in some cases, for the purpose of affording relief to the superior courts, inferior courts should be given exclusive jurisdiction over all misdemeanors; whereas, in other cases the superior courts are able to dispose of all or a part of such petty cases. See generally, as sustaining the foregoing view: Ex parte Halsted, 89 Cal. 471, 26 Pac. 961; Ex parte Mitchell, 120 Cal. 384, 52 Pac. 799. We therefore conclude that the act of 1901 creating police courts for cities of the 1½ class, in so far as it confers exclusive jurisdiction upon such courts in all cases of misdemeanor, is not subject to attack as special legislation, but that such provision is a general law which, by reason of its repugnancy to the provisions of section 4426, Pol. Code, repeals the latter so far as it applies to such courts in cities included within said classification.

While the Cartwright law provides for punishment of the offense designated by imprisonment, it does not specify the place of imprisonment. Inasmuch, however, as we hold the offense to be a misdemeanor as to which the police court has jurisdiction, we must, in the absence of other provision, look to the act of 1901 for a designation of the place of imprisonment. Section 12 of said act is as follows: "In all cases of imprisonment of persons convicted in said police court of any offense committed in the city, the person so to be imprisoned, or by ordinance required to labor, shall be imprisoned in the city jail, or, if required to labor, shall labor in the city." There appears to be no doubt that under this provision it is the duty of the police court to direct imprisonment in the city jail. Ex parte Henshaw, 73 Cal. 486, 15 Pac. 110.

So far as concerns the offense with which petitioners are charged, there is no merit in their contention that certain provisions of the act indicate that it was not the intent of the Legislature that the police court should have jurisdiction of the matter. The act not only provides for criminal prosecutions, but for civil actions in damages, for forfeitures, etc. The fact that section 5 of the act implies that criminal proceedings may be commenced by complaint, information, or indictment is unimportant. Section 1426, Pen. Code, requires all proceedings in the police court to be commenced by complaint, while section 888, Pen. Code, provides that all public offenses triable in the superior courts must be prosecuted by indictment or information. The fact that the Legislature by section 5 of the act not only specifies what shall constitute a sufficient statement of the offense in an information and indictment, but also what shall constitute a sufficient complaint in a prosecution, furnishes "internal evidence" that the Legislature recognized that the act designated a misdemeanor which in some jurisdictions was triable in the superior court, while in others it was triable in the police court.

For the foregoing reasons, the alternative writ heretofore issued is vacated and annulled, and the application for the writ of prohibition is denied.

We concur: ALLEN, P. J.; TAGGART, J.

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11 Cal. App. 325

WRIGHT & KIMBROUGH v. CARLY et al.

(Civ. 604.)

(Court of Appeal, Third District, California. Sept. 16, 1909.)

1. APPEAL AND ERROR (§ 843*)—MOOT QUESTIONS.

The life of the agreement appointing defendant to exercise powers of agency or trusteeship having expired pending the appeal from judgment for him in an action to restrain his further exercise of power, and for an accounting, on the ground that he had a mere terminable agency, the question whether there was a valid trust, or a mere agency, becomes moot, and unnecessary to determine.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331–3341; Dec. Dig. § 843.*]

2. ACTION (§ 38*)—JOINDER—COMPLAINT—CAUSES OF ACTION.

A complaint, which shows that plaintiff complains of the invasion by defendant of one primary right only, that he continues to manage and control and retain the rents and profits of plaintiff's property without its authority, and consequently without right, is not open to objection on the ground of stating more than one cause of action, though it sets out facts from which plaintiff would be entitled to several kinds of relief.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 38.*]

3. TRUSTS (§ 291*)—RIGHT TO ACCOUNTING—SUBROGATION TO RIGHT.

Though an agreement between the owners of property appointing one for a definite time to manage it, collect and distribute the rents thereof to them monthly, creates a trust revocable only according to its terms, a third person, to whom some of such owners convey their interests in the property, is subrogated to their rights under the agreement to receive rents and to have an accounting.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 291.*]

Appeal from Superior Court, Sacramento County; C. N. Post, Judge.

Action by Wright & Kimbrough against J. Clarence Carly and others. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

J. O. Prewett and Eugene Aram, for appellant. W. F. Renfro, White, Miller & McLaughlin, and Chauncey H. Dunn, for respondents.

HART, J. The court below sustained the demurrer of the defendants, Carly and Tate, to the first amended complaint, and, the plaintiff having declined to amend, judgment was entered in favor of said defendants. This appeal is by plaintiff from said judgment.

The facts which occasion this action are fully set out in the complaint and in a certain agreement between the defendants which is made a part of said complaint, and are, in substance, as follows: On the 8th day of December, 1905, the superior court in and for the county of Sacramento made and caused to be entered a decree distributing certain real property situated in the city of Sacramento, and described in the complaint, to Mrs. Minnie Zoe Crawford, Mrs. Amy Zella Sherman, and Harrison Tate, as the sole heirs and devisees of one J. D. Tate, deceased. The defendant Harrison Tate, at the time of the entry of said decree of distribution, was a minor, aged about 17 years, and the defendant J. Clarence Carly was "the duly appointed, qualified, and acting guardian of the estate of said minor." On the 8th day of October, 1905, an agreement was entered into between the said Crawford and Sherman, as parties of the first part, and said Carly, for said minor, as party of the second part, by the terms of which the estate of said J. D. Tate, deceased, was directed to be distributed to the devisees in the manner already stated, and said J. Clarence Carly named "as trustee, to hold, manage and control, for the use and benefit of the said parties of the first part herein, their respective interests in said estate until the said minor shall have attained the age of twenty-one years, which will occur on the 25th day of August, 1909; or, should said minor die before he attain the age of twenty-one years, then until such time as he would have attained the age of twenty-one years, had he lived, at which time this trust, herein created, shall absolutely terminate; provided, however, that, if all the devisees mentioned in said last will and testament should die before said minor would have attained the age of twenty-one years, then said trust shall terminate." It is further provided by said agreement that "it shall be the duty of the party of the second part" to collect all the rents and profits of said estate, make necessary repairs and improvements upon the property, pay all taxes and insurance on said property, and to "make and return an annual account to the superior court of the county of Sacramento, of all receipts and disbursements made by him during each and every year during his term of office." "Said trustee" is required, by the terms of the writing, to "furnish a monthly statement showing the receipts and disbursements of moneys collected by him during his term, as such trustee, to the said Mrs. Crawford and Mrs. Sherman, or to their attorneys," and to "pay over to each of the three heirs and devisees, herein named, the sum of one hundred dollars per month during his said term of office," if the net receipts justify such payments. If any moneys remain in his hands at the end of any year in excess of those required to meet necessary expenses and other stipulated expenditures, then "said trustee shall divide said surplus at the expiration of such year among the three devisees equally." The compensation which the agreement stipulates that Carly "shall receive for his services in managing the property is 6 per cent. of all moneys collected by him as such trustee."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The complaint alleges that on the 8th day of August, 1907, the defendants Crawford and Sherman "granted and conveyed to said plaintiff, by good and sufficient deeds, among other property, all of the hereinabove described real estate, together with the rents, issues, and profits thereof"; said deeds having been subsequently recorded in the office of the county recorder of Sacramento county. The complaint further alleges that the defendants Crawford and Sherman, on the 10th day of August, 1907, notified said Carly that they had conveyed said real estate, together with the rents, issues, and profits thereof, to plaintiff, and at the same time notified said Carly "that they and each of them revoked his right and authority to collect the rents and profits of said real estate and to manage the same, or to further act for them as agent of said real estate, and that his employment as agent to collect said rents, issues, and profits and to manage said real estate was revoked, annulled, and made void." It is alleged that on the same day the plaintiff served upon Carly a notice of similar import, and, further, "not to collect the said rents to which it was entitled, or any portion thereof, or to assume any charge or control over said property of said plaintiff, or to attempt in any manner to manage or control said real estate so owned by said plaintiff, and to refrain and cease collecting the rents thereof, or in any manner attempting or assuming any supervision over the same, with which demand said defendant, J. Clarence Carly, then and there refused, and ever since has and still does refuse to comply, and the said defendant J. Clarence Carly still claims the right to manage and control said real estate, and to collect the rents thereof, and still continues to do so, adversely and contrary to the rights of plaintiff." It is alleged: That the plaintiff "is now and has been ever since the 8th day of August, 1907, the sole owner in fee and seised of all of said hereinbefore described real property, together with the rents, issues, and profits thereof"; that said Carly has no interest "in relation to said real property," except the compensation stipulated in the agreement between the parties for collecting the rents and managing the property; that he "has no right, title, estate, lien, claim, or interest whatever, in law or equity, in or to said premises, * * * or any portion thereof; and that his claim for commissions under said agreement for collecting the said rents and managing said real estate is not coupled with any interest in said real estate, or any portion thereof."

Plaintiff avers: That, since it became the owner of the property described in the complaint, it has attempted without success to collect the rents, etc., accruing therefrom; the tenants of said property basing their refusal to pay over the same to plaintiff on the ground that said Carly claims to be entitled to collect said rents, etc., under and by virtue of the terms of the agreement referred to. That since said 8th day of August, 1907, Carly has collected a large amount of the rents, issues, and profits of said real estate, and that plaintiff has not received any part or portion thereof. That plaintiff has demanded of Carly that he pay to it all of the rents and profits belonging to it, so collected by said Carly, and that he cease collecting said rents and profits, but that Carly has failed and refused, and still continues to fail and refuse, to comply with said demand, and has refused to pay said rents to said plaintiff, or to account therefor, and still retains said rents belonging to said plaintiff, as aforesaid, in his possession." Plaintiff charges that Carly is still attempting to collect said rents and to manage said real estate, and that "it has never authorized said Carly to collect said rents or in any manner whatever manage or control said premises." Plaintiff further declares "that it is willing and able to pay to the said defendant, Carly, any and all sums of money, either for services, disbursements, or other purposes to which he may be legally entitled, and it further offers to pay to him any and all sums of money to which the court may decree that he may be legally entitled." The prayer of the complaint is for a decree: That no trust was created under and by virtue of the written agreement between the defendants; that the right of said Carly, under the terms of said agreement, to manage and control the property described in the complaint and to collect the rents, issues, and profits thereof, "has been terminated and extinguished"; that said agreement has been terminated; "that the object for which it was made has been entirely fulfilled and accomplished; that said defendant, Carly, be restrained and enjoined from further collecting said rents or attempting to manage said property or otherwise interfering with the rights of said plaintiff in connection with said real estate"; that the said Carly render an account of said rents collected by him in pursuance of said agreement; that he account and pay over to said plaintiff all the rents of said premises collected by him since the 8th day of August, 1907; that "the said defendants and each of them be enjoined and restrained from claiming any interest in said premises by virtue of the said agreement hereto attached, or in any manner acting, or proceeding to do anything whatsoever in relation to said real estate, under and by virtue of said agreement," etc.

From the agreement between the parties which, as seen, is made a part of the complaint, it appears that the defendant Harrison Tate reached his majority on the 25th of August, 1909, and that therefore the life of the agreement having then expired by virtue of its own terms, and no longer exists, the question as to the nature and effect of said agreement—whether there was established thereby a valid trust relating to the real property therein mentioned or a mere agency in Carly to manage the same and collect the rents, etc.—has become purely abstract and moot, and hence a construction by this court of the instrument unnecessary. Bradley v. Voorsanger, 143 Cal. 214, 76 Pac. 1031, and cases therein cited. The demurrer is both general and special. The special demurrer objects to the complaint on a number of different grounds, which may be summarized as follows: That the court is without jurisdiction of the subject of the action or of the persons of the defendants; that several causes of action have been improperly united; that several causes of action are set out but not separately stated; that plaintiff is without legal capacity to sue in this action; that the complaint is uncertain, ambiguous, and unintelligible in certain particulars specifically pointed out by the demurrer. The complaint, in our opinion, states a cause of action, and only one, and is therefore invulnerable as against the general demurrer. It follows, of course, that, if but one cause of action is set out in the complaint, the pleading cannot be obnoxious to the objection of the special demurrer that several causes of action are improperly united, and that several causes of action are pleaded without being separately stated. Nor is the complaint open to the criticism that its averments are ambiguous, or uncertain, or unintelligible. Neither do we perceive any reason upon which there may be founded the contention that the court is without jurisdiction of the subject of the action or of the persons of the defendants, or that plaintiff is without capacity to sue.

The pleading, by its averments, very clearly, we think, declares that the plaintiff became the purchaser of the real estate involved (the undivided one-third interest each of two of the three devisees named in the will of J. D. Tate, deceased); that Carly, having been appointed by said devisees an agent or trustee to manage said property and collect the rents accruing therefrom for a certain stipulated period, which had not expired at the time of the conveyance to plaintiff, claimed the right to exercise the full power vested in him by the agreement creating the agency or trust after plaintiff became the owner of the property; that plaintiff seeks to have the instrument investing Carly with such power over the property revoked and the so-called "trust" terminated; that it is entitled to an accounting of the moneys received by Carly as rents and issues flowing from the property after its transfer to plaintiff, and asks that said Carly be enjoined from further exercising any power, management, or control over said property described in the complaint. It is at once to be observed, from these averments, that the plaintiff complains of the invasion or violation by one of the demurring defendants of one primary right only, to wit: That Carly continues to manage and control and retain the rents and profits of property of which the plaintiff is the owner without its authority, and consequently without right. Therefore but one cause of action is stated. It is true that plaintiff, in the statement of said cause of action, sets out facts from which it would be entitled to several different kinds of relief; but, obviously, this cannot be made the ground of an objection to a pleading the averments of which, as here, justify the granting of any one or all the several kinds of relief asked for. Indeed, the central purpose of the reformed procedure is to authorize the awarding in one action of any kind of relief to which a party may be entitled under the facts pleaded and characterizing the transaction out of which the action has grown, and thus avoid running afoul of that other rule against a multiplicity of suits involving the same cause of action.

Assuming, but by no means conceding, that the effect of the instrument of agreement between the defendants was to establish a valid trust which could not be revoked or terminated except by virtue of its own terms, or until its objects had been entirely accomplished, we do not think that counsel for the respondents would for a moment undertake to deny the right of Crawford and Sherman to sell and convey their interests in the real estate which is the subject of such trust. This proposition is so manifestly true that authorities need not be cited in its support; nor will the proposition be disputed that the party to whom their interests in said property have been transferred is, upon such transfer, immediately subrogated to all the rights to which the grantors or cestuis que trust were entitled under the terms and provisions of the trust. Therefore, when the plaintiff became the owner by purchase of so much of the real estate to which the so-called "trust" relates as was owned by two of the beneficiaries under the trust, it was entitled, from the time of the transfer, to receive the proportion of the rents, issues, and profits accruing from the property to which the grantors would have been entitled had they retained the interests in the trust property which they sold and conveyed to the plaintiff. Carly having refused to turn over the rents to plaintiff, the latter is therefore entitled to an accounting of all the moneys received by said Carly from the property which it purchased from Crawford and Sherman, and we think the complaint clearly discloses by its averments that plaintiff is at least entitled to relief to that extent.

The complaint, as we have seen, alleges: That the plaintiff, as well as its grantors, notified Carly of the transfer; that the plaintiff thereafter demanded of Carly the rents collected by him from tenants of the property of which it had become the owner, and demanded of Carly that he render to it an account of all the rents and profits which he had collected and received from said property; that Carly refused either to pay over to plaintiff any of the moneys collected by him as rents, or to render a statement or an account of the moneys so received by him. Under the terms of the agreement (Carly's sole authority for collecting the rents) it was his duty to pay over to each of the parties of the first part thereto a certain specified sum of money each month, and this, the complaint alleges, he failed and refused to do, so far as plaintiff, the successor in interest to Crawford and Sherman, was concerned. We entertain no doubt that the facts pleaded in the complaint state a good cause of action for at least an accounting, even if it be assumed that the other reliefs demanded could not be awarded under the allegations of the complaint, and that the order sustaining the demurrer was erroneous.

The judgment is reversed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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11 Cal. App. 333

PEOPLE v. KNOBLOCK et al. (Cr. 170.)

(Court of Appeal, First District, California. Sept. 17, 1909. Rehearing Denied by Supreme Court Nov. 15, 1909.)

1. CRIMINAL LAW (§ 1090*)—DEMURRER TO INDICTMENT—REVIEW—BILL OF EXCEPTIONS.

An order sustaining a demurrer to an indictment can only be reviewed on bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1090.*]

2. CRIMINAL LAW (§ 304*)—EVIDENCE—JUDICIAL NOTICE—JUDICIARY.

Under Code Civ. Proc. § 1875, requiring courts to take notice of the accession to office of the principal officers of government, the appellate court will take notice that a judge of the superior court, whose signature was attached to a bill of exceptions, was not a judge of that court on the date when the order sought to be reviewed was entered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 712; Dec. Dig. § 304.*]

3. CRIMINAL LAW (§ 1092*) — APPEAL — BILL OF EXCEPTIONS — SIGNING — AUTHORITY OF SUCCEEDING JUDGE.

Under Pen. Code, § 1174, providing that a bill of exceptions shall be settled by the trial judge, or, if he refuses to settle, the party may apply to the Supreme Court to prove the same, a bill could not be settled by the successor in office of the judge by whom the order sought to be reviewed was made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2837; Dec. Dig. § 1092.*]

4. CRIMINAL LAW (§ 1092*)—APPEAL—BILL OF EXCEPTIONS—IMPROPER SETTLEMENT.

A bill of exceptions settled by the successor in office of the judge making the ruling cannot be considered on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2837; Dec. Dig. § 1092.*]

Appeal from Superior Court, City and County of San Francisco; Carroll Cook, Judge.

A. J. Knoblock and another were indicted for obtaining money by false pretenses, and, from an order and judgment sustaining demurrers to the indictment, the People appeal. Affirmed.

U. S. Webb, Atty. Gen., for the People. Frank J. Murphy, for respondent Knoblock. Hiram W. Johnson, for respondent Grossman.

HALL, J. This is an appeal by the people from an order and judgment sustaining the demurrers of defendants to an indictment for obtaining money by false pretenses. The transcript filed in this court contains what purports to be the judgment roll and a bill of exceptions, settled on the 21st day of January, 1909, by George W. Cabaniss, judge of the superior court.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Respondents make the point that the transcript contains no legal record, and for this reason ask that the order and judgment be affirmed. It is insisted that the only way in which a review of the action of the trial court in sustaining a demurrer in a criminal case can be had is upon a bill of exceptions. This is the rule laid down in People v. Long, 121 Cal. 494, 53 Pac. 1097, and which this court is obliged to follow. People v. Druffel, 3 Cal. App. 731, 86 Pac. 907.

It is next urged that the purported bill of exceptions set forth in the transcript appears to have been settled by a judge other than the judge who made the ruling now sought to be reviewed, and for that reason cannot be considered. Before taking up the discussion of the law as to who must settle the bill of exceptions, appellant urges: That the record does not disclose that the order sustaining the demurrer was made by one judge and the bill of exceptions settled by another. Upon this point the purported bill of exceptions shows that the demurrers came on to be heard before the Honorable Carroll Cook, as judge of the superior court, and were denied and overruled on the 22d day of August, 1908; that thereafter the court set this order aside, and the demurrers were reargued, and the matter was continued from day to day by the court until the 2d day of January, 1909, when the court entered an order sustaining the demurrers of said defendants. While the record does not state that Judge Cook was presiding when this order was entered, we know that Judge George W. Cabaniss, who settled the bill of exceptions, could not have presided at that time, for he did not take office until the first Monday in January of the present year, which was January 4th. We are obliged to take notice of "the accession to office and the official signatures and seals of office of the principal officers of government in the legislative, executive, and judicial departments of this state and of the United States." Code Civ. Proc. § 1875.

That a superior judge is a principal officer of the judicial department of this state cannot, we think, be doubted, and as such the accession to office as well as the official signature of such superior judge must be taken judicial notice of by all the courts of this state. We thus have judicial knowledge of the fact that the judge whose official signature is attached to the order settling the bill of exceptions, January 21, 1909, was not a judge of any superior court on the 2d day of January, 1909, when the order sought to be reviewed in this proceeding was made and entered.

There is no provision in the law authorizing the successor in office of the trial judge to settle a bill of exceptions in a criminal case as to rulings made by the trial judge. Section 1174 of the Penal Code requires such bill of exceptions to be settled by the trial judge, or, if he refuses to settle the bill of exceptions according to the facts the party seeking the settlement may apply to the Supreme Court to prove the same, "and the bill when proven must be certified by the Chief Justice as correct, and filed with the clerk of the court in which the action was tried, and when so filed it has the same force and effect as if settled by the judge who tried the case. If the judge who presided at the trial ceases to hold office before the bill is tendered or settled, he may nevertheless settle such bill, or the party may, as provided in this section, apply to the Supreme Court to prove the same." The provisions of the statute were not followed in this case. The bill of exceptions was settled by a judge who had no power so to do.

It may well be said that the method of proving the bill of exceptions before the appellate tribunal is inconvenient and cumbersome, and that a wiser and more convenient method could be devised. The Legislature seems to have recognized this in providing for the settlement of bills of exceptions in civil actions, for while the provisions of the Code of Civil Procedure (sections 652 and 653) as originally enacted in 1872 were substantially identical with section 1174 of the Penal Code, the Legislature in the session of 1875–76 amended the law (St. 1875–76, p. 93, c. 505) so that in such cases as the present bills of exceptions in civil cases may be settled in such manner as the Supreme Court in its rules may provide. The propriety, however, of making the procedure in criminal cases correspond to the procedure in civil cases is for the Legislature, and not for the courts.

In this case, as the bill of exceptions was not settled by an officer with power so to do, it cannot be considered by this court. We are therefore obliged to affirm the order and judgment appealed from for want of any legal record from which we can determine whether or not the court erred in its ruling. People v. Long, 121 Cal. 494, 53 Pac. 1097.

The order and judgment are affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

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156 Cal. 439

SHULTZ et al. v. REDONDO IMPROVEMENT CO. et al. (L. A. 2,288.)

(Supreme Court of California. Nov. 4, 1909.)

1. Appeal and Error (§ 843*) — Questions Reviewable—Immaterial Questions.

Where the court found for plaintiff on two grounds, and the finding on one ground justified the judgment, the question whether the other ground was sufficient need not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3338; Dec. Dig. § 843.*]

2. Vendor and Purchaser (§ 341*)—Option Contract — Fraudulent Representations —Evidence—"Alley."

Where, in an action for the compensation paid for options to purchase real estate on the ground that plaintiff was induced by misrepresentations to accept the options and pay the consideration, the evidence showed that defendant represented to plaintiff that the premises were bounded by alleys, that plaintiff understood that the alleys were public alleys, that the representations were false because there was but the unexecuted intention to make the land private alleys, a finding that defendant falsely represented that the premises were bounded by public alleys was justified; the word "alley," when used without qualification and applied to subdivision of land into lots, ordinarily meaning a public alley.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 341.*

For other definitions, see Words and Phrases, vol. 1, pp. 341–343; vol. 8, p. 7573.]

3. Dedication (§ 19*)—Private Alleys.

Where the owner of land sold a lot according to a map which showed, adjoining the lot sold, two narrow strips marked "lot A" and "lot C," the unexecuted intention of the owner to make these strips private alleys for the use of the purchasers of lots does not constitute a dedication of the strips as private alleys.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 35, 37–47; Dec. Dig. § 19.*

For other definitions, see Words and Phrases, vol. 2, pp. 1908–1918; vol. 8, pp. 7629, 7630.]

4. Vendor and Purchaser (§ 34*)—Validity of Contract—Misrepresentations—Materiality.

A false representation by a vendor that the premises are bounded by public alleys is a material one, where the evidence shows that the existence of public alleys would increase the value of the premises to the extent of one-half.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 39; Dec. Dig. § 34.*]

In Bank. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by James Shultz and another against the Redondo Improvement Company and another. From a judgment for plaintiffs and from an order denying a new trial, defendants appeal. Affirmed.

Gibson, Trask, Dunn & Crutcher, for appellants. Gray, Barker & Bowen, for respondents.

SHAW, J. The plaintiffs sued to recover the sum of $5,825.25 paid by them to the Redondo Improvement Company as the consideration for two options to purchase a tract of land belonging to said company. The judgment was in favor of the plaintiffs. The defendants appeal from the judgment and from an order denying their motion for a new trial.

The first contract was executed on July 10, 1905. It stated that the Redondo Improvement Company thereby granted to the plaintiffs, in consideration of $5,443.75, then paid, the option to purchase at any time within six months the lot in question, at the price of $16,344.65. This price was to be paid, if the option was accepted, by applying thereon the amount paid as a consideration for the option, and by paying a like amount six months from the date of the option, and a third like amount at a period not named; the last payment to be secured by mortgage on the property. If the option was not accepted, the consideration paid therefor was to be retained by the seller as the consideration for granting the option. The second option was similar in form, except that it was dated January 10, 1906, six months after the first option, that the consideration was $381.50, and that it should be exercised within six months from its date, and that the price was $11,282.40. The $381.50 paid as the consideration of this option was the interest which had then accrued upon the unpaid portion of the price expressed in the first option. The price named in the second option, it will be observed, was made up of the $381.50 accrued interest and the two payments of $5,443.75 each, constituting the unpaid portion of the price named in the first option. It is quite obvious that the second option was, in effect, a mere renewal or extension of the first option, and that the $5,443.75, paid as the consideration for the first option was understood to be a part of the price for the sale of the lots.

The grounds upon which the plaintiffs claim the right to recover the consideration paid for the options are two: First, that the agreements are illegal because the tract to be sold was a part of a subdivision of lots intended for sale, and that at the time of the execution of the options the map of the subdivision had not been recorded or officially approved, as required by the statutes of 1893 and 1901 (St. 1893, p. 96, c. 80; St. 1901, p. 288, c. 124); second, that the plaintiffs were induced to accept the options and pay the considerations therefor by material false representations made to them by the defendants to induce plaintiffs to enter into the contracts and pay the money. A large part of the briefs of counsel is devoted to the discussion of the first-mentioned ground, and of the validity and effect of the statutes referred to, as applied to the particular map in question. We do not find it necessary to take up this branch of the case. The court found in favor of the plaintiffs on both grounds, and it is clear that the findings upon the second ground above stated are sufficient to support the judgment. In that event it is immaterial whether the first ground is well taken or not.

The first contract described the property as "lot 5," block 216 of Redondo Beach town-site, as per map recorded at page 1, book 39, miscellaneous records of Los Angeles county. The statement that the map recorded at page 1, book 39, showed any lot 5 or block 216 was erroneous. The map of Redondo Beach town-site was recorded on April 21, 1889. It did not show any block 216. The block now designated as 216 was shown thereon as an irregular shaped tract, some 640 feet long and from 83 to 227 feet wide, and it was not numbered, lettered, or designated upon that map in any way except by boundary lines. A map was exhibited to the plaintiffs by the defendants at the time this option was made, showing a subdivision of this tract into 23 lots, designating the tract as block 216 of the town-site of Redondo Beach, and stating that the Redondo Improvement Company had caused it to be surveyed and platted. Upon this map lot 5 was shown as a lot 50 feet wide extending across the block about midway thereof, with a narrow strip some 20 feet wide, in appearance like an alley, bounding it on the west end, and a similar narrow lot bounding it on the south side, marked, respectively, as "lot A" and "lot C." This map was recorded on August 5, 1905, in book 7 of maps, at page 150. The second option, which was executed after the recording of this map, described the property as "lot 5, block 216, of Redondo Beach townsite, as per map recorded in book 7 of maps, page 150." The first contract, if taken alone and without aid from the unrecorded map then exhibited to the plaintiffs, would be void because of the uncertainty in the description; the map therein referred to containing no block or lot answering the description there given. The court found that it was uncertain for this reason. It may be conceded that, if the map subsequently recorded was taken into consideration, the uncertainty might have been removed, and that, perhaps, it would not be fatal to the validity of the contract; but, in view of the ground upon which we hold the judgment is supported, it is not necessary to consider this question.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The court made its findings: That, at the time of the execution of the first option, the defendants falsely represented to the plaintiffs that lot 5 was bounded in the rear by an alley; that a public alley also extended along the entire length of one side of the lot; that plaintiffs believed the said representations to be true and did not discover the contrary until June 12, 1906; that because of such belief they were induced to pay the sum of $5,443.75 for the first option and the further sum of $381.50 for the second option; that the said representations were false; and that there were in fact no alleys bounding said lot. Each plaintiff testified that the defendant Ainsworth, who was acting for his codefendant in the transaction, made the representations substantially as the court found they had been made. It was not claimed that there was any public alley adjoining or bounding the lot. Ainsworth testified that the two strips of land bounding the lot were marked respectively "lot A" and "lot C" in order to withhold them from dedication as public alleys, and that it was the intention to make them private alleys for the use of the purchasers of lots in the subdivision. There was no evidence that any instrument making such dedication had even been executed, nor is it claimed that any such dedication has been in fact made. An unexecuted intention of this character would not be sufficient to constitute a dedication of these strips of land as private alleys or ways. The evidence is ample to show that plaintiffs were justified in understanding the statements of Ainsworth to mean that the strips in question were public alleys. The word "alley," when used without qualification and applied to a map or subdivision of land into lots which are offered for sale, ordinarily means a public alley. The testimony of the plaintiffs is that they so understood it in this case, and that their action was induced by that understanding. There is no merit in the contention that the presence of a public alley would not materially enhance the value of the lot. The evidence was to the effect that it would increase its value to the extent of one-half. The representation was clearly material.

The judgment and order are affirmed.

We concur: HENSHAW, J.; ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.

156 Cal. 434

GRIERSON v. GRIERSON. (S. F. 5,125.)

(Supreme Court of California. Nov. 2, 1909.)

1. Divorce (§ 93*)—Desertion—Complaint.

A complaint, in an action for divorce for desertion, which alleges that on or about a designated date defendant "willfully and without cause deserted and abandoned plaintiff, and has continued to live separate and apart from plaintiff against her will and without her consent," sufficiently alleges continuance of the desertion to the time of the filing of the complaint, as against a demurrer without an allegation that the desertion lasted longer than the reasonable period mentioned in Civ. Code, § 124.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 303; Dec. Dig. § 93.*]

2. Divorce (§ 93*)—Desertion—Complaint.

The complaint also sufficiently charged that defendant remained away from plaintiff without sufficient cause, because the words "willfully and without cause" modify the words "has continued to live," as well as the words "deserted and abandoned."

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 303; Dec. Dig. § 93.*]

3. Divorce (§ 27*)—Desertion—Acts Constituting.

It is not necessary that the husband should entertain, in connection with his acts of cruelty, any settled purpose to drive his wife from him, but it is enough where such is the natural consequence of his acts.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 62–83; Dec. Dig. § 27.*]

4. Divorce (§ 93*)—Grounds—Habitual Intemperance—Extreme Cruelty.

Habitual intemperance and extreme cruelty are separate grounds of divorce, and the pleading of instances of voluntary intoxication, in connection with other matters, as constituting acts of cruelty cannot, in the absence of a finding of cruelty, be regarded as a sufficient allegation of a cause of action for habitual intemperance.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 297; Dec. Dig. § 93.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

5. DIVORCE (§ 93*) — GROUNDS — EXTREME CRUELTY—COMPLAINT.

A complaint, in an action for divorce on the ground of extreme cruelty, which contains allegations of excessive drinking of liquor, coupled with other acts which, in themselves, amount to extreme cruelty, states a cause of action for extreme cruelty.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 300; Dec. Dig. § 93.*]

6. DIVORCE (§ 93*)—EXTREME CRUELTY—COMPLAINT—IMMATERIAL ALLEGATIONS.

The allegation in the complaint, in an action by a wife for divorce on the ground of extreme cruelty, that defendant is a highly nervous and excitable man is immaterial; for all men, whether nervous or otherwise, must treat their wives decently.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 300; Dec. Dig. § 93.*]

Department 2. Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

Action by Carrie Forrest Grierson against James Louis Grierson. From an interlocutory judgment of divorce, and from an order denying a new trial, defendant appeals. Affirmed.

Julian H. Biddle, for appellant. Will M. Beggs, for respondent.

MELVIN, J. This is defendant's appeal from an interlocutory judgment of divorce, and from the order denying the motion for a new trial. The judgment was in favor of plaintiff upon two causes of action, the first for desertion and the second for extreme cruelty. Appellant urges as grounds for reversal, first, that the demurrer was improperly overruled; second, that the findings are not supported by the evidence. The first cause of action is briefly, but we think fully, stated. The gist of it is in the following language: "That on or about the 1st day of July, A. D. 1904, the said defendant, disregarding the solemnity of his marriage vow willfully and without cause, deserted and abandoned plaintiff, and has continued to live separate and apart from plaintiff, against her will, and without her consent." We find no merit in the theory that the pleading fails to assert how long the desertion continued. The language quoted means, when fairly interpreted, that the desertion, dating from about July 1, 1904, continued to the time of the filing of the complaint. It can mean nothing else, and would be given no additional force if words had been appended to the effect that the desertion lasted longer than the reasonable period mentioned in section 124 of the Civil Code. Nor was it necessary that the pleading should contain an added averment that in the abandonment of the plaintiff defendant remained away from her without sufficient cause, because the words "willfully and without cause" in the quoted paragraph of the complaint clearly modify the words "has continued to live" as well as the verbs "deserted" and "abandoned."

Appellant's counsel cites McVickar v. McVickar, 46 N. J. Eq. 490, 19 Atl. 249, 19 Am. St. Rep. 437, to support the view, which he apparently holds, that unless a defendant's acts of cruelty show an intention upon his part to drive his wife from the home, he may cure the results of a milder degree of cruelty, although it was sufficient to send her into temporary exile, by urging her to return to him. There is an expression in the closing paragraph of the learned vice chancellor's opinion in that case which, at first glance, might be taken as a statement of such a rule. Closer examination of the case, however, will bring to mind the fact that the writer of the opinion was discussing the duty of the offending party in seeking reconciliation, if he would escape the conclusion that his wife lived separate and apart from him by his own desire. There is nothing in that opinion, however, which supports the theory that the wife must in every case accept the advances of her husband. But, even if there were such a rule, it would have no application here, for the court below found in this case that the husband's conduct amounted to desertion, and, as was said, in McVickar v. McVickar, supra, it is not necessary "that the husband should entertain, in connection with his acts of cruelty, any settled purpose to drive his wife from him. It is enough if such is the natural consequence of his acts." The court having found, in effect, that his cruelty was (to quote again from McVickar v. McVickar) of such "intensity as to amount to desertion," it is unnecessary for us further to discuss the rule which seems to exist in New Jersey when the cruelty justifies merely temporary absence on the part of the wife.

There was a demurrer to the second count of the complaint on the ground that two causes of action, one for habitual intemperance, and the other for extreme cruelty, are improperly united. Haskell v. Haskell, 54 Cal. 263, is cited in the brief to support the statement that "intemperance cannot be pleaded to support cruelty." Such is not the doctrine of that case. It was there held that "habitual intemperance" and "extreme cruelty" are separate grounds of divorce, and that the pleading of certain instances of voluntary intoxication in connection with other matters as constituting acts of cruelty cannot, in the absence of a finding of cruelty by the court of trial, be regarded as a sufficient allegation of a cause of action for habitual intemperance. The second count contains allegations of excessive drinking of liquor, coupled with other acts which, in themselves, would amount to extreme cruelty. Delatour v. Mackay, 139 Cal. 621, 73 Pac. 454. This part of the complaint is obviously drawn with the design of charging, and we think it does clearly allege, a cause of action for extreme cruelty. The demurrer to the second count was properly overruled.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The findings that on various occasions defendant spoke harshly to plaintiff, and that plaintiff believed her life to be in danger, are sufficiently sustained by the testimony of plaintiff supported by that of her brother-in-law. The force of the latter's corroboration is not broken in the least by his testimony: "Personally I have never seen him (defendant) in a mood to hurt any one." This statement immediately following the declaration that the witness had never seen the appellant with a deadly weapon obviously meant that Mr. Downing had never seen Grierson ready to perform any act of personal violence; but that the latter did speak harshly to his wife, and that Mrs. Grierson was afraid of him, are facts that may be derived from the testimony of both witnesses.

Appellant's counsel calls our attention to the omission of the superior court to find on paragraph 6 of the complaint. That paragraph is as follows: "That the defendant is a highly nervous and excitable man, frequently drinks, and when in that condition is dangerous. Said defendant has so frequently threatened to kill plaintiff and the said child that plaintiff is afraid that he will carry said threat into execution." The court specifically found that it was not true that defendant threatened to kill his wife or child, and this is, of course, a finding adverse to the allegation that she was afraid he would carry said threat into execution. Obviously plaintiff could not be afraid that an unuttered threat would be executed. The court found in accordance with nearly all of the substantial allegations of a preceding paragraph of the complaint "that frequently * * * the defendant would become intoxicated, and would reel around the yard and house so that neighbors and strangers could see his condition," and "that on many occasions the defendant, while intoxicated, would lie down in the house with his pipe in his mouth, and while the pipe was lit and full of live coals, the defendant would go to sleep, thereby endangering plaintiff's life, and the home and property of the parties hereto." These findings seem to cover all the other allegations of paragraph 6 except, perhaps, the one that "defendant is a highly nervous and excitable man," and that, we think, was an immaterial allegation. The obligation is upon all men, whether they be nervous, phlegmatic, excitable, or habitually calm to treat their wives decently. While courts might, in some cases, be inclined to show more charity towards nervous, excitable men than towards others less mercurial of temperament, we think that these characteristics, when alleged as in this complaint, would neither intensify nor excuse the defendant's acts.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

156 Cal. 416

PASS SCHOOL DIST. OF LOS ANGELES COUNTY v. HOLLYWOOD CITY SCHOOL DIST. OF LOS ANGELES COUNTY. (L. A. 2,296.)

(Supreme Court of California. Nov. 1, 1909. Rehearing Denied Dec. 1, 1909.)

1. Schools and School Districts (§ 32*)—Nature—Division, Change or Abolition—Power of Legislature.

School districts of California, being public quasi municipal corporations, subject to constitutional limitations, the power of the Legislature over them is plenary, and it may divide, change, or abolish them at pleasure.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 54; Dec. Dig. § 32.*]

2. Schools and School Districts (§ 41*)—Alteration of Boundary — Effect on Property Rights.

By the annexation of land belonging to a school district to a city and a city school district, which by virtue of Pol. Code, § 1576, sprang at the same time into existence, the power of the first-named district to use the property for school purposes ended, and the legal title passed to the trustees of the new district, since under section 1617 the management and control of school property within their districts is vested in the trustees of the district.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 72; Dec. Dig. § 41.*]

3. Schools and School Districts (§ 41*)—Division—Property—Debts.

While the Legislature may provide for the division of the property of a school district and the apportionment of the debts of the old corporation, when a portion of its territory and public property are transferred to the jurisdiction of another corporation, in the absence of such provision, the common-law rule obtains which leaves the property where it is found, and the debt on the original debtor.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 72; Dec. Dig. § 41.*]

4. Constitutional Law (§ 278*)—Due Process of Law—Division of School District—Transfer of Property.

The division of a school district by the Legislature and the transfer of part of the property to a new district is not a taking of property without due process of law; the state being the beneficial owner, and the transfer amounting merely to the naming of new trustees.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 278.*]

Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by the Pass School District of Los Angeles County against the Hollywood City School District of Los Angeles County. From a judgment for defendant, and from an order denying a new trial, plaintiff appeals. Affirmed.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

W. Cole, for appellant. Robert Young, for respondent.

HENSHAW, J. This action was brought to quiet title to a piece of land and the schoolhouse thereon formerly within the limits of plaintiff school district and used by the district for public school purposes. Judgment passed for defendant school district, and from that judgment and from the order denying its motion for a new trial plaintiff appeals.

The facts are stipulated, subject, as to some of them, to objections touching their admissibility. From these facts it appears that plaintiff for many years past has been and still is a school district of Los Angeles county. In 1889 the real property in controversy was deeded to the trustees of plaintiff "to be used as a schoolhouse, lot, and grounds." For such purposes plaintiff held and used the property until in November, 1903, when the city of Hollywood was incorporated, with which incorporation came into existence the Hollywood City School District, defendant herein. The school property in question was included, on the incorporation of the city of Hollywood and the organization of the Hollywood City School District, within the corporate limits of the latter, and is still included therein. The remaining portion of the Pass School District, not within the corporate limits of the city of Hollywood, continued as a school district under the name of the Pass School District. No petition has been filed on behalf of the existing Pass School District for annexation to the Hollywood City School District, as provided by section 1576 of the Political Code. The question presented may be thus stated: What, under the indicated circumstances, is the disposision made by the law of the real property of such corporation owned and used for the corporate purposes when, by a change in the boundaries, that property falls within the territorial limits of a new corporation organized for identical purposes? Or, wording it differently, did the title, dominion, power, and control over the land in controversy pass to the Hollywood City School District, or did they remain where formerly they had been, with the Pass School District? So far as this state is concerned, this question would seem to have been conclusively answered in favor of respondent by such cases as Los Angeles County v. Orange County, 97 Cal. 329, 32 Pac. 316, Johnson v. City of San Diego, 109 Cal. 468, 42 Pac. 249, 30 L. R. A. 178, and Vernon School Dist. v. Board of Education, 125 Cal. 593, 58 Pac. 175. The last case is directly in point. It was an action brought to quiet title by the Vernon School District to lands used for public school purposes originally within the territorial limits of the district, but subsequently, by annexation, falling within the corporate limits of the city of Los Angeles. It is there said that, "in the absence of statutory provisions governing the ownership of municipal property, upon the division of a municipality, municipal property consisting of real estate belongs to the municipality within which it is located by the division." The judgment of the trial court so decreeing was upheld. But appellant argues that this decision should be reconsidered; that it does violence to its constitutional rights in depriving it of property without due process of law; that it works great injustice; and that it is contrary to the law as laid down in the best-considered cases. Because of the earnestness with which these pleas are advanced, and of the brevity with which the subject was treated in the Vernon Case, more amplified discussion of the question may not be amiss.

School districts of this state are public quasi municipal corporations. Hughes v. Ewing, 93 Cal. 414, 28 Pac. 1067; Kennedy v. Miller, 97 Cal. 429, 32 Pac. 558. Subject to such constitutional limitations as may exist, the power of the Legislature over these public municipal corporations is plenary. It may divide, change, or abolish them at pleasure. Hughes v. Ewing, supra; Bay View School District v. Linscott, 99 Cal. 27, 33 Pac. 781; 1 Dill. Mun. Corp. p. 54. By the legal annexation of the land in controversy to the city of Hollywood and the Hollywood City School District (which latter, by virtue of section 1576, Pol. Code, sprang at the same time into existence), the power of the Pass School District to use this property for school purposes undoubtedly came to an end; for, by section 1617 of the Political Code, the management and control of school property within their districts is vested in the trustees of the district. This proposition, as we understand it, appellant does not dispute. But it contends that title to this property still remained in the plaintiff district, with the correlative rights of leasing or selling the same.

The legislative power being full and complete over the matter as a part of that power, it may make provision for the division of the property and the apportionment of the debts of the old corporation, when a portion of its territory and public property are transferred to the jurisdiction of another corporation. But, in the absence of such provision, the rule of the common law obtains, and that rule leaves the property where it is found, and the debt upon the original debtor. Johnson v. San Diego, 109 Cal. 477, 42 Pac. 249, 30 L. R. A. 178; Board of School Directors v. Ashland, 58 N. W. 377, 87 Wis. 533. Such is the declaration in the Vernon Case, in the cases of Bay View School District v. Linscott, 99 Cal. 27, 33 Pac. 781, of the Supreme Court of the United States in Laramie v. County of Albany, 93 U. S. 307, 23 L. Ed. 552, Mountpleasant v. Beckwith, 100 U. S. 535, 29 L. Ed. 699, McGovern v. Fairchild, 2 Wash. St. 479, 27 Pac. 173, Board of Education v. Board of Education, 30 W. Va. 424, 4 S. E. 640, 20 Am. & Eng. Corp. Cas. 11, Allen v. School Town of Macey, 109 Ind. 559, 10 N. E. 578, New Point, etc., v. School Town of New Point, 138 Ind. 141, 37 N. E. 650, Prescott v. Town of Lenox, 100 Tenn. 591, 47 S. W. 181, Bloomfield v. Glen Ridge, 54 N. J. Eq. 280, 33 Atl. 925, Board of Education v. Board of Education, 30 W. Va. 424, 4 S. E. 640, 1 Dill. Mun. Corp. p. 64, 15 Am. & Eng. Ency. of Law, 1023, City of Wellington v. Wellington Township, 46 Kan. 213, 26 Pac. 415, and of cases from many other jurisdictions.

To the contention that a transfer of ownership thus accomplished works the taking of property without due process of law, it should be sufficient to point out that in all such cases the beneficial owner of the fee is the state itself, and that its agencies and mandatories—the various public and municipal corporations in whom the title rests—are essentially nothing but trustees of the state, holding the property and devoting it to the uses which the state itself directs. The transfer of title without due process of law, of which appellant so bitterly complains, is nothing more, in effect, than the naming by the state of other trustees to manage property which it owns and to manage the property for the same identical uses and purposes to which it was formerly devoted. In point of law, then, the beneficial title to the estate is not affected at all. All that is done is to transfer the legal title under the same trust from one trustee to another. In this sense the trustees of the Hollywood City School District became, by operation of law, successors to the trustees of the Pass School District, as is directly held in Allen v. School Town of Macey, 109 Ind. 559, 10 N. E. 578, where it is said: "It is now a well-recognized legal inference deducible as well from general principles as from the decided cases that under the Constitution and laws of this state public school property is held in trust for school purposes by the persons or corporations authorized for the time being to control such property, and that it is in the power of the Legislature to provide for a change in the trusteeship of such property in certain contingencies presumably requiring such a change, or, indeed, to change the trustees of that class of property whenever it may choose to do so." Even if such well-established principles could be set aside under the plea that they work injustice in the individual case, this plea here presented is without merit. The state is profoundly interested in the education of its young, but has no deep concern over the personality of the trustees who shall administer this trust, so long as the administration is in the orderly form of law. But to relieve against the possibility of injustice being worked by the operation of the rule which might, without recompense, take a schoolhouse away from one district and assign it to another, this state has made explicit provision whereby the use of the school under the changed conditions may still be open to the children within the territory to which it originally belonged. This provision is found in section 1576 of the Political Code. But the residents within the plaintiff district have not seen fit to avail themselves of it. We are unable to perceive, therefore, that the rule adopted in this state either works injustice to plaintiff or does violence to any of its constitutional rights. Nor, to the last proposition which appellant urges, namely, that the weight of authority is contrary to that laid down in this state, can assent be granted. The authorities which he cites are Winona v. School District, 40 Minn. 13, 41 N. W. 539, 3 L. R. A. 46, 12 Am. St. Rep. 687; Board of Education v. School Trustees, 45 Kan. 560, 26 Pac. 13; 21 Am. & Eng. Ency. of Law (1st Ed.) Title "Schools," p. 791.

The Minnesota case unquestionably holds with appellant's contention, but it stands in single opposition to an otherwise unbroken current of authority. In this connection we have heretofore cited the decisions of the Supreme Court of the United States and of many sister states, with the text-writers thereon. The Minnesota case is expressly disapproved in Bloomfield v. Glen Ridge, 54 N. J. Eq. 280, 33 Atl. 925, and in Prescott v. Lenox, 100 Tenn. 591, 47 S. W. 181. The language of the Supreme Court of Kansas in Board of Education v. School Trustees is obiter, and later was expressly disapproved in City of Wellington v. Wellington Township, 46 Kan. 213, 26 Pac. 415, where that state adopts the accepted rule. The declaration in the first edition of the Am. & Eng. Ency. of Law under the head of "Schools" is modified in the second edition, where the rule adopted in Minnesota is set forth upon the authority of Winona v. School District, 40 Minn. 13, 41 N. W. 539, 3 L. R. A. 46, 12 Am. St. Rep. 687, supra, and other Minnesota cases, but where also it is declared: "On the other hand, it has been held that the common law leaves the property where it is found, and that, in the absence of special legislation to the contrary, a new school district which is organized from territory detached from an old school district, will not be required to pay anything to the old district on account of schoolhouses or schoolhouse sites or any real estate whatever belonging to the old school district and situated in the new district." Moreover, in the fifteenth volume of the same learned work, at page 1023, it is said: "The old corporation will hold all the corporate property within her new limits, * * * and the new corporation will hold all the property falling within her boundaries, to which the old corporation will have no claim."

The judgment and order appealed from are therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

156 Cal. 429

YOLO COUNTY v. JOYCE et al. (Sac. 1,720.)

(Supreme Court of California. Nov. 1, 1909.)

1. District and Prosecuting Attorneys (§ 7*)—Claims—Criminal Cases—Expenses—Certification by District Attorney.

Code Civ. Proc. § 274, providing that in criminal cases the fees for reporting and for transcripts ordered by the court must be paid out of the county treasury on the court's order, does not vest in the court exclusive power to order a transcript of testimony in criminal cases, but merely deals with fees to be paid reporters for reporting and transcribing when ordered by the court, and did not deprive the district attorney of authority to order a transcript of testimony of a criminal case at the county's expense, when he deemed it necessary under County Government Act (St. 1897, p. 575, c. 277), § 228, subd. 2, providing that all expenses necessarily incurred by the district attorney in the prosecution of criminal cases shall be a county charge.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. § 34; Dec. Dig. § 7.*]

2. District and Prosecuting Attorneys (§ 7*)—Nature of Office.

A district attorney is an executive officer charged with the detection of crime and prosecution of criminal cases, in the furtherance of which he is authorized by County Government Act (St. 1897, p. 575, c. 277), § 228, subd. 2, to incur such expense as is necessary to enforce the criminal law.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Dec. Dig. § 7.*]

3. District and Prosecuting Attorneys (§ 7*)—Counties (§ 204*)—Expenses—Control—Allowance.

A district attorney's authority to incur expenses for the prosecution of crime, conferred by County Government Act (St. 1897, p. 575, c. 277), § 228, subd. 2, is not subject to the control or supervision of any court or judicial officer, but is a matter solely for the consideration of the board of supervisors to the extent of determining whether the expense was necessarily incurred so as to be a county charge under County Government Act, § 25, subd. 11 (page 459), vesting supervisors with authority to examine, settle, and allow all accounts chargeable against the county except salaries of officers, etc.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Dec. Dig. § 7;* Counties, Cent. Dig. §§ 312, 316–321; Dec. Dig. § 204.*]

4. Counties (§ 204*)—County's Expenses—Enforcement of Criminal Law—Determination of Board of Supervisors.

The board of supervisors of a county being vested with authority to determine the necessity of expense incurred by the district attorney in the enforcement of criminal law by County Government Act (St. 1897, p. 459, c. 277), § 25, subd. 11, the board's determination of that question is conclusive.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 312, 316–321; Dec. Dig. § 204.*]

5. District and Prosecuting Attorneys (§ 7*)—Enforcement of Criminal Law—Expenses.

Under County Government Act (St. 1897, p. 575, c. 277), § 228, subd. 2, providing that the expenses of the county attorney, necessarily incurred in the prosecution of criminal cases, shall be a county charge, the district attorney is entitled to determine for himself, in the first instance, whether a contemplated expense is necessary.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Dec. Dig. § 7.*]

In Bank. Appeal from Superior Court, Yolo County; H. M. Albery, Judge.

Action by the County of Yolo against Hallie E. Joyce and another. From a judgment for plaintiff and from an order denying a new trial, defendants appeal. Reversed, with instructions.

Arthur C. Huston, for appellants. W. A. Anderson, Dist. Atty., for respondent.

LORIGAN, J. This is an action brought by the county of Yolo to recover from the defendant Hallie E. Joyce certain money claimed to have been illegally paid to her under an order of the board of supervisors of that county. On April 18, 1906, and for some time prior thereto, there was on trial in the superior court of Yolo county a criminal case entitled "People, etc. v. Dean McGrew," the further hearing of which, on account of legal holidays declared by the Governor following the earthquake in San Francisco and along the coast, it was necessary to adjourn for a considerable period of time. The trial was resumed on June 13, 1906, and the then district attorney of Yolo county, who was prosecuting the case, in anticipation of the resumption of the trial, directed the defendant Hallie E. Joyce, who was the stenographic reporter of the superior court, to transcribe the testimony of the witnesses who had theretofore testified, for the purpose of having such testimony read to the jury to refresh their minds. The district attorney considered it necessary to have such transcription made, and it was read to the jury. On June 29, 1906, the defendant Hallie E. Joyce presented a claim to the board of supervisors for $309 for the transcription of such testimony, upon which claim the then district attorney made an indorsement reciting that the transcript for which the bill was presented was used by him "in the prosecution of Dean McGrew and was necessary in the conduct of the trial of said McGrew." The claim was allowed by the board of supervisors, and a warrant issued for the amount, which was paid on July 4, 1906. A demand was subsequently made on the defendant to pay back the amount of said claim to the county, which she refused to do, and this action was brought to recover it. The court found the above facts, and, in addition, found "that the amount claimed for said alleged service * * * was not an expense necessarily incurred by the district attorney of Yolo county in the detection of crime or in the prosecution of a criminal case." Judgment was entered for the plaintiff, from which, and from an order denying her motion for a new trial, the defendants appeal.

This appeal is to be determined by a consideration of the proposition whether the district attorney had authority to incur liability for this claim against the county. It is provided by section 228 of the county government act of 1897 (St. 1897, p. 575, c. 277) as follows: "The following are county charges: * * * (2) The traveling and other personal expenses of the district attorney incurred in criminal cases arising in the county and in civil actions and proceedings in which the county is interested, and all other expenses necessarily incurred by him in the detection of crime and the prosecution of criminal cases, and in civil actions and proceedings and all other matters in which the county is interested." By section 274 of the Code of Civil Procedure it is provided that: "For his services the official reporter shall receive the following fees: * * * For reporting testimony and proceedings ten dollars per day. * * * For transcription, for one copy 20 cents per hundred words. * * * In criminal cases the fees for reporting and for transcripts ordered by the court to be made must be paid out of the county treasury on the order of the court. * * *" By subdivision 11 of section 25 of the county government act the supervisors are vested with authority "to examine, settle, and allow all accounts legally chargeable against the county except salaries of officers and such demands as are authorized by law to be allowed by some other person and order warrants to be drawn on the county treasurer therefor."

It is insisted by the respondent, in support of the judgment of the trial court, that no charge against the county for the transcription of testimony taken down by an official stenographer of the superior court can be allowed, unless the order for its transcription is made by the judge of the superior court and the claim therefor approved and ordered paid out of the county treasury by the judge, under section 274 of the Code of Civil Procedure heretofore referred to. It will be observed, however, that this section does not vest exclusive power in the court to order transcription of testimony in criminal cases. The section simply deals with the fees to be paid official stenographers of the superior court for reporting and for transcribing testimony, when ordered in cases pending before the court, and prescribes the method whereby payment shall be made, namely, upon an order of court. By section 228 of the county government act it is provided, however, that expenses necessarily incurred by the district attorney in the "prosecution of criminal cases" are county charges, which, under subdivision 11 of section 25 of the same act, are to be paid out of the county funds under a claim presented to and allowed by the board of supervisors. There is nothing in the provisions of section 274 of the Code of Civil Procedure, fixing fees and providing how an allowance shall be paid to a reporter for reporting or for the transcription of testimony, which can be construed as a limitation upon the power of the district attorney, under the provisions of the county government act, in incurring an expense for the transcription of testimony to be used by him in a criminal case when he deems it necessary in the prosecution of a criminal case. The section of the Code of Civil Procedure only provides how payment shall be made upon order of the court when a transcription is ordered by the court. It does not provide an exclusive method whereby such a transcription may be obtained, but provides only that when the transcription is ordered by the court the power to pay for it is exclusively vested in the judge and is to be made by an order drawn by the judge on the county treasurer; but because this power is conferred upon the court in a given instance furnishes no reason for saying that under the provision of the county government act a transcription of testimony may not be obtained by the district attorney, for use in a criminal prosecution, when he deems it necessary, except under an order of court, or that the board of supervisors, if they deem it a necessary charge, may not allow it. The district attorney is an executive officer charged with the detection of crime and the prosecution of criminal cases. In furtherance of the proper discharge of his duties, the Legislature has, under the section of the county government act, enlarged his power so as to permit him to incur expense necessary to enforce the criminal law. His authority to do so for that purpose is not made subject to the control or supervision of any court or judicial officer, but is a matter for the consideration of the board of supervisors alone to the extent of determining whether the expense was necessarily incurred so as to constitute a county charge. Of course, the right of a district attorney to incur expense is not an arbitrary one. All that the section of the county government act permits is to give to the district attorney, in the first instance, the discretion to determine whether it is necessary in the detection of crime, or the prosecution of a criminal case, to incur an expense chargeable against the county. Any such claim, however, must be presented to the board of supervisors for allowance, and that body reviews the action of the district attorney and determines whether the expense was a necessary one and acts accordingly; and as the board of supervisors is vested with the authority to determine the question whether the expense was necessary or not, and is the tribunal to which is committed, under the county government act, the jurisdiction to supervise the action of the district attorney in incurring the expense, its determination that it was a proper and necessary expense is conclusive. Colusa County v. De

Jarnett, 55 Cal. 375; McFarland v. McCowen, 98 Cal. 330, 33 Pac. 113; McBride v. Newlin, 129 Cal. 36, 61 Pac. 577; County of Santa Cruz v. McPherson, 133 Cal. 282, 65 Pac. 574; County of Alameda v. Evers, 136 Cal. 132, 68 Pac. 475.

Much is said in argument of the necessity of the supervision by the superior court over expenses incurred by the district attorney, to the end that unnecessary expenditures may not be allowed. It is not to be assumed that the district attorney will incur any unnecessary expenses. It is to be assumed that he, like all other public officials, will properly and conscientiously discharge his duties, and, as the board of supervisors is charged with the duty of supervising all expenditures incurred by the district attorney and rejecting payment of those that are unwarranted, there is no reason for assuming that any invasion of the public treasury will be attempted or allowed. In the case at bar it is not claimed but that the services in transcribing the testimony were rendered and the price charged therefor a fair one. It is not even seriously claimed that the transcription was not a necessary expense in the prosecution of the criminal case in which it was used. The only claim is that the transcript could only be ordered by the superior court and only paid for upon an order of the court. This was the view taken by the lower court, and it was erroneous. There is no provision of the law which requires the district attorney to consult any court or obtain any order therefrom as a prerequisite for his incurring any expense which he may deem proper in the discharge of his duties in detecting crime or prosecuting criminal cases. It is not necessary for him to apply to the superior court for an order directing the transcription of testimony. He has a right to determine for himself in the first instance whether it is a necessary expense to be incurred for the purposes for which he is permitted under the act to incur it, subject to having his discretion in that respect ultimately reviewed by the board of supervisors alone, and when that body determines that the discretion has been properly exercised; that the expense was necessarily incurred by him and the charges fair and reasonable, that is the end of the matter. The board of supervisors being vested with the exclusive power to allow the claim if they find it was necessarily incurred by the district attorney and that the charges are fair and reasonable, their action in that respect is not subject to the review or supervision of the courts, but is final and conclusive.

It appears the defendants demurred to the complaint, and their demurrer was overruled. We have set forth the facts as found by the court which follow the allegations of the complaint. The facts as stated in the complaint constituted no cause of action, and, as this point was made on demurrer, the demurrer should have been sustained.

The judgment and order are reversed, with instructions to the lower court to enter an order sustaining the demurrer to the complaint.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; SHAW, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.

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156 Cal. 422

In re CARITHERS' ESTATE. (L. A. 2,380.)

(Supreme Court of California. Nov. 1, 1909. Rehearing Denied Dec. 1, 1909.)

1. New Trial (§ 154*)—Waiver of Motion.

Mere failure to present oral argument on a motion for a new trial is not a waiver of the motion.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 312; Dec. Dig. § 154.*]

2. Wills (§ 55*)—Testamentary Capacity—Sanity—Sufficiency of Evidence.

Evidence *held* insufficient to support a finding that testator at the time of executing his will was mentally incompetent because of intemperate habits.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 137–161; Dec. Dig. § 55.*]

3. Wills (§ 166*)—Undue Influence—Sufficiency of Evidence.

Evidence *held* insufficient to show that the execution of a will was obtained through undue influence exercised by testator's wife.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421–437; Dec. Dig. § 166.*]

4. Wills (§ 155*)—"Undue Influence"—Evidence.

In order to establish undue influence, there must be proof of a pressure which overpowered the mind and bore down the volition of testator at the very time the will was made.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 375–381; Dec. Dig. § 155.*

For other definitions, see Words and Phrases, vol. 8, pp. 7166–7172; vol. 8, pp. 7823, 7824.]

Department 2. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

In the matter of the estate of William D. Carithers, deceased. Appeal from a judgment revoking probate of the will of said deceased, and from an order denying motion for a new trial. Reversed.

Morton & Pruitt and E. S. Williams, for appellant. Stephens & Stephens, William A. Bowles, and Grove E. Walter, for respondent.

MELVIN, J. Appeal from a judgment entered after verdict of a jury revoking probate of the last will of William D. Carithers, deceased, and from an order denying appellant's motion for a new trial. The contention is made on behalf of respondent that, by the failure to argue orally the motion for new trial, the said motion was waived. This is an interesting question which, in view of the conclusions reached by us with reference to the appeal from the judgment, need not be here considered at great length. This court has decided recently, however, that mere failure to present oral argument on the motion for a new trial is not a waiver of said motion. We think that the circumstances in this case and the fact that the motion for the new trial was made upon the very day of the settlement of the bill of exceptions bring it clearly within the rule announced in Boin v. Spreckels Sugar Company (Cal.) 102 Pac. 939. By stipulation but two forms of verdict were submitted to the jury. One was as follows: "Did the deceased, William D. Carithers, know and understand on the evening of August 18, 1906, that he was then making his will and leaving his property to the parties therein named?" The other was a general form of verdict to be signed by the foreman after finding for plaintiff or defendant. To the question calling for special verdict, the jury returned a negative answer, and the general verdict was in favor of the plaintiff. The form of the verdict makes it necessary for us to determine its sufficiency or error in view of all the grounds of contest, which are: First, mental incompetency; second, undue influence; third, lack of due execution. If the general verdict may be sustained upon any one of the above grounds, the judgment must be affirmed.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

We will first consider the evidence with reference to the first ground of contest mentioned above, as the special verdict was evidently based upon the belief of the jurors that the testator was of unsound mind at the date of the execution of the will. It appears from the testimony of several witnesses, and seems to be conceded by all parties to this proceeding, that prior to taking up his residence in California, William D. Carithers, who was a prosperous banker and merchant in Illinois, was a regular drinker of alcoholic liquors, but not addicted to the excessive use of such stimulants. After he came to California his habits grew worse, and he was frequently intoxicated for weeks at a time. In 1902 he married the proponent, but marriage did not seem to improve his habits. He continued to drink heavily in spite of his wife's efforts to bring about a reformation. He was taken for treatment to an institution for the care of those addicted to the improper use of liquor, and was also for a time in a home where Christian Science was practiced. Neither form of treatment availed, and he died on October 17, 1906, not quite two months after the execution of his purported last will; the cause of death being acute alcoholism. He was 57 years of age at the time of his death. About 12 days after the execution of the will he was taken to a hospital, and from that time until his death was under medical treatment.

Contestants called two physicians, Drs. Bassett and Justice. The former, in answer to a hypothetical question, gave it as his opinion that the person therein described would be insane, and expressed the belief that Mr. Carithers, whom these physicians saw for the first time when he was taken to the hospital some days after the signing of the testament, was then demented and incapable of making a will. A critical examination of the testimony of the physician, however, fails to reveal anything in the condition of his patient which would not be accounted for by the fact that Carithers had entered upon a fresh debauch after the execution of the will. In other words, the witness failed to relate any circumstances that might not well comport with the theory that Carithers was merely suffering from the usual effects of overindulgence in liquor by a man of his age and physical condition, rather than a permanent state of insanity which, to avoid the will, must have existed on August 18, 1906, when the will was prepared, signed, and attested. Dr. Justice testified that, from the specifications of the hypothetical question, the man described must have been insane, and that testator, whom he saw about 10 days after August 18, 1906, was at that time an "alcoholic dement," and must have been one for a period extending back further than the date of the will. Neither physician saw the patient on or prior to the 18th of August, 1906. Benjamin McCartney, a lifelong friend of the decedent, who was called by the contestants, testified that Mr. Carithers was of unsound mind in the summer of 1906; but he seems to have limited that judgment to periods when the testator was actually drunk. He stated that, when not too drunk to attend to business, Mr. Carithers possessed a fairly bright and active mind. Dr. Guy Elder, witness for contestant, who before he was a physician had acted as a nurse for Mr. Carithers, testified that when he first saw the patient at the emergency hospital during the first week in September the latter was drunk. Later, in the month of October, when he was called to nurse the testator at the latter's home, he found that, according to his judgment, Mr. Carithers' mind was unbalanced. Regarding the mental condition of the testator during the period of his stay at the emergency hospital, however, he testified as follows: "When I went there he was heavily under the influence of liquor. I sobered him up then. After he was sobered up I considered his condition of mind as good as anybody's. He seemed to be in perfect possession of all his faculties, and during the 10 days that I was there with him—during all that time—he seemed to be in possession of all his faculties." Other witnesses described particular eccentric acts of Mr. Carithers; but their testimony throws no light on the subject of the sanity or insanity of testator at the time when he performed the testamentary act.

There is nothing in the will itself to raise any suspicion respecting the mental condition of the testator, except perhaps the signature, which, according to the testimony, seems to have been badly written and not in his usual chirography. It was explained, however, that he signed his name while he was sitting on the edge of his bed, and without having adequate support beneath the paper. These circumstances might easily account for the bad penmanship. The will itself is a natural one, containing nothing essentially unjust. There is a small devise to a sister, and the residue of the property is devised and bequeathed to his wife. The testament was drafted by Mr. Lynn Helm, a reputable member of the bar, who had acted as Mr. Carithers' attorney for a long time. He emphatically asserted at the trial that Mr. Carithers was of sound and disposing mind when the will was prepared and executed. The most significant facts concerning the writing and signing of the will may best be given in Mr. Helm's own words: "Mr. Carithers was lying in bed, and I said to him: 'How do you do, Mr. Carithers? Are you sick? I am sorry to see you sick. He said: 'No, Helm, I am not sick. I am just getting over a drunk.' I said: 'I did not know you ever drank.' He said: 'Yes, you did too.' I said: 'No, I didn't.' 'Well,' he said, 'I am all right now, and I want to see you about some business.' I said, 'How long has this been,' and he said, 'Oh, I have been here the best part of a week; but I am all right now, and I want you to draw my will. Can you do it?' I hesitated a minute, and I said: 'I don't know. What do you want to do?' He said: 'I want to leave everything to my wife.' I said: 'That is easy. I can do that.' He and I were alone in the room at the time, and I said: 'What do you want to do?' He said: 'I want to give my property to my wife, and I want to make her the executrix.' I said: 'I can do that if I can have a piece of paper. I can write it out here.' And he said: 'You call Mrs. Carithers.' He called up to her himself, and in a moment or so she came to the door, and she was leaning over the foot of the bed. It was a very narrow room. I was sitting between the side of the bed and the wall, and there was hardly room for her to have passed me between where I was sitting and the bed, and she leaned over the foot of the bed, and he said to her: 'Dell, get the lawyer a pencil and some paper. I want him to draw my will.' She hesitated a minute and went out and brought me a sheet or pad of paper, and she came in and said: 'What are you going to do?' And he said: 'I am going to draw my will; I am going to leave you everything;' and she hesitated a minute and sort of drew back, and he said: 'Yes, I am going—I have made up my mind, I am going to leave you everything. You are the only one who takes care for me or does anything for me, and no one else cares for me.' She said: 'Well, aren't you going to remember any of your relatives?' And he said: 'Oh, I don't know, you can do that just as well as I can. If anything happens to me, why you can give any one of them a deed to anything as well as I can.' She said: 'No, I don't want it that way. If you are going to do anything of that kind, you had better do it now. Aren't you going to remember your sister, Mary Hipsley?' And he said: 'Well, if you want me to, I will give her something.' Then he talked about his property. He talked about the Kansas property, and then he said: 'I will tell you, I can leave her that piece at Table Grove.' I said: 'How are you going to describe it?' And he said: 'I will describe it as the same property I have with my brother John. I had a half interest with him.' And I said: 'Did you ever have any other property with your brother John at Table Grove?' And he said: 'No, I never did.' 'Well,' I said, 'that would be a good description, to describe it as the property in which you had a half interest with your brother John.' He said: 'All right, you can describe it then as the half interest in the property in the store and building at Table Grove which I owned with my brother John.' I said, 'All right,' and so I then took the pad and wrote the will, and I wrote it with pencil. I had an indelible pencil in my pocket, and I wrote it with that, and after I had finished I read it over to Mr. Carithers." The lawyer's graphic account of these occurrences on August 18, 1906, tends to show not only that the testator was fully conscious of what he was doing, and that he acted rationally, but that his wife was not seeking to influence him unduly in the disposition of his property. Mr. Vogel and Mrs. Strong, the witnesses to the will, both said that Mr. Carithers was sane, that on August 18, 1906, he was of sound and disposing mind, and the testimony of both of these neighbors tends to show that, except when directly under the influence of liquor, he was a man of average intellect. There was much other evidence furnished by laymen and physicians respecting Mr. Carithers' sanity, but we need not reproduce it here.

The great question is whether or not there is sufficient evidence to sustain the verdict upon the ground of testator's permanent insanity, or of his temporary inability to understand that he was making a will and leaving his property to the persons named therein. We do not think that the contestants produced sufficient evidence of facts to justify the jury's verdict. It is true that gross habits of indulgence in strong drink were disclosed; but there was nothing which tended to break the force of the positive testimony of the attorney and the attesting witnesses that Carithers was possessed of testamentary capacity when he signed the will. The testimony of the physicians was largely speculative and was founded entirely upon knowledge gained subsequent to August 18, 1906, while the other witnesses depended upon facts which were just as consistent with the theory of temporary drunkenness as of permanent mental derangement. Such evidence is not adequate for the overthrowing of the provisions of a will. In re Wilson's Estate, 117 Cal. 276, 49 Pac. 176, lays down the rule for cases of this kind very clearly as follows: "While evidence of the condition of the testator's mind both before and after the date of the testamentary act is admissible, yet it is important only as it bears upon that condition at the very time of the execution of the will. It unfortunately is often the case that exceedingly bright and strong-minded people are addicted to the excessive use of alcoholic drinks, and are frequently intoxicated; and to hold that the wills of such persons, although shown to have been executed when they were in full possession of testamentary capacity, can be upset by a jury upon mere proof of such drinking habit, would be to carry the rule of 'conflicting evidence' beyond all reasonable bounds."

There was no evidence of lack of due execution, so we need not consider further that ground of contest. Upon the issue of undue influence there was some evidence that Mrs. Carithers had sought to keep certain friends from communicating with her husband, and that she had expressed to Dr. Justice a fear that Mr. McCartney and Mr. Helm might induce him to make some change in his papers. There was practically nothing shown beyond interest and possible opportunity of the wife to sway her husband's mind. Much more is needed to make out a case of undue influence. Proof must be had of a pressure which overpowered the mind and bore down the volition of the testator at the very time the will was made. Estate of Nelson, 132 Cal. 182, 64 Pac. 294; Estate of Calef, 139 Cal. 673, 73 Pac. 539; Estate of Black, 132 Cal. 392, 64 Pac. 695; Estate of Donovan, 140 Cal. 390, 73 Pac. 1081.

Appellant calls our attention to other alleged errors; but, in view of the conclusion which we have reached respecting the sufficiency of the evidence, we do not deem it necessary to consider them.

The judgment and order are reversed.

We concur: HENSHAW, J.; LORIGAN, J.

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11 Cal. App. 373

BARTLETT ESTATE CO. v. FRASER et al.

(Civ. 665.)

(Court of Appeal, Second District, California. Sept. 27, 1909.)

1. Pleading (§ 126*)—Answer—Sufficiency of Denials—Negative Pregnant.

The rules of pleading are intended to prevent evasion and to require a denial of every specific allegation in a sworn complaint in substance and in spirit, and not merely a denial of its literal truth.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 261–263; Dec. Dig. § 126.*]

2. Corporations (§ 514*) — Actions—Pleading—Denial of Corporate Existence.

In an action by a corporation which alleged its due organization and existence as a corporation, an allegation of an answer that defendant had not sufficient information and belief upon the subject to enable him to answer, and upon that ground denied plaintiff's due organization and existence as a corporation, being conjunctive, did not deny such specific averment and was properly stricken out.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2061; Dec. Dig. § 514.*]

3. Pleading (§ 121*) — Answer—Allegation Upon Information and Belief—Presumptive Knowledge of Defendant.

A defendant may not answer an allegation by denial for want of information and belief when he is presumed to know, or when he is aware before answering, that he has the means of ascertaining the truth and hence, in an action on a nonnegotiable note signed by defendant, a denial, for want of information and belief, that no part of the note had been paid, was improper.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 247; Dec. Dig. § 121.*]

4. Bills and Notes (§ 120*)—Joint Notes.

A note in form, "We promise to pay," etc., is joint, and not joint and several.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 257; Dec. Dig. § 120.*]

5. Bills and Notes (§ 120*)—Joint Notes.

A note which is joint by its express terms must be enforced according to its terms, and Civ. Code, § 1430, providing that an obligation imposed upon several persons may be joint, several, or joint and several, does not apply.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 257; Dec. Dig. § 120.*]

6. Set-Off and Counterclaim (§ 44*)—Joint Notes—Counterclaim by One Obligor.

In an action on a note joint by its express terms, no counterclaim is permissible which consists of a demand in favor of one of the obligors.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 85; Dec. Dig. § 44.*]

7. Banks and Banking (§ 102*)—Officers—President.

The president of a bank being its executive head under the usages and customs of modern banking, the rule that his power is limited to transactions expressly authorized by the directors no longer obtains.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 242; Dec. Dig. § 102.*]

8. Banks and Banking (§ 113*)—Authority of President—Estoppel to Deny.

Even if the internal policy of a banking corporation requires the indorsements on its rediscounts to be executed by the cashier or other officer, where a bank received and retained the proceeds of a rediscount of a note obtained from an assignment of the note by the president, it was estopped to deny the president's authority under Civ. Code, § 3519, providing that he who can and does not forbid that which is done on his behalf is deemed to have bidden it.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 275; Dec. Dig. § 113.*]

9. Bills and Notes (§ 523*)—Nonnegotiable Notes—Action by Assignee.

In an action against a maker of a nonnegotiable note by the assignee of the payee, the extent of the maker's right to proof of the assignment is his protection from further liability.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1822–1825; Dec. Dig. § 523.*]

10. Bills and Notes (§ 523*)—Nonnegotiable Notes — Actions — Evidence—Assignments.

In an action against a maker of a nonnegotiable note by the assignee of the payee, evidence *held* to support a finding that the note was assigned to plaintiff.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1822-1825; Dec. Dig. § 523.*]

Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by Bartlett Estate Company against W. H. Fraser and another. From a judgment for plaintiff and an order denying a new trial, the mentioned defendant appeals. Affirmed.

Stearns & Sweet, for appellant. Mills & Hizar, for respondent.

ALLEN, P. J. Plaintiff filed a verified complaint, alleging its due organization and existence as a California corporation, setting out in hæc verba a nonnegotiable promissory note, joint in form, payable to the People's State Bank, and signed by defendants Fraser and Wyneken, alleging that no part had been paid except interest for one year, and the assignment and transfer of the note to plaintiff. Defendant Wyneken made default. Fraser answered, averring that he had not sufficient information and belief upon the subject to enable him to answer, and upon that ground denied that plaintiff is now, and at all times mentioned in the complaint has been, a corporation, etc.; further, for want of information and belief, denied that no part of the note had been paid except the one year's interest; for want of information and belief, denied that no part of the note remained unpaid; and, by way of counterclaim, set up an account against plaintiff theretofore assigned to him, which he alleged remained unpaid, and for the amount of which he asked judgment. The court, on motion, struck from the amended answer of defendant Fraser the portions thereof attempting to deny the corporate existence of plaintiff, and those paragraphs of the answer denying nonpayment, as well as the allegations with reference to the counterclaim, leaving in the answer only as an issue the question of the assignment and transfer of the obligation on which suit was brought.

Appellant insists that the court erred in sustaining the motion to strike out. We see no error upon the part of the court in this regard. "The rules of pleading under our system are intended to prevent evasion, and to require a denial of every specific averment in a sworn complaint, in substance and in spirit, and not merely a denial of its literal truth." Doll v. Good, 38 Cal. 290. The allegation of the answer with relation to the corporate existence of plaintiff, being in form conjunctive, fell short of denying each specific averment. The denials as to nonpayment upon information and belief are within the rule laid down in Mulcahy v. Buckley, 100 Cal. 487, 35 Pac. 144: "A defendant is not at liberty to answer an allegation in this form, when he may be presumed to know, or when he is aware before answering, that he has the means of ascertaining whether or not such allegation is true." Applying these rules, the court properly eliminated these evasive and insufficient denials from the answer. The note set out is in form, "We promise to pay," etc. This was therefore a joint note, as distinguished from a joint and several obligation. The form of such an obligation must be enforced according to its express terms. Farmers' Exchange Bank v. Morse, 129 Cal. 242, 61 Pac. 1088. The obligation being by its express terms joint, section 1430, Civ. Code, has no application, and, being joint, no counterclaim can be made available which consists of a demand in favor of one of the obligors. Roberts v. Donovan, 70 Cal. 114, 9 Pac. 180, 11 Pac. 599.

The court found in favor of plaintiff upon the issue as to the assignment and transfer of the obligation the basis of the action. Appellant contends that there is no evidence in the record to sustain this finding of the court. There is evidence that the bank to whom the note was made payable received a consideration for its transfer, and that the assignment was made in the name of the bank by its president eight months before suit was brought. Under the usages and customs of modern banking, the president of a bank is no longer regarded as an ornamental magnet with which to attract deposits, but, on the contrary, is now, and has been for several years, recognized as the executive head and most important agent in connection with banking operations. The reason for the rule that through banking usage the president's power was limited to transactions expressly authorized by the board of directors no longer obtains, and the rule should cease; but, aside from this, the People's Bank received and retained the proceeds of a rediscount of the note set out, thereby acquiescing in the acts of its president in making the assignment, and transfer from which the proceeds of the rediscount were obtained, and were it even conceded that the internal policy of a banking corporation requires the indorsements on its rediscounts to be executed by the cashier or other officer, nevertheless, by acquiescence in the acts of its president, it would be estopped to deny his authority in the premises. This principle is established by section 3519 of our Civil Code: "He who can and does not forbid that which is done on his behalf is deemed to have bidden it." The bank being estopped to deny the authority of the president in making the transfer appellant is fully protected from further litigation or liability in connection with any claim of the bank on the paper, and this should be the full measure of his right to enforce proof of assignment, or to question its validity. In our opinion the court was warranted in finding that the note had been assigned and that plaintiff was the owner and holder thereof.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The judgment and order are affirmed.

We concur: SHAW, J.; TAGGART, J.

11 Cal. App. 354

PAINE et al. v. WARD et al. (Civ. 627.)

(Court of Appeal, First District, California. Sept. 22, 1909.)

1. HIGHWAYS (§ 184*)—PERSONAL INJURIES—ACTIONS—EVIDENCE.

Evidence *held* to support a finding that defendant negligently permitted his team to run away, and thereby injure plaintiff.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 472; Dec. Dig. § 184.*]

2. APPEAL AND ERROR (§ 1011*)—FINDINGS—CONCLUSIVENESS.

A finding on conflicting evidence will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3989; Dec. Dig. § 1011.*]

3. HIGHWAYS (§ 184*)—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

Evidence *held* to justify a finding that one injured by the runaway team of another was not guilty of contributory negligence.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 472; Dec. Dig. § 184.*]

Appeal from Superior Court, Santa Clara County; John E. Richards, Judge.

Action by Catherine Paine and another against A. B. Ward and others, a copartnership. From an order denying a motion for new trial after judgment for plaintiffs, defendants appeal. Affirmed.

E. D. Crawford and B. A. Herrington, for appellants. A. A. Caldwell and E. M. Rea, for respondents.

KERRIGAN, J. This is an action to recover damages for personal injuries alleged to have been caused by the negligence of the defendants. The case was tried without a jury, and a judgment was entered in favor of the plaintiffs. The appeal is from an order denying defendants' motion for a new trial.

At the time of the accident the plaintiffs were employed on the Cullen ranch, near the town of Gilroy, as teamster and cook, respectively, and the defendants, who were in the wood business, were cutting and hauling wood from the same ranch. At that time an employé of the defendants, having in charge the defendants' team attached to a wagon, had passed from the public road into the Cullen property, and, after doing so, had left the team and wagon standing unattended while he stepped back to close a gate through which he had just passed. At this moment he noticed the plaintiffs approaching driving a horse and buggy, and he held the gate open until they had passed into the Cullen ranch. After passing through the gate, the plaintiffs drove around the team, and, when they got into the road and about 40 feet ahead of the team, the latter ran away and collided with or jumped into the rear of their buggy, resulting in the injuries complained of.

Defendants contend that the findings are not supported by the evidence. The court found: That defendants' "said servant negligently and carelessly left said team of horses, hitched to said wagon, standing about 20 feet from the gate or entrance to the Cullen ranch * * * without fastening the reins or setting the brake upon said wagon, said horses being unattended by any person or persons and untied." That while the team was left in that unsafe condition said employé "carelessly and negligently" did "slam shut violently and with great force the gate to said entrance, thereby creating a great and sudden noise," which noise "combined with other causes * * * caused said team of horses to take fright" and run away.

Defendants' contention that the evidence is insufficient to support this finding is untenable. One witness testified that this was a restless and nervous team, and that it had acted in a fractious manner before. It was undisputed that the employé in charge of the team on the day of the accident had been driving it for a period of three months. One of the plaintiffs, W. A. Paine, said in his testimony that it is the custom of teamsters to set brakes, back the team, and twist the lines securely around the seat of the wagon or the brake before getting down to open or close a gate, whether the team is gentle or not; that on this occasion, in driving by the standing team, he glanced down and noticed the reins of the team upon the ground; that, when the team was stopped, the lines were dragging upon the ground, and the brake upon the wagon was not set; and that the team and wagon were unattended while the driver thereof was holding open the gate. Both plaintiffs testified that just as they turned into the road ahead of the team, and while the team was still unattended, the gate slammed, making a loud noise, and that the team almost immediately started and came up behind them so rapidly that it was impossible to avoid the accident. On the other hand, defendants introduced testimony to the effect that the brake on the wagon was set and the reins fastened, that the gate was held open by their driver at the request of plaintiffs, and that they in passing the team drove so close to it as to touch with their buggy the stomach of one of the horses, which caused the team to run away.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The effect of all this evidence was to present a question of fact to the trial court. The court accepted the version of the accident which showed negligence on the part of defendants' employé, and under the well-established rule in cases of conflict in the evidence this court will not disturb the conclusion of the trial court.

Appellants also claim that the finding that plaintiffs were not guilty of contributory negligence is contrary to the evidence. W. A. Paine testified that as he approached the gate he "yelled to the man standing there to go on" as "the team coming behind would close the gate"; that "I told him several times to drive on, but he would not do so, and motioned to us to go on through the gate. We drove no closer at any time to the team than 30 or 40 feet. I saw the reins on the ground just as my wife turned into the road ahead of the team, and I had not noticed them before." His wife testified: "I naturally supposed the driver of the team had set his brake and fastened his reins. If he had done so, the accident would not have happened. I did not see the reins upon the ground and did not see the brake." Neither of these witnesses, according to their testimony, knew the horses nor had ever seen them before. They were familiar with the custom of teamsters, and therefore supposed that the brakes were set and the lines securely fastened.

If the testimony in the case disclosed that the plaintiffs knew that the team in question was naturally nervous and restless, that the brakes were not set, and the lines lying on the ground, the court might have found that the plaintiffs were guilty of contributory negligence in driving ahead of the unattended team, but their evidence shows that they did not know those facts, except that one of the plaintiffs in passing the team saw the lines on the ground, but it may be inferred that this was at a time too late to change the course of the buggy and avert the accident. Neither of them could anticipate the slamming of the gate, without which act the team would probably not have run away. We think the finding of the court on this branch of the case is also amply sustained by the evidence.

The order appealed from is affirmed.

We concur: COOPER, P. J.; HALL, J.

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11 Cal. App. 364

BEALL, Road Com'r, v. WEIR. (Civ. 620.)

(Court of Appeal, First District, California. Sept. 23, 1909.)

BOUNDARIES (§ 3*)—CONVEYANCE ACCORDING TO SECTION LINE MARKED BY STAKES.

The owner of two sections, after having the east and west section line between them surveyed, and stakes set showing such line, conveyed a strip for a highway 60 feet wide, 30 feet wide off the south side of the north section, and 30 feet wide off the north side of the south section. The county entered on the strip and used it as a highway, though not to its entire width; and the owner of the sections platted the remainder of the north section, each on the basis of the deed for the road having conveyed a strip 30 feet wide each side of the section line as marked by the surveyor with stakes. *Held* that, the conveyance being made with reference to the stakes as showing the section line, the county could not be disturbed in its possession by defendant, who bought one of the south platted lots, knowing his south boundary was located with reference to the conveyance to the county being in accordance with the stakes, showing that the true section line was farther south.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 14–19; Dec. Dig. § 3.*]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by George W. Beall, Road Commissioner of Supervisor District No. 2, Fresno county, against W. J. Weir. Judgment for plaintiff, and defendant appeals. Affirmed.

E. A. Williams, for appellant. Denver S. Church and Manson F. McCormick, for respondent.

COOPER, P. J. This action was brought by the plaintiff as road commissioner for the purpose of abating a certain post and wire fence alleged to have been erected and maintained by the defendant on a public highway in Fresno county. The defendant admitted that he constructed and maintained the fence, but claimed that such fence was not upon a highway, but upon his own land. Upon the issue thus made the court found in favor of plaintiff, and ordered the fence abated as a public nuisance, and judgment was accordingly entered. Defendant prosecutes this appeal from the judgment and from the order denying his motion for a new trial.

Defendant, no doubt in good faith, believed that he owned the land upon which he erected the fence. His counsel states in his brief that "the only issue in the case is the location of the section line between sections 23 and 26 in township 13, S. R. 21." After carefully examining the record, we are of the opinion that the issue in the case is as to the correct location of the boundaries upon the face of the earth according to the calls of a deed made by the then owner of the land to the county of Fresno for a right of way for a public highway, and whether or not the place where the fence was erected is within the exterior calls of said deed.

On June 29, 1888, one Eggers was the owner of said sections 23 and 26, and while so the owner he conveyed by deed to the county of Fresno a strip of land 60 feet wide, being 30 feet on each side of the section line between sections 23 and 26, and extending east and west across the entire section; or, in other words, he conveyed a strip of land 30 feet wide off the south side of section 23 and a strip of land 30 feet wide off the north side of section 26. Prior to the time Eggers made the deed to the county of the right of way the section lines in the township had been located or had been attempted to be located by one Manuel, by surveys made by said Manuel, who drove redwood stakes down in the ground to mark the section corners at the east and at the west end of what was believed to be the true section line dividing said sections 26 and 23. The people in the township, so far as appears, were governed by the survey so made by Manuel and the corners as fixed by him. The surveyor of the county, McKay, made a survey in 1898 along the east line of said section 23, and found the redwood post at the southeast corner which had been placed there by Manuel in making his original survey prior to the time Eggers deeded to the county. In 1890 Eggers had all of section 23 surveyed and platted by a surveyor named Tielman, who subdivided the section into lots numbered from 24 to 59, inclusive, which survey was called the plat of the Eggers colony. In making this survey the surveyor found all the original redwood stakes as set by Manuel, and which were in the ground at the time Eggers made the deed to the county. This plat located the south boundary of the south tier of lots of said section 23 the same as the northerly line of the 60 feet right of way as fixed with reference to the stakes originally set by Manuel. Eggers, in having the survey and plats made of the Eggers colony, treated the deed to the county as fixed and located by said stakes so originally set. This survey and plat was filed for record by Eggers. The defendant afterwards (but at what time does not appear) became the owner of lot 32 of the property so platted for Eggers. It does, however, appear that defendant knew of the stake at the southeast corner of the section and of the south boundary of his lot, which did not include the place where he built the fence which is here claimed to be a nuisance. Defendant purchased with full knowledge of the construction which had been placed upon the deed by Eggers when he conveyed to the county and with full knowledge as to the south boundary of lot 32 as fixed by the Eggers map. The county accepted the deed and the public traveled the road as a highway after the conveyance was made to it. A furrow was at first run so as to mark the line of the road, but the road was not completely graded until 1905. During the year 1905, at the request of defendant, about 20 years after the first survey had been made, Manuel resurveyed the township. In making this resurvey Manuel states that, by measuring the township north and south between the township line and the line between sections 23 and 26, he found an overplus of 39 feet, and that he divided this excess of 39 feet between the sections so "that would bring the line of Wier's place in the neighborhood of 13 or 14 feet below the place where his first row of vines is." In other words, by the resurvey made by Manuel in 1905, disregarding the stakes he originally set in the ground so as to designate the lines, he made the south line of defendant's lot about 13 to 14 feet farther south than the line was made by the Eggers map, thus taking 13 or 14 feet, a portion of the highway as located by Eggers at the time he conveyed to the county.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It is not necessary to decide as to whether or not the last survey made by Manuel is the correct one. When Eggers conveyed to the county, he owned the entire tract through which the right of way was granted, and the reference in the deed to the section line separating sections 23 and 26 was made with reference to the line as he had located it by his own surveyor. It conveyed the strip of land precisely as if the description had commenced at one of the stakes at the section corner and gone around the entire 60 feet, closing at the same stake. Eggers so understood it when he made the deed. He continued to so understand and construe it when he had the section surveyed and platted and defendant knew his said boundary as located by the Eggers colony map when he purchased. Defendant still owns undisturbed all the land described in lot 32 of the Eggers colony. He may not disturb the county in its ownership of all that Eggers had conveyed to it prior to the time defendant came upon the scene. This construction leaves each grantee undisturbed as to the lands described in the conveyance under which they respectively took.

When land has once been conveyed with reference to stakes and monuments which were fixed and in place at the time of such conveyance, the conveyance cannot be afterwards defeated by a new survey which shows that the stakes and monuments as originally set were not as a matter of fact in their true places. A contrary rule would upset titles and make all conveyances more or less uncertain. It is always the endeavor of courts to ascertain the intention of the parties in applying the description contained in a deed to the monuments referred to therein so as to locate the land in accordance with the intention of the parties. The construction we have given the deed to the county is in accord with the rule as laid down time and time again by the Supreme Court.

In Helm v. Wilson, 76 Cal. 476, 18 Pac. 604, the deed described the land as being in the southeast instead of southwest quarter of a certain section; but the court held that, if the land intended to be conveyed could be identified by monuments actually fixed upon the ground, the mistake as to the subdivision in which the land was really located was falsa demonstratio. In Kaiser v. Dalto, 140 Cal. 168, 73 Pac. 828, it was held that the boundaries of city lots as originally located on the surface of the earth must govern, and a line shown by monuments as platted by the city authorities, and acquiesced in for many years, must control courses and distances, and cannot be overturned by measurements afterwards made by a surveyor. We repeat what was there said: "The testimony of surveyors on the part of defendants was sharply in conflict with the above as to the division line by a survey by courses and distances. The defendants' surveyors took the monumental line of Green street as they located it. They found an original line monument at a point on Union street near Hyde, thence from the line of Union street across the block to Green street, a distance of 275 feet, thence 68 feet across Green street, and thence 68 feet and 9 inches to the line of defendant's lot. These surveys may have been correct by courses and distances, but in the course of 30 or 40 years a change in the position of the monuments on the surface of the earth might easily cause a variation of 4 or 5 inches. The lines as originally located must govern in such cases. The survey as made in the field and the lines as actually run on the surface of the earth at the time the blocks were surveyed and the plats filed must control. The parties who own the property have a right to rely on such lines and monuments. They must when established control courses and distances. A line, as shown by monuments and as platted by the city authorities, and as acquiesced in for many years, cannot be overturned by measurements alone." See, further, Penry v. Richards, 52 Cal. 496; Bullard v. Kempff, 119 Cal. 9, 50 Pac. 780; Diehl v. Zanger, 39 Mich. 601.

There is no merit in the suggestion that the county only used the central portion of the right of way, and did not accept the right of way for the full width of the 60 feet, because it did not use all of the 60 feet up to the south boundary of defendant's land. The county accepted the right of way by entry upon and using the same as a public highway and expending public moneys thereon. Its acceptance was as broad as the grant, although it did not use the entire width of the right of way. The question is entirely different from the construction given to the width of a right of way where the right of way is claimed entirely by prescription or user. In such case the public cannot claim a constructive dedication or a constructive title to land which in fact was never used or traveled over by the public.

There is no merit in any of the other contentions of defendant.

The judgment and order are affirmed.

We concur: HALL, J.; KERRIGAN, J.

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11 Cal. App. 370

PETERSON v. NESBITT. (Civ. 637.)

(Court of Appeal, First District, California. Sept. 25, 1909.)

ARREST (§ 28*)—IN CIVIL ACTION—AFFIDAVIT FOR ARREST.

It does not appear from an affidavit for arrest in a civil action that a sufficient cause of action exists necessary under Code Civ. Proc. § 481, to give the court jurisdiction to make the order of arrest, the affidavit stating that "a good and sufficient cause of action exists * * * as fully appears from the verified complaint * * * as follows"; this being but the statement of affiant's opinion, and not being an oath to the truth of the matters in the complaint.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. §§ 56–63, 72; Dec. Dig. § 28.*]

Appeal from Superior Court, Monterey County; John E. Richards, Judge.

Action by Josephine Peterson, administratrix of Michel Cartier, deceased, against W. J. Nesbitt. Judgment for defendant. Plaintiff appeals. Affirmed.

J. H. Andresen and W. S. White, for appellant. Daugherty & Lacey, for respondent.

HALL, J. Plaintiff brought this action against the defendant, who is the sheriff of Monterey county, to recover damages for allowing the escape of one Marcelin Cartier, who had been arrested upon mesne process in a civil action, brought by this plaintiff against said Marcelin Cartier. At the trial plaintiff offered in evidence the affidavit upon which the order of arrest had been made, but upon objection of defendant the court refused to admit it in evidence, and as a result plaintiff was unable to prove her case, and at the close of her testimony the court granted defendant's motion for a nonsuit. The appeal is from the judgment of nonsuit entered in accordance with this order.

The only question to be determined is as to whether or not the court erred in sustaining defendant's objection to the introduction of the affidavit for the order of arrest. The correctness of the ruling of the court depends upon whether or not the affidavit upon which the order of arrest was based was sufficient to invest the court with jurisdiction to make the order. The statute (section 481, Code Civ. Proc.) provides that "the order may be made whenever it appears to the judge, by the affidavit of the plaintiff, or some other person, that a sufficient cause of action exists, and that the case is one of those mentioned in section four hundred and seventy-nine. The affidavit must be either positive, or upon information and belief; and when upon information and belief, it must state the facts upon which the information and belief are founded."

Several objections are urged as to the sufficiency of the affidavit, the first of which is that it does not appear from the affidavit that a sufficient cause of action existed. In this regard the affidavit, which was made by the attorney for the plaintiff in the original actions, states "that a good and sufficient cause of action exists in favor of the said plaintiff and against the defendant in said action for the sum of $2,705 for the wrongful conversion of certain property belonging to the estate of Michel Cartier, deceased, as fully appears from the verified complaint on file herein, which said complaint is in words and figures as follows, to wit:" Then follows a copy of such complaint. This is but the statement of the opinion of the affiant that the complaint states a good and sufficient cause of action. It is not a statement of the affiant that the matters set forth in the complaint are true. We apprehend that no prosecution for perjury would lie against the affiant predicated upon the falsity of any of the matters set forth in the complaint. The affidavit in question differs radically from the affidavits held sufficient in Ligare v. Cal. S. R. R. Co., 76 Cal. 610, 18 Pac. 777, and Ex parte Howitz, 2 Cal. App. 753, 84 Pac. 229, where the affiant made oath to the truth of the facts stated in the document referred to. In the Howitz Case the complaint was annexed to and made a part of the affidavit, and the affiant averred "that the allegations contained therein are true." In Ligare v. Cal. S. R. R. Co., the affidavit referred to the complaint on file, and made it a part and portion of the affidavit. The language was such that the court held that "the oath to the affidavit is an oath to the truth of the document referred to."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

That cannot be justly said of the language of the affidavit in this case. Though the complaint is set forth in the affidavit, the affiant does not make oath to the truth of any matter contained therein. It certainly is not sufficient for the affiant to state in general terms that a good and sufficient cause of action exists. This is a matter for the judge to determine, and the facts constituting the cause of action must be set forth and sworn to, either positively or upon information and belief. If sworn to upon information and belief, the facts upon which the information and belief are founded must be stated. The jurisdiction to issue an order of arrest in a civil suit rests upon the affidavit. Where the affidavit in an essential particular fails to meet the requirements of the law, the court is without jurisdiction to issue the order for arrest. Ex parte Fkumoto, 120 Cal. 316, 52 Pac. 726; Neves v. Kosta, 5 Cal. App. 111, 89 Pac. 860.

The court did not err in sustaining the objection to the offer of the affidavit or in granting the motion for a nonsuit, and the judgment is affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

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11 Cal. App. 383

PACIFIC PAVING CO. v. VERSO et al.

(Civ. 242.)

(Court of Appeal, First District, California. Sept. 29, 1909.)

1. APPEAL AND ERROR (§ 384*)—BONDS—SUFFICIENCY.

Where the recitals in an appeal bond do not identify the particular appeal which it was intended to perfect, the bond is totally void, not merely insufficient, but where a bond on appeal from a judgment properly refers to the judgment appealed from, so as to fully identify it, and shows that it was a judgment from which an appeal could only be properly taken to the court of appeal, it was not void because it recites by mistake that the appeal was to be taken to the Supreme Court, especially in view of Const. art. 6, § 4, providing for a transfer of the appeal to the proper court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2049, 2050; Dec. Dig. § 384.*]

2. APPEAL AND ERROR (§ 391*)—BONDS—SUFFICIENCY.

It is no objection to the sufficiency of an appeal where a good bond has been filed and approved that the sureties on a former bond would not be liable; the very purpose of Code Civ. Proc. § 954, providing that no appeal can be dismissed for insufficiency of the undertaking thereon, if a sufficient undertaking be filed and approved before hearing upon motion to dismiss, being to allow a sufficient bond to be given to supply the defects of an insufficient one.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2077; Dec. Dig. § 391.*]

3. CONSTITUTIONAL LAW (§ 50*)—LEGISLATIVE POWER—APPEAL BONDS.

The entire law relating to the giving of appeal bonds being statutory, the Legislature may regulate the matter at its will.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 48; Dec. Dig. § 50.*]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by the Pacific Paving Company against Peter Verso and others. Judgment for defendants, and plaintiff appeals. On motion to dismiss. Denied.

W. J. Bartnett and R. K. Barrows, for appellant. Alexander D. Keyes, for respondents.

HALL, J. Respondents have made a motion to dismiss the appeal in this case upon the ground that the appeal bond filed upon taking the appeal is so defective as not to support the appeal. Two defects in the bond are pointed out by respondents, one of which they concede is not fatal, and may be corrected by the filing in this court of a new bond under section 954 of the Code of Civil Procedure. Before the hearing of this motion, a new bond was filed and approved, which is sufficient in form and substance to support the appeal, provided the other defect in the original bond is not fatal to the appeal. The appeal is from a judgment, and the bond properly refers to the judgment appealed from so as to fully identify it. The defect urged as fatal consists of the recital that "whereas an appeal is about to be taken to the Supreme Court," when, in fact, the appeal was taken to this court. It is contended that this does not identify the appeal, and that, therefore, the bond is no bond at all on this appeal.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It is true that it has been held that, where the recitals in the undertaking do not identify the particular appeal which it is intended to perfect, the undertaking is considered as totally void for any purpose, and not merely insufficient. Little v. Thatcher, 151 Cal. 559, 91 Pac. 321; Wadleigh v. Phelps, 147 Cal. 135, 81 Pac. 418; Estate of Heydenfeldt, 119 Cal. 346, 51 Pac. 543; Centerville, etc., Co. v. Bachtold, 109 Cal. 111, 41 Pac. 813; Home & Loan Ass'n v. Wilkins, 71 Cal. 626, 12 Pac. 799; Corcoran v. Desmond, 71 Cal. 101, 11 Pac. 815. In most of the above cases several appeals had been taken and but one bond given, which did not show which appeal it was intended to perfect. In Little v. Thatcher the bond identified a judgment as the subject-matter of the appeal, when, in fact, an order denying a motion for a new trial was the matter appealed from. In the case at bar the bond fully identifies the matter from which the appeal was taken. It was the judgment rendered in the case, and is completely identified by the recitals in the bond. Furthermore, it was a judgment from which an appeal could only be properly taken to this court; and, if the appeal should in form be taken to the Supreme Court the proceedings would still in law ultimately result in an appeal to this court; for in such case the Constitution provides for a transfer of the appeal to the proper court. Const. art. 6, § 4. It would still be the same appeal, and heard upon precisely the same record, and involve the same questions.

It is no objection to the sufficiency of this appeal as it now stands, with a good bond filed and approved before the hearing of this motion, to say that the sureties on the original undertaking would not be liable. That may be true, and the appeal supported by the new bond. It is the very purpose of section 954, Code Civ. Proc., to allow a sufficient bond to be given to supply the defects of an insufficient bond. Spreckels v. Spreckels, 114 Cal. 61, 45 Pac. 1022; Jarman v. Rea, 129 Cal. 157, 61 Pac. 790; Bay City Bldg. & Loan Ass'n v. Charles E. Broad, 128 Cal. 670, 61 Pac. 368. The entire law for the giving of any bond on appeal is statutory, and it is competent for the Legislature to regulate the matter as its wisdom may dictate. Spreckels v. Spreckels, supra. Section 954, Code Civ. Proc., allowing a new bond to be given when the original bond is insufficient, is remedial in its nature, and we think for that reason should receive a liberal interpretation with a view to further the determination of appeals upon their merits. The giving of the new bond before the hearing of the motion to dismiss amply protects the interests of the respondent.

As before indicated, this appeal is in its legal effect practically the same as if the notice of appeal had in fact been an appeal to the Supreme Court. Such an appeal would have effected an appeal to this court, because, as the judgment is one directly appealable only to this court, the Supreme Court, under the Constitution, would have transferred the appeal to this court. In either case, the appeal would be heard and determined by this court upon the same record, and the same question would be involved. In this regard the principle is analogous to that part of the decision in Wadleigh v. Phelps, supra, dealing with the appeals from the judgment and various nonappealable orders reviewable upon the appeal from the judgment. But one bond was given, and it was held that this supported the appeal from the judgment. Especially see concurring opinion by Mr. Justice Angellotti, 147 Cal. 142, 81 Pac. 418.

We do not think the facts of this case bring it within the rule of those cases where the subject-matter of the appeal is not identified by the bond; and in view of the remedial character of section 954, Code Civ. Proc., the doctrine of those cases should not be stretched to cover cases not fairly within them. In McAulay v. Tahoe Ice Co., 3 Cal. App. 642, 86 Pac. 912, cited by respondent, no new bond was filed or offered, and the question of the effect of giving a new and sufficient bond under section 954 did not arise.

The motion to dismiss the appeal should be denied, and it is so ordered.

We concur: COOPER, P. J.; KERRIGAN, J.

156 Cal. 443

COLE v. ROEBLING CONST. CO. et al.

(S. F. 5,145.)

(Supreme Court of California. Nov. 6, 1909. Rehearing Denied Dec. 6, 1909.)

1. Appeal and Error (§ 1024*) — Review — Conflicting Evidence—Motion to Open Default.

Where, on a motion to vacate a default, the evidence substantially conflicts as to a fact on which defendant claimed to have relied in failing to appear and defend, the decision below is conclusive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4028; Dec. Dig. § 1024.*]

2. Judgment (§ 102*)—By Default—Effect of Amendment of Pleadings.

Where, after entry of default, the complaint is amended in matter of substance, the default is opened, and, unless the amendment is served on defendant, no judgment can be properly entered on the default, but this does not apply where judgment has been entered on the default, based on the original complaint before it was amended; defendant not being "affected" within Code Civ. Proc. § 432, providing for service on defendants affected by the amendment, nor an "adverse party," within sections 465 and 472, providing for service on such a party.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 172; Dec. Dig. § 102.*]

3. Parties (§ 27*)—Joinder of Defendants —Joint and Several Liability.

Two or more persons who jointly commit a tort being jointly and severally liable at the election of the injured party, he may sue all or any of them jointly, or each separately.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 35; Dec. Dig. § 27.*]

4. Execution (§ 18*)—Joint Defendants.

Where a joint judgment is obtained against several tort-feasors, it may be enforced by execution against one only of the judgment debtors; the only limitation being that but one satisfaction can be had.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 35; Dec. Dig. § 18.*]

5. Judgment (§ 239*) — Judgment Against One or More Codefendants—Joint and Several Liability—Complaint.

Where plaintiff sued two defendants for negligence, alleging that "defendants, their servants, agents, and employés" negligently threw from a building along which he was passing a "heavy, solid plank," in such a manner that it struck plaintiff, he was entitled to take judgment against but one of the defendants.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 417; Dec. Dig. § 239.*]

6. Judgment (§ 239*)—For or against One or More Defendants—Actions for Tort.

In view of Code Civ. Proc. § 578, providing that judgment may be given for or against one or more of several defendants, a judgment may be given against one defendant and in favor of another, in an action for a joint act of negligence.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 417; Dec. Dig. § 239.*]

7. Judgment (§ 98*)—Default against One Defendant—Action for Joint Act of Negligence.

In an action against two defendants for a joint act of negligence for which each could have been sued separately, a default judgment could be rendered against one of them, Code Civ. Proc. § 579, permitting judgment against one defendant in the court's discretion, in an action against several, leaving the action to proceed against the others whenever a several judgment is proper, and section 585, providing that, if in actions of this character defendant fails to answer, the clerk may enter his default, "and thereafter the plaintiff may apply to the court for the relief demanded in the complaint."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 156; Dec. Dig. § 98.*]

8. JUDGMENT (§ 631*)—JUDGMENT AGAINST ONE OF SEVERAL WRONGDOERS AS SATISFACTION.

No bar arises as to any wrongdoer till the injured party has received satisfaction, or what in law is deemed its equivalent; and a judgment against one wrongdoer which remains wholly unsatisfied is not such satisfaction.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1147; Dec. Dig. § 631.*]

9. JUDGMENT (§ 241*)—DIFFERENT JUDGMENTS AGAINST WRONGDOERS FOR THE SAME ACT.

Different judgments against different wrongdoers for the same wrongful act may be for different amounts, and the same result may follow where there is one action only against all the wrongdoers.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 426; Dec. Dig. § 241.*]

10. TRIAL (§ 335*) — SEVERANCE AND APPORTIONMENT OF DAMAGES FOR SINGLE ACT.

In an action for a single wrongful act, the damages cannot be severed and apportioned by the jury among the several defendants.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 788; Dec. Dig. § 335.*]

11. JUDGMENT (§ 241*)—SEVERANCE OF DAMAGES FOR SINGLE ACT.

In an action for a single wrong the damages cannot be apportioned among the several defendants; but there is no severance of damages because, after a default is entered against one defendant, plaintiff is allowed to proceed and obtain judgment against the other for a different amount.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 424, 426; Dec. Dig. § 241.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; F. J. Murasky, Judge.

Action by O. R. Cole against the Roebling Construction Company and James Wilson. From an order denying a motion to vacate a default judgment against defendant Wilson, he appeals. Affirmed.

Wm. M. Abbott and J. J. Lerman, for appellant. Hiram W. Johnson and D. M. Duffy, for respondent.

ANGELLOTTI, J. This action was one for the recovery of $6,018 damages for personal injuries alleged to have been suffered by reason of the negligence of defendants. The complaint alleges that the "defendants, their servants, agents, and employés" negligently threw from a building into a street along which plaintiff was passing a "heavy solid plank" in such a manner that it struck plaintiff, inflicting upon him permanent and other injuries, by all of which he had been damaged "at the present time" in the sum already specified. The action was commenced in the superior court of the city and county of San Francisco on February 13, 1907. Summons was duly served on both defendants on February 15, 1907. Defendant Wilson having failed to appear within the time allowed by law, his default was entered on March 1, 1907. The other defendant appeared, and filed a demurrer and a motion to strike out a portion of the complaint. On March 22, 1907, the motion to strike out was granted. The effect of this order was simply to strike out the following: "That it cannot now be told what the permanent effects of the said injury will be other than the loss of the said toes of the plaintiff, and for that reason the plaintiff avers that his damage will be continuous and increasing." It does not appear that the demurrer was sustained, and the striking out of this portion did not leave it any way defective. It alleged in another place the loss of three of plaintiff's toes by reason of the negligence, and also that thereby plaintiff "has been permanently maimed, injured, and crippled." On March 29, 1907, defendant Wilson not having appeared, the court proceeded with the hearing of the cause as to him; he not being present and not having been notified. The court found that he had been regularly served, and that his default had been duly entered, and that all of the allegations of the complaint are true except that as to the amount of damage. It further found that the damage was $6,318, and ordered a judgment against Wilson accordingly. The findings and decision were filed on March 29, 1907, and judgment was given against Wilson for that amount on the same day, and entered on March 30, 1907. On April 1, 1907, plaintiff filed an amended complaint. This was an exact copy of the original, except that the matter that had been stricken out was omitted, and in lieu thereof there was inserted the following: "That the injuries of plaintiff are permanent; that his damage will be continuous and increasing." The amended complaint was not served on Wilson. On May 24, 1907, the other defendant filed its answer thereto, and at the time of the hearing of the motion hereinafter referred to the cause was at issue between plaintiff and said defendant on said amended complaint and said answer. On June 15, 1907, Wilson made his first appearance in the action by moving to vacate the default and judgment against him, on the ground of excusable neglect on his part in theretofore failing to appear and answer, and also on the grounds that the judgment was inadvertently rendered by the court, was irregular, and was without the jurisdiction of the court. This motion was denied on July 28, 1908, and this is an appeal by Wilson from the order denying his motion.

Learned counsel for appellant frankly admit that, so far as their motion was based on the ground that the judgment was taken against him through his excusable neglect, their case on appeal from the order of the trial court denying relief is not a strong one. This is clearly apparent when the record is examined. Indeed the showing was of such a nature that, notwithstanding the established tendency in favor of a trial on the merits, it might well have been contended that the granting of the motion would have been an abuse of discretion on the part of the trial court. But it is sufficient to say that as to the alleged fact upon which alone appellant claimed to have relied in failing to himself appear and defend there was a substantial conflict of evidence, and the decision of the trial court thereon is conclusive here. We may add that the preponderance of evidence on this question of fact was clearly against appellant.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

As we have seen, an amended complaint was filed subsequent to the entry of the default, which was never served upon appellant. It is earnestly urged that the effect of this was to open the default and make the judgment entered irregular, one inadvertently rendered, and one given without jurisdiction. It is settled by a long line of decisions that where, after the default of a defendant has been entered, a complaint is amended in matter of substance as distinguished from mere matter of form, the amendment opens the default, and unless the amended pleading be served on the defaulting defendant, no judgment can properly be entered on the default. See Thompson v. Johnson, 60 Cal. 292; Reinhart v. Lugo, 86 Cal. 399, 24 Pac. 1089, 21 Am. St. Rep. 52; Witter v. Bachman, 117 Cal. 319, 49 Pac. 202; Woodward v. Brown, 119 Cal. 304, 51 Pac. 2, 542, 63 Am. St. Rep. 108; Linott v. Rowland, 119 Cal. 452, 453, 51 Pac. 687; Riverside County v. Stockman, 124 Cal. 224, 56 Pac. 1027; Tappendorff v. Moranda, 134 Cal. 421, 66 Pac. 491. The reason for this rule is plain. A defendant is entitled to opportunity to be heard upon the allegations of the complaint on which judgment is sought against him. His default on the original complaint is limited in its effect to that complaint; and, if by amendment a matter of substance is added, he should be given the opportunity to contest the same before any judgment is given against him on account thereof. The law, therefore, requires that the amended pleading shall be served on all the adverse parties, including defaulting defendants. But, assuming the amendment here to have been a matter of substance, this rule has no application to the case at bar. All of the cases cited are cases where the judgment was given against the defaulting defendant subsequent to the presentation of the amended pleading, and was necessarily based solely on such amended pleading which had taken the place of the original pleading, while here judgment had been given and entered upon the default against the defaulting defendant before any amendment was made, there being at the time of such judgment a good and sufficient complaint on file, with a copy of which he had been duly served, and which constituted the basis of the judgment. So far as the superior court was concerned, the action, at the time of the amendment, had been finally disposed of as to the appellant by the judgment entered upon the original complaint, the allegations of which were admitted by his failure to appear. The judgment having thus been given, appellant could not be "affected" by any subsequent amendment (Code Civ. Proc. § 432), nor was he longer an "adverse party" within the meaning of that term as used in sections 465 and 472 of the Code of Civil Procedure. As to him, the action had been disposed of in the superior court upon the issues tendered by the original complaint. The whole reason for the rule relied on by the appellant is wanting in such a case, and there is nothing in the law warranting the conclusion that there is any such rule where judgment is given against the defaulting defendant before any amendment is made.

It is further contended that the trial court had no power to give judgment against the appellant alone, "in view of the finding that both defendants were jointly guilty of the negligence alleged to have been the cause of plaintiff's injury." We have already stated the allegation of the complaint as to the act of the defendants that caused the injury. The court simply found "that all the singular the averments of the complaint are true," except the averment as to damages. Section 579 of the Code of Civil Procedure provides: "In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper." Section 585 of the Code of Civil Procedure provides that if, in an action of this character, the defendant fails to answer, the clerk must enter the default of the defendant, "and thereafter the plaintiff may apply to the court for the relief demanded in the complaint," and the court is authorized to hear the evidence that may be offered to sustain the allegations of the complaint.

It is not disputed that two or more persons who jointly engage in the commission of a tort are jointly and severally liable, as the injured party may elect. The injured party may sue all or any of them jointly, or each separately, or, having secured a joint judgment against all, enforce such judgment by execution against one only; the only limitation being that he can have but one satisfaction for the injury that he has received. Fowden v. Pacific Coast, etc., Co., 149 Cal. 157, 86 Pac. 178. See, also, Tompkins v. Clay St. R. R. Co., 66 Cal. 166, 4 Pac. 1165. In this case plaintiff might have brought separate actions against Wilson and the other defendant; his complaint containing the precise allegations as to a joint act of negligence that are made in the complaint here. If he had so done, such complaint in each action, although alleging a joint act of negligence on the part of the defendant and the other party named, would have stated a complete and separate individual liability against the party sued on account of the single act complained of. Fowden v. Pacific Coast, etc., Co., supra. Nor can it be disputed that, under the rules of law in force in this state, in an action of the character of the one before us, judgment may be given against one defendant and in favor of another defendant. Section 578, Code Civ. Proc.; Fowden v. Pacific Coast, etc., Co., supra. In view of these well-settled views, by virtue of which a separate action could have been maintained against Wilson upon the very allegations contained in this complaint, it is difficult to conceive why a "several judgment" against one of two or more defendants charged with having jointly participated in a single act of negligence producing injury is not "proper"; and, if it would be "proper," it is in terms authorized by section 579 of the Code of Civil Procedure. Wherein can appellant complain of such action being taken in this case? By his failure to appear he had admitted the truth of the allegations of the complaint "which stated a complete and separate individual liability" on his part on account of the single act complained of just as fully as if he had been the sole defendant. So far as his liability was concerned, it could make no difference whether his codefendant was subsequently held liable or not. He had no legal right to insist that others who had participated in the confessed negligent act, whether defendants or not, should pay any portion of the damage. He was liable for all such damage upon the allegations of the complaint that must be taken as admitted by him. Learned counsel for Wilson say that if this practice is to be sustained, the logical result will be that the court, after entering this judgment against the appellant, can proceed to the trial of the case as against the remaining defendant, entering up a new and separate judgment, and perhaps a different judgment from the one entered against the appellant. This may be so, but we do not see that it affects the question before us. The well-settled rule is that no bar arises as to any of the wrongdoers until the injured party has received satisfaction, or what in law is deemed its equivalent, and a judgment against one wrongdoer which remains wholly unsatisfied is not such satisfaction. See Dawson v. Schloss, 93 Cal. 199, 29 Pac. 31; Grundel v. Union Iron Works, 127 Cal. 438, 59 Pac. 826, 47 L. R. A. 467, 78 Am. St. Rep. 75.

The situation here in this regard is practically not different from that in Dawson v. Schloss, supra, where the action was against Schloss and Hinkle. On the first trial judgment was recovered against both Schloss and Hinkle for $5,000. A new trial was granted as to Schloss alone. The judgment against Hinkle for $5,000 remained in force, but wholly unsatisfied. A new trial resulted in a judgment against Schloss for $3,000. Schloss appealed from the judgment against him, contending that so long as the original judgment existed against Hinkle, no judgment should have been rendered against him on the new trial; that "while separate suits may be brought against each of joint tort-feasors, yet it is well settled that, if the defendants are sued jointly, as here, there can be but one verdict and judgment." This court said: "Such is not the prevailing rule in the United States." The judgment against Schloss was affirmed.

It is not true under our rules that different judgments against different wrongdoers for the same wrongful act may not be for different amounts, the amount in each case being dependent upon the conclusion of the particular judge or jury as to the amount of damage accruing to the injured party from the wrongful act. Dawson v. Schloss, supra, shows that the same result may follow where there is one action only against all the wrongdoers. It is true that in an action of this character the damages cannot be severed and apportioned by the trial court or jury among the different defendants. McCool v. Mahoney, 54 Cal. 491, holds no more than this. In that case the jury by their verdict against two defendants apportioned the total damage of $3,500 found, awarding $3,000 against one defendant and $500 against the other, and judgment was entered accordingly. This judgment was reversed, the court saying that, as the action was for a wrong in which both defendants joined, the damages could not be severed. But this rule has no application to the question we are discussing. There will be no severance of damages even if plaintiff is allowed to proceed and obtain judgment against the remaining defendant for a different amount. The amount for which he finally obtains judgment against the other defendant would be the total amount of damage that, in the opinion of the trial court or jury, the plaintiff had suffered from the wrongful act of both defendants. The case of Curry v. Roundtree, 51 Cal. 184, cited by appellant, was an action against three alleged copartners jointly on a partnership demand, and is not in point. See Harrison v. McCormick, 69 Cal. 620, 11 Pac. 456.

No other point is made for reversal.

The order is affirmed.

We concur: SLOSS, J.; SHAW, J.

11 Cal. App. 439

BAIRD v. JUSTICE'S COURT OF RIVERSIDE TP. et al. (Civ. 691.)

(Court of Appeal, Second District, California. Oct. 2, 1909.)

1. Attorney and Client (§ 36*)—Suspension of Attorney—Jurisdiction of Justice's Court.

A justice's court is not a court which, under Code Civ. Proc. § 287, has power to remove or suspend an attorney from practice.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 49; Dec. Dig. § 36.*]

2. Attorney and Client (§ 38*)—Suspension of Attorney—Grounds.

The practicing of law by one occupying a judicial position is not one of the causes for removal or suspension of an attorney.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 51; Dec. Dig. § 38.*]

3. Attorney and Client (§ 45*)—Suspension of Attorney—Grounds.

If an attorney engages in the practice of his profession while holding a judicial position, in violation of Code Civ. Proc. § 171, his offense is that of a judicial officer, and not that of attorney.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 63; Dec. Dig. § 45.*]

4. Attorney and Client (§ 57*)—Suspension Proceedings—Review—Parties.

Under Code Civ. Proc. § 1069, requiring the petition for certiorari to be made by the person beneficially interested, defendant, in an action in a justice's court, whose answer is oral, requiring no signature of an attorney, is not a proper party to bring certiorari to review an order of the justice disbarring his attorney from practicing in such court.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 81; Dec. Dig. § 57.*]

5. Certiorari (§ 5*)—Existence of Remedy by Appeal.

Certiorari will not lie where the matter complained of can be reviewed on appeal.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 5; Dec. Dig. § 5.*]

6. Appeal and Error (§ 1074*)—Harmless Error—Prejudicial Character of Judgment.

Under Code Civ. Proc. § 475, providing that no judgment shall be reversed for error unless substantial injury appears, an erroneous judgment, vacating an order which was void and ineffective on its face, will not be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4248, 4249; Dec. Dig. § 1074.*]

Appeal from Superior Court, Riverside County; Benjamin F. Bledsoe, Judge.

Petition for certiorari by John Baird, against the Justice's Court of Riverside Township and Thomas B. Stephenson, Justice of the Peace. From a judgment for plaintiff, defendant appeals. Affirmed.

Lafayette Gill, for appellant. Miguel Estudillo and George A. French, for respondent.

ALLEN, P. J. This is a proceeding wherein the court below gave judgment annulling the following order made and entered by appellant justice in an action pending in said justice's court wherein petitioner was defendant: "It is ordered that Police Judge George A. French be disbarred from practicing law in the justice court of Riverside township so long as he shall remain police judge of said city, and his name is hereby stricken from the files in this case." The application for the writ was made by the defendant to the action in which the order was made; the attorney, French, not being a party thereto. It is conceded, however, that French was at all times mentioned in the proceedings a practicing attorney, having been duly admitted to practice in all the courts of the state, and had been retained by petitioner and had appeared in said action in petitioner's behalf.

Counsel for the respective parties have discussed at length in very interesting and instructive briefs the effect which should be given section 171, Code Civ. Proc., which in terms prohibits a justice of the peace from practicing law before another justice of the peace of the same county; respondent's contention being: That the section is not applicable to a police judge appointed in a city, even though his jurisdiction within such city is concurrent with that of the justice of the peace, while appellant contends that under the charter of the city of Riverside a police judge is a justice of the peace when performing the functions of that office; that the character of a court is determined, not by its name, but by the nature of its jurisdiction and functions; that in the enactment of section 171 the Legislature intended to prohibit those performing the functions of a justice of the peace from engaging in such practice of law. In view of the conclusions hereinafter expressed, we do not consider it necessary to discuss or determine the above-mentioned controversy.

Section 287, Code Civ. Proc., designates the courts having power to remove or suspend attorneys, and the causes for which such removal or suspension may be made. A justice of the peace is not a court which, under that section, has power to remove or suspend an attorney, and the practicing of law by one occupying a judicial position is not one of the causes for removal or suspension. If, as a matter of fact, French violated the law by thus engaging in the practice of his profession before a justice of the peace, when at the same time he was occupying a judicial position, his offense is that of a judicial officer and not that of an attorney (In re Silkman, 88 App. Div. 102, 84 N. Y. Supp. 1027); and, if he subjected himself to any penalty by reason of misconduct, the punishment therefor is provided by section 758 et seq., Pen. Code. As said in the case last cited: Courts which have inherent power to discipline lawyers are confined in its exercise to such acts exhibiting turpitude, or loss of that good character which was essential to admission in the first instance, and, when misconduct is made by statute ground for removal from office for transgression as a judicial officer, the same, in the absence of expressions to the contrary, must be deemed exclusive. Conceding want of jurisdiction on the part of the justice to make the order complained of, the question as to the power of petitioner to invoke the writ of certiorari for its annulment then presents itself. Section 1069, Code Civ. Proc. with reference to the writ of certiorari, provides: The application must be made upon a verified petition of the party beneficially interested. Is the petitioner herein shown to be such party? That part of the order complained of, purporting to strike the name of French from the file, could in no wise prejudice petitioner. The answer, being the only instrument which could be affected by the order, was an oral one requiring no signature by an attorney, and, eliminating his name therefrom, it still remains as a complete answer to the complaint, and the cause was as much at issue as if French's name appeared as attorney. Aside from the fact that the order of a justice of the peace disbarring an attorney is so obviously without authority, so foreign to any jurisdiction or power reposed in a justice of the peace, its void character is made apparent upon its face, and for that reason could scarcely be said to work injury or affect the rights of any one. Petitioner does not show how such order could affect his substantial rights, or any judgment which might be rendered in the action. That petitioner has the right to be represented by counsel does not imply that he has the right to be represented by any particular person. The attempt at disbarring French could only affect petitioner in that, while the justice of the peace persisted in his effort to prevent French from practicing law before him, he could not have the benefit of French's services. It may be that French does not care to interest himself further in petitioner's defense, or, perchance, the plaintiff in the action may discontinue the same before trial, and the services of an attorney will no longer be required. In either of which events, the order could not remotely affect petitioner. Upon the other hand, if this order in any wise affects a judgment thereafter rendered against petitioner in the action, he possesses the right under section 974, Code Civ. Proc., to appeal upon questions of law, and by section 980 the superior court, upon such appeal, may review all orders affecting the judgment appealed from. Certiorari will not lie when the matter complained of can be corrected on appeal. Stoddard v. Superior Court, 108 Cal. 303, 41 Pac. 278; Southern Cal. Ry. Co. v. Superior Court, 127 Cal. 422, 59 Pac. 789.

While it appears from what is here said that, in the opinion of this court, the superior court erred in its judgment vacating the order, yet it is apparent that the order thus vacated has no efficacy and is a nullity, void upon its face, and an order of the court vacating an order of such character, even if erroneous, could not prejudice the rights of any one. Section 475, Code Civ. Proc., charges an appellate court in every stage of the action to disregard any error which, in the opinion of the court, does not affect the substantial rights of the parties, and that no judgment shall be reversed by reason of any error unless it shall appear from the record that such error was prejudicial, and that the party complaining or appealing sustained and suffered substantial injury. Prejudicial error not being apparent, an order will be entered affirming the judgment.

Judgment affirmed.

We concur: SHAW, J.; TAGGART, J.

11 Cal. App. 425

KNOTT v. PATNOTT. (Civ. 683.)

(Court of Appeal, Second District, California. Sept. 30, 1909.)

APPEAL AND ERROR (§ 987*)—FINDINGS—CONCLUSIVENESS.

The court will not on appeal consider questions only involving the weight and effect of testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3893–3896; Dec. Dig. § 987.*]

Appeal from Superior Court, Kings County; John G. Covert, Judge.

Action by B. F. Knott against A. F. Patnott. From a judgment for defendant and from an order denying a new trial, plaintiff appeals. Affirmed.

H. B. McClure and J. L. C. Irwin, for appellant. M. L. Short, John F. Pryor, and D. L. Phillips, for respondent.

ALLEN, P. J. The plaintiff in his complaint set out the purchase by him of a motor car from defendant at an agreed price of $750; that plaintiff was induced to make such purchase and pay said sum by reason of the representations of the defendant that the car was in every respect in first-class condition, suitable for use, and had been tested by defendant and found satisfactory and in good condition; that plaintiff was unskilled in the mechanism of such machines and notified defendant that he would rely upon his representations; that these representations of defendant were false, and known by him to be false when made, and the plaintiff promptly, upon discovering the defects which rendered the car unsatisfactory, notified defendant of his rescission of the contract and demanded the return of the price paid. Defendant by answer denied all of the allegations made by plaintiff in respect of representations, and, on the contrary, averred that the machine was in good condition when sold and was worth the sum received; denied that the purchase was based upon any belief in any representations made by defendant, but, on the contrary, that plaintiff, through a skilled agent, who minutely examined the car before purchase, purchased the same upon the faith of such report and examination of the agent. The court finds against plaintiff as to all the material allegations in his complaint, and further that, in substance, the allegations of the answer are true. Judgment went for defendant, from which judgment and an order denying a new trial plaintiff appeals.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The specifications of error all refer to the insufficiency of the evidence to support the findings. The record discloses evidence which, if accepted by the trial court, amply supports its findings. The rule that an appellate court will not usurp the functions of the trial court and upon appeal consider questions only involving the weight and effect which should be given the testimony has been declared so often that it would seem that a time should arrive when its force and effect should be appreciated. The duty of this court in considering such specifications of error is discharged when, upon examination, it finds that the findings of the trial court have some support from competent evidence.

The judgment and order are affirmed.

We concur: SHAW, J.; TAGGART, J.

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11 Cal. App. 450

RUSSELL v. BANKS et al.

(Court of Appeal, Third District, California. Oct. 4, 1909.)

1. Appeal and Error (§ 373*)—Necessity of Filing Appeal Bond.

As a new or alternative method of taking appeals to the Supreme and District Courts of Appeal, without filing appeal bonds, is provided by St. 1907, p. 750, c. 408, an appeal, evidently taken under the former exclusive method, is sufficient under the alternative method recently adopted, though no bond was filed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2001; Dec. Dig. § 373.*]

2. Appeal and Error (§ 340*)—Time of Taking Appeal—Review of Evidence to Support Findings—Consideration of Bill of Exceptions.

An appeal being taken within 60 days after entry of judgment, the bill of exceptions may be considered on the point that the evidence does not support the findings on which the judgment rests.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1888; Dec. Dig. § 340.*]

3. Evidence (§ 98*)—Burden of Proof—Failure to Sustain.

It is the duty of plaintiff having the burden of proof to establish his case by satisfactory proof, and, until he has done so, defendants need not reply or cross-examine witnesses whose testimony has little tendency to sustain the complaint.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 122; Dec. Dig. § 98.*]

4. Landlord and Tenant (§ 80½*)—Assignment of Lease—Sufficiency of Evidence.

Evidence *held* to show that defendants went on premises to manage the same for a survivor of a firm leasing the same from plaintiff, and that there was no sale, transfer, or assignment of the lease on which the suit was based, so that the relation of landlord and tenant between the parties to the suit was not shown.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 231; Dec. Dig. § 80½.*]

5. Contracts (§ 187*)—Third Persons Employed to Manage Premises—Liability to Lessor.

The employment of third persons by a lessee to manage leased premises is obviously a contract between the parties for their own benefit, and for that of no other person, and so cannot be enforced by lessor against such persons under Civ. Code, § 1559, as a contract made expressly for his benefit.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 802, 803; Dec. Dig. § 187.*]

6. Landlord and Tenant (§ 64*)—Third Persons Employed to Manage Premises—Liability to Lessor.

Payment of rent by persons employed to manage premises for a lessee did not create an estoppel against them in favor of lessor suing them on the lease; that being only what they agreed to do under their arrangement with lessee irrespective of the lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 171, 177, 178; Dec. Dig. § 64.*]

Appeal from Superior Court, Mendocino County; M. S. Sayre, Judge.

Action by C. E. Russell against James A. Banks and another. From a judgment for defendants, plaintiff appeals. Affirmed.

J. W. Preston, for appellant. Robert Duncan, for respondents.

HART, J. The complaint alleges that the defendants are indebted to the plaintiff in the sum of $873 under the terms of a certain lease executed by said plaintiff to one N. J. Waymire, and prays for judgment for that sum. The cause was tried by the court without a jury, and judgment against the plaintiff and in favor of the defendants for costs was rendered and caused to be entered by the court. The plaintiff appeals from said judgment on a bill of exceptions.

Respondents first object to the consideration of this appeal upon the alleged ground that jurisdiction to do so has not been conferred because of the failure of the appellant to file an undertaking on appeal, citing sections 940 and 953 of the Code of Civil Procedure and the case of Pacific Mutual Life Ins. Co. v. Edgar, 132 Cal. 197, 64 Pac. 260; but, since the decision in the case cited, the Legislature of 1907 (St. 1907, p. 750, c. 408) has provided a new method of taking appeals to the Supreme and District Courts of Appeal, and thereunder it is not necessary, as under the old method, in order to perfect such appeals, to file an undertaking guaranteeing the payment by the appellant of all damages and costs which may be awarded against him on the appeal, or in lieu thereof to deposit with the clerk the sum required by the statute. And, in Mitchell v. Cal. & O. S. S. Co., 154 Cal. 731, 99 Pac. 202, our Supreme Court, dealing with the new or alternative method of taking appeals, says that, while the later act did not repeal the old method by which the filing of a bond for costs is required, it is sufficient if an appeal is perfected under either method, "and hence," quoting from the syllabi, "though a party did not file a sufficient undertaking for costs, as required by the old method, but filed his notice of appeal which was sufficient under the new method, the appellate court obtained jurisdiction, though the party intended to pursue the old method." Here the appellant has, evidently, so far as the form of the record is concerned, taken his appeal under the former exclusive method, and, although no appeal bond was filed, this is sufficient under the alternative method recently adopted by the Legislature, according to the ruling in the case referred to.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

There are some other technical objections to a review of the bill of exceptions; but they are not of sufficient importance to require special notice. It may, however, be remarked that the appeal here was taken within 60 days after the entry of the judgment, and therefore the bill of exceptions may be considered on review of the point that the evidence does not support the findings upon which said judgment rests. It appears from the record that on the 3d day of October, 1905, the plaintiff leased, by an instrument in writing, a certain dairy ranch, situated in Mendocino county, and the machinery thereon for conducting the dairy business, together with a number of milch cows, to one N. J. Waymire, for the term of one year, with a stipulation on the part of the plaintiff that at the expiration of said term he would renew said lease for the further term of four years. It was also stipulated in said lease that "this lease shall not be sold or transferred to any other party during the term of it without the written consent of the party of the first part"—that is, the plaintiff. The complaint alleges, and the evidence shows, and the court finds, that, notwithstanding the fact that the written lease indicated that said N. J. Waymire was the sole lessee, "the truth and fact was that the said lease was taken by and on behalf of a copartnership which then and there existed between the said N. J. Waymire and her son, G. C. Waymire." Mrs. Waymire and her son, G. C. Waymire, entered into the possession of said dairy ranch and the stock, etc., under said lease; but on the 19th day of February, 1906—approximately eight months prior to the expiration of the term fixed by said lease—Mrs. Waymire died, and, as the complaint alleges, "leaving as her sole surviving partner in the said lease the above-named G. C. Waymire, her son." The complaint continues as follows: "That on or about the said 1st day of March, 1906, and after the death of the said N. J. Waymire as aforesaid, the said G. C. Waymire, surviving partner as aforesaid, acting in liquidation of the affairs of said copartnership, did sell, assign, transfer, and convey unto the defendants, James A. Banks and Thomas N. Hale, the unexpired portion of the said lease so made and executed as aforesaid. That pursuant to said sale and transfer so made as aforesaid, the said defendants, James A. Banks and Thomas N. Hale, entered into the possession of the said ranch, together with the stock thereon, and did use and enjoy the same for the greater part of the unexpired term of said lease, to wit, from March 1, 1906, to the 4th day of September, 1906, at which time the said defendants abandoned the said property and taking therefrom a large number of cattle and other personal property. That the plaintiff accepted the said defendants and each of them as tenants of said property under and by virtue of the said lease so made as aforesaid." The complaint is unverified, and the answer denies generally each and every allegation in said complaint. The court found from the evidence: That said G. C. Waymire, as surviving partner of N. J. Waymire, deceased, and in the liquidation of the affairs of said copartnership, did not "sell, assign, transfer, and convey" to the defendants the unexpired portion of said lease; that said defendants did not, pursuant to said alleged sale and transfer, enter into the possession of the said ranch, together with the stock thereon; that said defendants did not "use and enjoy the same for the greater part of the unexpired term of said lease; that they did not on the 4th day of September, 1906, abandon said property or take from said ranch a large number of cattle and other personal property"; that "it is not true that the plaintiff accepted the said defendants or either of them as tenants of said property under and by virtue of said lease or otherwise or at all."

The principal contention upon the part of the appellant is that the respondents took possession of the demised premises under the lease executed to Mrs. Waymire and attorned to the appellant for a portion of the unexpired term; that, the clause in the lease interdicting the assignment of said lease without the consent of the lessor being alone for the benefit of the latter, he could waive that right or benefit, and, having done so, an assignment of the lease took place by operation of law. There are some other suggestions offered by counsel with regard to the legal effect of the alleged transfer of the possession of the demised premises to the defendants; but these will not require special notice. The position of the respondents is that they were merely employed by G. C.

Waymire to take charge of the ranch and the business connected therewith and manage the same for him.

Thus it will be observed that the only proposition involved in this controversy is: What is the legal effect of the transaction, as disclosed by the evidence, between G. C. Waymire and the respondents with respect to the property to which the lease relates? And therefore the sole question submitted here is: Are the findings of the court below justified by the evidence? We may say, in the outset, that we believe the findings are sufficiently supported, although it may be admitted that the evidence submitted by both the plaintiff and the defendants, as presented in the record before us, does not appear to be very clear or altogether satisfactory upon the question of what was in reality the legal nature of the transaction between G. C. Waymire and the respondents; but the burden was upon the plaintiff to prove the material allegations of his complaint, and this, according to the court's findings, he failed to do to the satisfaction of the trial court, and we cannot now say that the judge's conclusions from the evidence are, as a matter of law, unsupported by the proofs. He had the witnesses before him, heard and saw them testify, and was, of course, in a much better position to weigh the testimony than a reviewing court.

The plaintiff testified that, in the month of March, 1906, after the death of Mrs. Waymire, he went to the ranch and found the defendant Banks in charge of the place. The latter was living on the ranch with his family. Banks said to the witness on that occasion that he (Banks) had made arrangements with Waymire to pay the rent and for six dead carcasses. "I found him [Banks] there in possession," plaintiff continued, "and as long as he was there, and I received my rent, that was all I wanted." He said that he had received certain sums paid as rent under the lease after the death of Mrs. Waymire and after Banks and Hale "went into possession of the place." These sums, he declared, were deposited to his credit with the Irvine & Muir Company's store. In connection with this statement of the witness, it was admitted by counsel for the defendants that the sum of $178 was left at said store for the plaintiff by the defendants; but it was not admitted that said sum was so deposited as rent due from the defendants under the terms of the lease. Plaintiff further testified that the defendants left a keg of butter with Irvine & Muir to be applied as payment on the rent.

G. C. Waymire testified as a witness for the plaintiff; but his testimony throws no light whatever upon the nature of the arrangement between himself and the respondents relative to the leased property. He said that, shortly after his mother's death, he left the "Russell ranch" (meaning the demised premises), and that he did not thereafter return to said ranch to remain permanently. "I never took possession of it any more," he continued. "Mr. Banks moved on the place, and Mr. Hale was to help him. It was my understanding that Banks and Hale were jointly to take charge of the property. * * * I do not know who got the butter produced by the dairy cows. It was sold around there. After the death of my mother I do not know who sold the butter. I wasn't there. I never made any effort to retake possession of the place. After Banks and Hale moved away in September, I was first at Willits. I sent Mr. Russell word and then moved to Lake county. * * * I never had anything to do with the place after the 1st day of March, except that I was upon it a few times."

A witness testified that he worked for the respondents in the year 1906 on the "Russell ranch," and that during that time he had a talk with Banks concerning the terms upon which the latter was holding the property, that Banks then said that "he was to give $12 per head for cows and $10 per head for heifers, and that it would amount to about $100 per month. He said he was to keep it [the property] the rest of the time after Waymire had quit it."

The plaintiff introduced the deposition of the defendant Banks, whose testimony was, in part, as follows: "The trade that I made with Cleve was that we were to take the place and run it for him, and we were to have the proceeds of the place over and above certain rents we were to pay. I do not remember how much money we were to pay Russell. We were to make such payments as Cleve Waymire told us to make. We were to pay the payments called for in the lease. They (the Waymires) were to make the old stock good. There were no wages set at all. We were to take the place and run it and pay the rent and have the proceeds of the place. * * * We did not stay on the place until the lease expired. We paid the rent until Cleve Waymire said we had paid more than was coming to Russell because the cows were not on the place that should have been there. We paid the rent until Cleve Waymire told us not to, but I cannot tell how much we paid. We didn't count the cattle on the place. We counted what milch cows we milked. There were about 65, and part of these were heifers. Cleve Waymire was at Willits when I left the place. I told him I was going to leave and for him to notify Russell, and he did. I took the butter we sold off the place and took the 48 head of calves. There were no powers of attorney or other writings between me and Cleve Waymire or Ed Waymire. There was to have been though, when he was appointed administrator, but they never was appointed administrator."

The witness Clark, for the plaintiff, testified, no objection having been offered to his testimony, that Waymire stated to him that he (Waymire) had "rented the place to Banks and Hale, and he also said he was going to make Russell believe that Banks and Hale were running the place for him (G. C. Waymire)."

The foregoing represents the substance of the important testimony brought out by the plaintiff. The cross-examination of plaintiff elicited the fact that, after the death of Mrs. Waymire, he procured the public administrator of Mendocino county to petition for and secure letters of administration upon her estate. Plaintiff was asked if he did not present a claim against said estate which contained the same items as those upon which this action was brought, and he replied in the affirmative, saying that the said claim "was actually the same as my bill of particulars furnished in this case." The claim as presented against the estate was received in evidence, and it shows that it was approved by the administrator of the estate and allowed and approved by the judge of the superior court on the 16th day of April, 1907. The present action was begun on the 13th day of March, 1908, almost a year after the administrator and the judge had approved said claim. Why the claim was not paid by the administrator does not appear. The plaintiff also admitted, upon cross-examination, that, at his instigation, the administrator of Mrs. Waymire's estate brought an action long prior to the institution of the present action against the defendants here to recover a certain number of head of calves which said defendants were alleged to have taken with them when they left the demised premises in September, 1906.

For the defendants, one Hotskin testified that he was present at the trial of said last-mentioned case and heard the plaintiff here therein testify that he had found Banks and Hale on his property, but that he "had never had any dealings with them at all."

It will be noticed from the evidence, as we have briefly presented it here, that the only witness whose testimony reflects, in any degree, any light upon the nature of the arrangement between G. C. Waymire and the respondents concerning the demised premises, is the defendant Banks. He stated that he and Hale were to manage the place and business for Waymire, for which services they were to receive such portion of the income from said business as might be in excess of the sum necessary to pay certain rents, and that they were to pay such rents only as G. C. Waymire directed them to do. Banks said that he was familiar with the provision in the written lease prohibiting the transfer or sale of the same by the lessee without the consent of the lessor, and that, when he and Hale took charge of the premises for Waymire, they were fully aware of the fact that Waymire could not, without plaintiff's assent, transfer or assign to them said lease. The respondents, he said, continued to pay the rent, leaving the same with Irvine & Muir for the plaintiff, until Waymire directed them to cease making further payments for that purpose.

Waymire, while on the witness stand, said nothing from which the conditions upon which Banks and Hale assumed control of the premises could definitely be inferred. His statement that his understanding was that the respondents "were jointly to take charge of the property" furnishes no definite information whether they were to do so under the lease or merely as agents of himself. It may, indeed, well be considered a significant fact that G. C. Waymire, the only other person than Banks and Hale who could have thrown any light upon the nature of the arrangement between himself and the defendants with regard to the control or management of the property by the latter, was not asked a single question, so far as the record shows, which would lead to an explanation of the transaction, although called as a witness by the plaintiff. If he was questioned upon the proposition, he made no satisfactory explanation of the transaction, for about all that we find from the record that he did say upon the subject was, "It was my understanding that Banks and Hale were jointly to take charge of the property." Waymire, above all other persons, except the respondents, ought to have been able to give in the most definite manner the terms and conditions upon which he permitted Banks and Hale to assume charge of the property, and yet, as suggested, he was apparently not questioned very closely upon the proposition, or, if he was, he was not compelled, as we think he could have been, to make satisfactory answers. It is true that he was asked no questions on cross-examination; but, having testified to nothing on direct examination seriously militating against the position of the respondents upon the issue before the court, there was no necessity for a cross-examination. It was the duty of plaintiff, as before stated, to establish the claims of his complaint by satisfactory proof, and, until he had made out a satisfactory case, there was no duty resting upon the defendants to reply or to cross-examine witnesses whose testimony had little tendency to sustain the averments of the complaint. We refer to this circumstance as illustrating the unsatisfactory showing made by plaintiff and in explanation of how the trial court, in weighing the testimony, could have justly rejected the contention of the plaintiff that Waymire had sold or transferred the lease to the respondents, and that they attorned to him according to the terms of the instrument. The truth is that the plaintiff, up to the time of the institution of this action, so far as we are advised by the record, did not treat or recognize in any manner the respondents as his tenants or as the successors in interest of Waymire under the terms of the lease. He encouraged the bringing of an action by the administrator of the estate of Mrs. Waymire against the respondents to recover certain stock which they took from the premises, claiming that said stock was still the property of the Waymires. Not only did he cause that action to be brought, but he testified therein that he never had had any dealings with the respondents, meaning, no doubt, that he did not place them in charge of the premises, nor recognize them as tenants after they assumed charge. Furthermore, he admitted that the items contained in the very account upon which he undertakes to sustain this action were included in a claim he filed in and against the estate of Mrs. Waymire, thus showing that up to that time he had not recognized or accepted the respondents as the tenants under the lease to the Waymires. The respondents always paid the rent to Irvine & Muir, as directed by G. C. Waymire, and never had any personal dealings with the plaintiff during the time they were on the premises, and ceased paying rent when directed so to do by Waymire. The last named testified that when the respondents left the premises he notified the plaintiff of the fact.

We can perceive no reason for doubting that the evidence justifies the court's conclusion that Banks' statement to the effect that the respondents went upon the premises to manage the same for G. C. Waymire, and that there was no sale, transfer, or assignment of the lease to them, is true. This being so, the relation of landlord and tenants between the plaintiff and the respondents is not shown, and this action cannot therefore be maintained.

We do not deem it necessary, in view of the conclusion we have reached as to the findings, to examine here the cases cited by the appellant in support of what he submits to be the law applicable to the facts as he understands them to be established by the evidence. We have no fault to find with the legal principles which he undertakes to invoke here. His difficulty, as we have seen, lies in what we deem to be a misconception of the effect of the evidence. His final proposition that, if there was not an assignment of the lease under any view of the evidence, the contract between Waymire and the respondents was nevertheless made expressly for his benefit, and that therefore, under the terms of section 1559 of the Civil Code, he is entitled to enforce it, cannot, under the findings, be maintained, for if, as the court found, upon sufficient evidence, we think, that there was nothing more than an employment of the respondents by Waymire, then, obviously, the contract thus made between the parties was for their own benefit and for that of no other person.

There is no showing that the defendants ever told or in any way ever represented or held out to the plaintiff that they were in possession of the property under the lease, nor did they mislead him to his injury. As is said in Canale v. Copello, 137 Cal. 25, 69 Pac. 699, "that the defendants paid rent" did not create an estoppel against them. If they paid rent while occupying the premises, they only did what they agreed to do under their arrangement with G. C. Waymire and irrespective of the lease. See: Fisher v. Slattery, 75 Cal. 325, 17 Pac. 235; Canale v. Copello, supra; Gustafson v. Stockton & Tuolumne R. R. Co., 132 Cal. 619, 64 Pac. 995; Brown v. Curtis, 128 Cal. 193, 60 Pac. 773.

It follows from the foregoing that the judgment must be affirmed, and it is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

11 Cal. App. 387

FRESE v. MUTUAL LIFE INS. CO. OF NEW YORK. (Civ. 598.)

(Court of Appeal, Third District, California. Sept. 29, 1909. Rehearing Denied by Supreme Court Nov. 26, 1909.)

1. INSURANCE (§ 36*)—POWERS OF INSURANCE COMPANIES—ULTRA VIRES.

Insured and the beneficiary in a life policy, procuring a loan from insurer secured by a pledge of the policy, are estopped from setting up that the act of the insurer was ultra vires, where they do not offer to repay the loan.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 45; Dec. Dig. § 36.*]

2. INSURANCE (§ 36*)—POWERS OF INSURANCE COMPANIES—ULTRA VIRES.

Where a loan agreement between insurer in a life policy and insured and the beneficiary was fully executed prior to the death of insured, the beneficiary could not urge that the loan agreement was ultra vires.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 45; Dec. Dig. § 36.*]

3. CORPORATIONS (§ 461*)—POWERS—POWER TO LOAN SURPLUS FUNDS.

The contract of a corporation is legal if not expressly prohibited, and it may loan its surplus funds in the absence of an express prohibition.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1814; Dec. Dig. § 461.*]

4. PLEDGES (§ 56*) — ENFORCEMENT — SALE — STATUTE.

Civ. Code, § 2889, providing that contracts for the forfeiture of property subject to a lien, and contracts in restraint of the right of redemption from a lien, are void, does not prohibit a sale of mortgaged real estate where the sale is fair and free from undue influence or fraud and for an adequate price; and under section 3000 et seq., relating to the sale of pledged chattels, a pledgee may sell pledged chattels without right of redemption, and the manner of sale may be agreed on by the parties.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 161, 181; Dec. Dig. § 56.*]

5. PLEDGES (§ 50*)—RIGHT OF REDEMPTION.

Civ. Code, § 3011, providing that, instead of selling property pledged, the pledgee may foreclose the right of redemption by a judicial sale, does not endow pledgors of personal property with the right of redemption, as is the case of a mortgage of real estate.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 118; Dec. Dig. § 50.*]

6. Contracts (§ 153*)—Construction.

The court must give effect to the contract of the parties, where that is possible.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 734; Dec. Dig. § 153.*]

7. Insurance (§ 228*)—Loans on Policies—Stipulations in Contract — Validity — Cancellation of Policy.

A loan agreement between insurer in a $5,000 life policy and insured and the beneficiary, which stipulated that the policy should be pledged to secure a loan of $1,930 made to insured and the beneficiary, and that, in the event of default of payment of the loan at maturity, insurer might at its option, without notice and without demand for payment, cancel the policy and apply the cash surrender value, stated to be $1,932.15, to the payment of the loan and pay the balance to the parties entitled thereto, was valid, notwithstanding Civ. Code, § 2889, providing that contracts for the forfeiture of property subject to a lien shall be void, etc., and where insurer, on the nonpayment of the loan at the time fixed for the payment, pursuant to an agreement extending the time of payment, canceled the policy and applied its then cash surrender value to the payment of the debt, and offered to pay the balance to the beneficiary, the latter could not complain.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 498, 499; Dec. Dig. § 228.*]

8. Insurance (§ 179½*)—Loan on Policy—Contract for Loan—"Option."

A loan contract between an insurer in a life policy and insured and the beneficiary for the pledge of the policy to secure a loan made to insured and the beneficiary, which stipulates that insurer shall loan a specified sum, and that insured and beneficiary shall assign the policy as collateral, and that, in the event of the nonpayment of the debt at maturity, insurer may, at its "option," cancel the policy, and apply the cash surrender value to the payment of the debt, evidences a loan transaction, and not a sale or option to sell; the word "option" in the contract meaning that insurer may, on default, at its pleasure, apply the cash surrender value in payment of the loan.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 179½.*

For other definitions, see Words and Phrases, vol. 6, pp. 5000–5002; vol. 8, p. 7739.]

9. Insurance (§ 229*)—Contract for Loan—Notice of Default.

That insurer in a life policy loaning money to insured and the beneficiary, pursuant to an agreement, whereby the policy was pledged to secure the loan, and whereby insurer, in case of default, could, at its option, cancel the policy without notice and without demand for payment and apply the cash surrender value to the payment of the loan, gave notice to insured of its intention to cancel the policy unless the loan was repaid, did not prejudice the rights of the beneficiary, who did not receive any notice, as insurer was not required to give notice to either, and as insurer might apply the cash surrender value to the loan as to both insured and the beneficiary.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 501; Dec. Dig. § 229.*]

10. Insurance (§ 388*)—Contract for Loan—Cancellation of Policy—Waiver.

That insurer in a life policy loaning money to insured and the beneficiary, pursuant to an agreement whereby the policy was pledged to secure it, and whereby insurer, in case of default, could at its option cancel the policy and apply the cash surrender value to the payment of the loan, extended by agreement the time for the payment of the debt, did not thereby waive its right to cancel the policy for nonpayment at the maturity of the debt as fixed by the new agreement, as the new agreement operated for the benefit of insured and beneficiary.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1026; Dec. Dig. § 388.*]

11. Insurance (§ 179½*) — Contract for Loan—Beneficiary as Surety for Loan.

Insurer, in a policy insuring the life of the husband for the benefit of the wife, made a loan to the husband and wife as principals, and took the policy as security under an agreement stipulating that, on the nonpayment of the loan, insurer could at its option cancel it and apply its cash surrender value to the payment of the loan. Insurer and the husband made a new agreement extending the time for the payment of the loan. *Held*, that under Civ. Code, §§ 2823, 2832, 2844, providing that mere delay on the part of a creditor to proceed against the principal does not exonerate a guarantor, and one appearing as principal may show that he is a surety except as against those who have acted on the faith of his apparent character, etc., the rights of the wife were not prejudiced by the delay, though she was in fact a surety only.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 179½.*]

12. Costs (§ 22*)—Right to Costs.

Code Civ. Proc. § 1022, subd. 3, giving costs to plaintiff recovering $300 or over, in an action for money damages, and section 1025, providing that no costs can be allowed where plaintiff recovers less than $300, forbid costs to defendant on a money demand.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 47, 48; Dec. Dig. § 22.*]

Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Action by Ida F. H. Frese against the Mutual Life Insurance Company of New York. From a judgment for insufficient relief, plaintiff appeals. Modified and affirmed.

A. E. Nathanson and C. L. Brown, for appellant. Chickering & Gregory, for respondent.

CHIPMAN, P. J. Action to recover upon a life insurance policy. The complaint alleges: That about August 29, 1889, defendant issued to plaintiff a policy of insurance on the life of her husband, William Frese, agreeing thereby to pay to her $5,000 at his death; that the premiums due thereon were prior to his death fully paid; that on July 7, 1899, plaintiff's said husband borrowed from defendant the sum of $1,930, repayable to defendant on August 29, 1900; that defendant required as security for said loan the pledge of said policy, and plaintiff assented thereto, and thereupon plaintiff and her said husband entered into an agreement with defendant, by which they assigned to defendant said policy and agreed therein to repay said sum to defendant on August 29, 1900, and as collateral security and in consideration of the amount so loaned did "assign, transfer, and set over all their right, title, and interest in and to said policy, * * * together with all the moneys which may become payable under the same, to the company as collateral security for the payment of said loan with interest." The agreement further provided: "In the event of default of the payment of the said loan on the date herein above mentioned, the company is hereby authorized, at its option, without notice and without demand for payment, to cancel said policy, and apply the customary cash surrender consideration then allowed by the company for the surrender for cancellation of similar policies, namely, $1,932.15 to the payment of the said loan with interest, the balance, if any, to be payable to the parties entitled thereto on demand." Plaintiff further alleges that she did not know whether or not said indebtedness had ever been paid, or whether said policy had been canceled, "although the defendant now claims to have so canceled it." On information, she averred: That defendant waived performance of said agreement touching payment of said indebtedness at maturity and its right to cancel said policy, and on September 4, 1900, "entered into a new agreement with said William Frese, whereby, in consideration of the payment by him of $96.50 in cash, which sum was then paid to the defendant, said loan was extended by defendant for one year from August 29, 1900"; and in like manner entered into "a fresh agreement with said William Frese, upon a like consideration of $96.50," extending payment of said indebtedness to August 29, 1902. That at said last-mentioned date, and for a long time prior thereto, said William Frese "was sick in body and mind and was mentally incompetent to attend to business," and that plaintiff was not aware that said indebtedness was not paid, or that said policy had been canceled, until after the death of her said husband (which occurred April 8, 1903), and not until when she made proof of death of her said husband. That she was furnished by plaintiff with blanks of proof of death on or about May 27, 1903, and made up and duly verified and filed the same with defendant, "and that no objection was made thereto, and no further or other proofs demanded." That five months have elapsed since said proofs were made, and, although payment has been demanded, defendant has neglected and refused to pay the sum of $5,000, by said policy agreed to be paid to her by defendant.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Defendant by its answer admits the issuing of said policy, that it has not been paid, that all premiums thereon were paid by the assured prior to his death, and that he kept and performed all its terms "save and except as they referred to the payment of the loan hereinafter mentioned." Most of the other averments of the complaint are denied. As to the loan, defendant alleges: That it was made "to said William Frese and plaintiff jointly," and that, "as collateral security for said loan, said William Frese and Ida F. H. Frese, plaintiff herein, pledged to the defendant said policy of insurance and delivered to defendant the written instrument, copy of which is set out in the complaint, * * * and that no part of said loan has ever been paid to defendant, save and except by the application of the cash surrender value of said policy as hereinafter stated." That the loan not being paid at maturity, to wit, August 29, 1900, "at the request of said assured the term of payment of said loan was extended by defendant until August 29, 1901, and on said last-named date the term of payment was again, at the request of the assured, extended by defendant to August 29, 1902. That no further extensions of the due date of said loan were ever made, nor was the right of defendant to cancel said policy ever changed or altered, except as herein stated." Further answering, defendant avers: That prior to the last date to which said loan had been extended, to wit, about August 6, 1902, defendant notified said assured that the said loan would be due and payable on August 29, 1902, and that, if the same was not so paid, "the company would cancel said policy and apply the cash surrender consideration thereof toward the payment of the said loan, with interest, as provided in said loan agreement." That said loan was not then or ever paid, and no application was made to renew the same, "and thereupon, to wit, on October 11, 1902, in accordance with said agreement, said policy was canceled by the defendant and the cash surrender consideration thereof applied toward the payment of said loan and interest." That the cash surrender value of said policy was $2,037.99, leaving a balance of $107.99 in excess of the amount of said loan and interest, which said balance defendant has ever since been and now is ready and willing to pay plaintiff. That on October 21, 1902, defendant advised said assured of the cancellation of said policy and of the facts last above stated, and then and there offered to pay said assured said balance "upon the execution of a form of surrender receipt by plaintiff and said assured." That thereafter said assured made application to defendant to restore said policy, but defendant refused "on account of the condition of health of said assured, and the assured was so notified by defendant on November 18, 1902." That subsequent to the death of said assured plaintiff made demand upon defendant for the amount of said policy, but payment was refused "on the ground that said policy was not in force at the time of the death of said assured, and plaintiff was so notified by defendant." That plaintiff was then notified that there remained a balance in cash of $107.99 due plaintiff as the difference between the cash surrender value of said policy and the amount due on said loan at the time of said cancellation.

That a check for that amount and a blank form of receipt were sent to plaintiff and still remain in her possession. That "plaintiff requested defendant to furnish her the usual form of proofs of death of said assured, and the same was so furnished to plaintiff," but that she was then informed that said proofs were furnished "upon the distinct understanding that it was without waiver upon the part of defendant that said policy of insurance had been canceled during the lifetime of the insured and was not in force at the time of his death, and said forms of proof of death were secured by said plaintiff upon such understanding, and not otherwise."

The cause was tried by the court without a jury, and plaintiff had judgment for $107.99. Plaintiff appeals from so much of the judgment as gave her but $107.99, and claims that it should have been for the full amount claimed, "or at least for the sum of $2,998.17, with interest thereon from May 27 1903," and appeals also from that part of the judgment awarding costs to defendant. The appeal comes up on a bill of exceptions.

It is not necessary to set out the findings specifically. Suffice it to say that the averments of the answer are found to be true in all material particulars. In certain respects the findings are challenged as unsupported by the evidence. It is claimed that the evidence was insufficient to show that the policy was canceled by defendant, and also to show that its cash surrender value was as alleged by defendant. The evidence consisted in considerable part of letters between the officers and agents of the company and by them to the assured and plaintiff, also of office records and abbreviated notations on the policy which were explained. It is suggested by plaintiff that these mention the "surrender" of the policy, and not its "cancellation"; but the surrender spoken of was explained to have been made under the loan agreement, and it was further shown that the surrender of the policy was in effect its cancellation. It sufficiently appeared that, so far as the company could do so, it canceled the policy and so treated it. Whether it had a right so to do is a question of law rather than of fact. The evidence was also sufficient to show that the cash surrender value of the policy at the date of its cancellation was as claimed by defendant and as credited on the loan. The finding, "nor was the right of said defendant to cancel said policy ever changed or altered except in reference to said due date," is challenged as unsupported by evidence. This refers to the extension of time of payment of the loan as shown above. It is claimed that as these extensions were made at the request of the insured as alleged in the answer and shown by the evidence, and not by plaintiff, and as the notice given was to William Frese that the loan would be due August 29, 1902, and was not given to plaintiff, she is not bound by what took place between her husband and the company of which she had no notice. Passing for the moment the legal effect of these extensions as affecting plaintiff's rights, it will be observed that the loan agreement expressly authorized the company, on default of payment of the loan, "without notice and without demand for payment, to cancel said policy and apply the customary cash surrender consideration * * * to the payment of the said loan."

The alleged errors in admitting evidence over plaintiff's objection may here be disposed of. They are five in number, to wit: (a) Relating to the admission of the letter of the defendant's agent to plaintiff's husband informing him that the company had canceled the policy; (b) his reply thereto; (c) the company's reply to this letter; (d) the second letter of William Frese to the company; (e) the company's letter to plaintiff declining to pay the policy. There is nothing in any of these letters in the slightest degree harmful to plaintiff. There are no admissions or declarations of plaintiff's husband affecting the rights of plaintiff. They had some tendency to show that her husband was not mentally deranged.

The real questions presented by the appeal are questions of law, and upon these plaintiff's position is: (1) That the loan agreement is ultra vires; (2) that the right given by the agreement to cancel the policy is a provision for the forfeiture of property subject to a lien, and is in restraint of the right of redemption from a lien, and therefore void; (3) that, if not void as a provision for forfeiture, it is merely an option or offer by plaintiff to sell the insurance policy within a reasonable time after August 29, 1900; (4) that plaintiff pledged her policy as a surety for money borrowed by William Frese, and she was exonerated by the new agreement of August 29, 1900, whereby William Frese was given an extension of one year. It should be stated: That the loan was made to plaintiff and her husband, both joining in the execution of the agreement to repay the sum loaned and assigning the policy as collateral security. The money was paid to them by the company's check to the order of both. There was evidence that William Frese was sound of mind during all the transactions between him and the company, and, although not in good health, the company, so far as appears, was not aware of his condition until he applied for a restoration of the policy after its cancellation, and upon the report of the company's medical examiner.

1. Was the agreement ultra vires? The argument of appellant is that under the act of March 28, 1874 (St. 1873–74, p. 777, c. 540), defendant was authorized "to loan upon mortgages of real estate," that the agreement of 1899 was prior to the enactment of section 421, subd. 7, of the Civil Code, which permits insurance corporations

to loan money on their own policies, and hence there was no authority for making the loan agreement. The contention is that by the act of 1874 there was an implied prohibition to loan upon property other than real estate. Respondent, it seems to us, makes conclusive answer to this contention: That by the terms of the agreement, and as alleged in the complaint, "plaintiff consented to the pledge, and did pledge, the said policy of insurance to defendant as security for said loan." That plaintiff and the assured received consideration for the loan agreement, and have not offered to repay it, and are estopped from setting up the act of the corporation as ultra vires. Grangers Ass'n v. Clark, 67 Cal. 634, 8 Pac. 445; Camp v. Land, 122 Cal. 167, 54 Pac. 839; Bay City Building & Loan Ass'n v. Broad, 136 Cal. 525, 69 Pac. 225. That the loan agreement was, prior to the death of the assured, fully executed by both parties, and in such a case ultra vires cannot be set up. Am. & Eng. Ency. of Law, vol. 29, p. 50. That the contract of a corporation is legal if not expressly prohibited, and it may loan its surplus funds in the absence of such prohibition. Colorado Co. v. American Co., 97 Fed. 843, 38 C. C. A. 433; Civ. Code, § 354, subd. 8.

2. It is contended that the loan agreement provides for the forfeiture of property the subject of a lien and is void as in violation of section 2889, Civ. Code, which reads: "All contracts for the forfeiture of property subject to a lien or satisfaction of the obligation secured thereby, and all contracts in restraint of the right of redemption from a lien are void." It is claimed that this section is declaratory of the equitable doctrine that property given as security cannot be taken in satisfaction of the obligation secured thereby, and that any provision in the instrument of security that undertakes to provide for such forfeiture or for restraint of the right of redemption is void, citing Bradbury v. Davenport, 114 Cal. 593, 599, 46 Pac. 1062, 55 Am. St. Rep. 92, and Lowe v. Ozmun, 3 Cal. App. 387, 86 Pac. 729. It was sought in the early cases, by virtue of this section of the Civil Code, to have the court declare void a conveyance of the mortgaged premises by the mortgagor to the mortgagee; but it was held that where the sale is fair and free from undue influence, oppression, or fraud and for an adequate price, it is not restrained by section 2889, Civ. Code. Phelan v. De Martini, 85 Cal. 365, 24 Pac. 725. The case of Bradbury v. Davenport, cited by appellant, was one involving the mortgage of real estate, where the mortgagor was, by unfair advantage taken of his physical condition and financial embarrassment, induced to place a deed of the mortgaged premises to the mortgagee in escrow, under an agreement to deliver the same to the mortgagee upon payment by him of a certain sum of money, and the holder of the escrow was authorized to discharge the mortgage and return the note secured thereby to the mortgagor. It was clearly a case of an attempt to secure unfairly a waiver of the equity of redemption by the mortgagor. In Lowe v. Ozmun, supra, cited by appellant, the action was for the conversion of certain bonds of a gas company and a railway company. Embodied in the collateral note was an agreement as to the manner of selling the bonds on default of the pledgor, either by private or public sale. The pledgee assumed to purchase the bonds himself at private sale. Speaking of this the court said: "The term 'private sale' comprehends something more than the mere taking over of the property by the pledgee at such price as he may elect to consider an offer. This is, in effect, but a declaration of forfeiture, an agreement for which is invalid under section 2889, Civ. Code." Conceding that the first part of this section applies to cases of forfeiture of all kinds of property, the latter part of the section refers only to cases where there is a right of redemption—such as mortgages of real estate. Here there was no right of redemption, for the Code expressly provides that a pledgee may sell property without right of redemption, and the manner of sale may be agreed to and the notice waived by the pledgor. Civ. Code, § 3000 et seq.; Williams v. Hahn, 113 Cal. 475, 45 Pac. 815. True, section 3011 furnishes a further means by which the pledgee may obtain money from his security, and the section provides that, "instead of selling property pledged, as hereinbefore provided, a pledgee may foreclose the right of redemption by a judicial sale"; but this section by no means can be said to endow pledgors of personal property with a right of redemption, as is the case of a mortgage of real estate. Farmers' & Merchants' Bank v. Copsey, 134 Cal. 287, 66 Pac. 324. Section 3006 of the Civil Code provides: "A pledgee cannot sell any evidence of debt pledged to him except the obligations of governments, states and corporations, but he may collect the same when due." Under the agreement—"and to give effect to the contract, if possible, is our duty"—Lowe v. Ozmun, supra—the defendant proceeded strictly within its terms, and in effect collected the obligation pledged to it, and applied the proceeds to the debt, or, in pursuance of the contract, applied to the debt the cash surrender value of the policy, and to do this without notice to the pledgors was within its rights. Du Brutz v. Bank of Visalia, 4 Cal. App. 201, 87 Pac. 467, 469. It cannot be claimed as necessarily inequitable to apply the cash surrender value of a $5,000 paid-up policy in payment of indebtedness amounting to no more than the amount here involved. It was applied at its full cash value and had no other except a speculative one based upon the uncertainty of the life of the assured and would be payable only at his death. There was no

attempt made to show that it had any greater value than given it by defendant. Indeed, the agreement itself fixed its then value at $1,932.15, and defendant applied the cash value as it stood when the policy was canceled.

3. We do not think appellant's third proposition is tenable, namely, that, if the provision relating to the cancellation of the policy was not a provision for a forfeiture, then it was merely an offer or option to sell the policy for $1,932.15 within a reasonable time after August 29, 1900. Appellant's contention is derived from the provision of the agreement that the company "is hereby authorized at its option, without notice and without demand for payment, to cancel said policy." The object of the agreement, plainly manifest by its terms, and as shown by the complaint itself, precludes the construction thus given by appellant. The transaction was a loan pure and simple, secured by a pledge of the policy. The agreement of the company was "to loan the parties of the second part the sum of $1,930." It provided that "the receipt of the foregoing amount as a loan is hereby acknowledged upon the pledge hereinafter set forth of policy No. 371257," and "in consideration of the amount of said loan the parties of the second part hereby assign * * * said policy as collateral security for the payment of said loan." There is no element of a sale, or option of a sale, to be found in the agreement. It would be a perversion of the English language to call this an offer or option of plaintiff and her husband to sell the policy for a certain sum. The term "option" as used in the agreement means that the company was authorized, on default of the pledgors, at its pleasure or upon its own motion, to apply the cash surrender value in payment of the loan.

4. Neither is the proposition of appellant maintainable that plaintiff pledged her policy as surety for the money borrowed by her husband, and hence she and her property were exonerated by the new agreement of August 29, 1900, between her husband and the company. There is no evidence in the record that plaintiff signed the agreement as a surety. The evidence is that the loan was to her and her husband. The agreement was signed by both, and the money was paid to both. The company was not informed as to what use the money was to be put or by whom. Both plaintiff and her husband were, by the terms of the agreement, principals, and both were debtors, and, if any other relation existed, it was not shown. The company had the same right to apply the cash surrender value to the loan as to both that it had to either. That the company gave notice to the husband, and not to plaintiff, was not prejudicial to plaintiff, for it was under no obligation to give notice to either. Neither was there any waiver by defendant of plaintiff's rights because it failed to collect the loan when originally due. Deferring the exercise of its right to cancel the policy by delaying to enforce the agreement ought not to be regarded as a waiver of defendant's rights, for it was a benefit rather than a detriment to plaintiff. The Code provides (Civ. Code, § 2832) that one who appears to be a principal may show that he is in fact a surety, "except as against persons who have acted on the faith of his apparent character of principal." A surety has all the rights of a guarantor (Civ. Code, § 2844), and conceding, what does not appear, that plaintiff was a surety, we do not find that she has been deprived of any right, given her as such by the Code. "Mere delay on the part of a creditor to proceed against the principal, or to enforce any other remedy, does not exonerate a guarantor." Civ. Code, § 2823. Since the argument of the cause, our attention has been called to the very recent case of Sherman v. Mutual Life Ins. Co. (Wash.) 102 Pac. 419. In that case the same company was defendant as here, and the same form of agreement was entered into between the parties under like circumstances. It was there held that the contract was valid, that the stipulation as to cancellation is not waived by an extension of the date of payment of the loan, that no notice of intention to cancel the policy was necessary, and that the company had the right, upon default in payment of the loan, to cancel the policy.

5. Defendant had judgment for costs. The allowance of costs is a matter of statutory regulation. Plaintiff is entitled to costs, of course, "in an action for recovery of money damages, when plaintiff recovers three hundred dollars or over." Code Civ. Proc. § 1022, subd. 3. "But no costs can be allowed in an action for the recovery of money or damages, where the plaintiff recovers less than three hundred dollars." Code Civ. Proc. § 1025. It was held, in Anthony v. Grand, 101 Cal. 235, 35 Pac. 859: "This [referring to section 1025] evidently applies to both parties to the action and forbids the recovery of costs by either of them."

The judgment is modified by striking out that part thereof which provides that "defendant have and recover of and from Ida F. H. Frese, plaintiff, its costs incurred herein," and, as thus modified, the judgment is affirmed.

We concur: BURNETT, J.; HART, J.

11 Cal. App. 377

ELSOM v. MOORE et al. (Civ. 642.)

(Court of Appeal, First District, California. Sept. 29, 1909. Rehearing Denied Oct. 28, 1909.)

1. Sales (§ 450*) — Conditional Sale — Option of Vendor.

Where there is an understanding between seller and buyer that title is not to pass until the goods are paid for, the seller may treat the sale as absolute or conditional.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 450.*]

2. Sales (§ 450*)—Conditional Sales—Election by Seller.

Where the seller of goods brings action against the buyer for the price, he thereby elects to treat the sale as absolute.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 450.*]

3. Fraudulent Conveyances (§ 295*)—Evidence.

Evidence *held* sufficient to show that a sale of goods was made to defeat a claim for the price due the seller's vendor.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Dec. Dig. § 295.*]

4. Sales (§ 233*)—Delivery — Question for Jury.

Whether there was a sufficient delivery of goods to constitute a sale as against the seller's creditor *held*, under the evidence, to be a question for the jury.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 233.*]

5. Appeal and Error (§ 231*) — Review — Pointing Out Error.

Where complaint is made that instructions were erroneous, counsel should point out the error definitely.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 231;* Trial, Cent. Dig. §§ 689, 690, 694, 696.]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by W. M. Elsom against F. H. Moore and others. From a judgment for defendants and an order denying a new trial, plaintiff appeals. Affirmed.

Hugh R. Osborn, for appellant. James A. Hall, for respondents.

KERRIGAN, J. This is an action against a constable and his bondsmen to recover the value of certain personal property taken by said officer under and by virtue of a writ of attachment. The verdict of the jury was for the defendants, and this is an appeal from the judgment entered thereon and from an order denying plaintiff's motion for a new trial.

The facts are as follows: During the latter part of November, 1906, E. R. Whitman was in Watsonville, attending for the plaintiff to the purchase and shipment of produce which had theretofore been contracted for by W. M. Elsom, the plaintiff. This produce, on being loaded into cars engaged by plaintiff, left one of them only partially filled. On November 26th Whitman, on his own account, obtained from one J. F. Kane 130 sacks of potatoes, and loaded them into the partially filled car, and billed the whole car to plaintiff. The car left Watsonville, arriving at Santa Cruz the next day, at which time plaintiff claimed to be the owner of the potatoes through purchase from Whitman. On November 28th Kane, having been refused payment by Whitman for the potatoes, commenced an action against him in the justice's court, and caused a writ of attachment to be issued therein, which was immediately levied by the constable, defendant in this case, upon the lot of potatoes in question. Plaintiff duly claimed the potatoes as his property, but the constable ignored his claim, sold them, and now retains the proceeds of the sale. The present action is against him and his bondsmen for conversion of the potatoes.

At the trial the defendants introduced evidence to show that there was an understanding between Kane and Whitman that the title to the potatoes was not to pass to Whitman until they were paid for. Under these circumstances Kane was at liberty to treat the transaction as a sale absolute or conditional (Van Allen v. Francis, 123 Cal. 477, 56 Pac. 339; Vermont Marble Co. v. Brow, 109 Cal. 236, 41 Pac. 1031, 50 Am. St. Rep. 37); but, inasmuch as Kane brought an action against Whitman for goods sold and delivered, and caused the goods to be attached as the property of Whitman, Kane must be deemed to have elected to consider the sale as absolute and unconditional (Parke, etc., Co. v. White River L. Co., 101 Cal. 37, 40, 35 Pac. 442; Ward Land & Stock Co. v. Mapes, 147 Cal. 747, 82 Pac. 426). At the request of the defendants, the court, by an instruction, submitted to the jury the question whether or not, under section 3440 of the Civil Code, there was such a delivery and continued change of possession from Whitman to Elsom as to make the transfer between them valid as to Kane. Plaintiff contends (if we understand him correctly) that there was no evidence in the case to warrant the giving of this instruction.

We will state in some detail the facts touching this phase of the case, as shown by the testimony.

Kane testified that a firm of produce dealers, by name Jacobs & Malcolm, telephoned to him from San Francisco "that Whitman wanted 130 sacks of potatoes; that he was willing to pay $1.50 a hundred for them; that they did not care to sell them to Whitman, and, if I wanted the deal, they would give them to me for $1.45. * * * Subsequently I sold Whitman 130 sacks of potatoes from the Jacobs & Malcolm lot. November 26th or 27th. I said to Whitman: 'When are you going to ship them, and when are you going out of town?' He replied, 'I don't know.' * * * In reference to payment he said: 'I will be right down to the office.

* * * I suppose I can get the potatoes if I pay for them?' I said: 'Under those conditions you can have them, but they must be paid for before they leave town.' When I next saw Whitman, he gave me the weights, and said he would be right down to the bank to get me a draft for them." He further testified that shortly after that Whitman got possession of the potatoes, and shipped them without paying therefor, and upon demand refused to do so, saying, in substance, that he had never intended to pay for them. This witness and also the constable testified—and, in fact, plaintiff admitted—that at the time the writ of attachment was levied Whitman was in full charge of the potatoes, that he had the key to the car containing them, and that he was there superintending their unloading. Elsom testified that the arrangement between him and Whitman was that the profits, if any, realized from the sales of other lots of produce purchased at Watsonville, were to be divided equally between them, but no division of profits at all was to be made concerning the potatoes in controversy; that he purchased these potatoes about noon November 27th from Whitman; that, while he did business with the banks in Santa Cruz, on this occasion he was at his home, and had on hand in cash $500 or $600 or perhaps $1,000, and, having no check book there, he paid Whitman $240.75 in cash for them; that all other purchases of produce at Watsonville were made by Whitman for him excepting these 130 sacks, and that the persons who sold such produce knew that he was the purchaser, and they looked to him for payment. The witness also said that at the time of the purchase of this lot of potatoes Whitman no doubt owed him a balance on some money advanced to pay expenses. Nevertheless nothing was said about this balance, nor was any attempt made to deduct it in making this payment. Whitman testified that he did not buy the potatoes from Kane, but from Jacobs & Malcolm, but he admits that Mr. Jacobs, of that firm, told him that, if they sold him the potatoes, he would have to pay for them before taking them out of the warehouse. Jacobs testified that, judging from past transactions, Whitman was a man not to be trusted. Whitman obtained these potatoes on the afternoon of November 26th without paying therefor; and, as a result of his efforts, they went out of Watsonville that night on the 11 o'clock freight train. He himself went to Santa Cruz early the next morning, and the potatoes reached there that same afternoon. Thereafter, on the same day, without any claimed change in the market price of the commodity, without any attempt to dispose of them to any one else, and without any general examination of them by the purchaser, Whitman asserts that he sold the potatoes to the plaintiff Elsom for the same price that he himself agreed to pay for them.

Kane, who was absent from Watsonville during the day of November 27th, returned in the evening, and, on learning that Whitman had taken the potatoes without paying for them, boarded a train that night and went to Santa Cruz. The next morning he saw Whitman about 7 o'clock, and demanded payment of him. Whitman refused to pay, and, in effect, according to Kane's testimony, said that it had been his intention throughout the negotiations to evade payment for them—and we may add that his conduct in the matter is quite consistent with such declaration.

Both Whitman and the plaintiff testified that on the afternoon of November 27th (the day before the attachment) Whitman, with money received from plaintiff for that purpose, paid the freight on all the produce, and that later that afternoon the purported sale was effected. The constable and the freight agent, on the other hand, testified that on the morning when the attachment was served and levied the freight had not been paid. The jury probably believed these two disinterested witnesses, and concluded that, if Whitman and Elsom were wrong in one part of this statement, they were probably wrong as to the other, and that, therefore, the alleged sale did not take place until after the writ of attachment was served and levied. No one can read this record and hesitate for one moment to say that the case is at least open to the view that the transfer from Whitman to the plaintiff was made with the intention of defeating Kane's demand and that it was fraudulent. But, with respect more particularly to plaintiff's contention, we also think there was sufficent evidence in the case to warrant the giving of the instruction to which objection is made. When the potatoes left Watsonville, they were under the control of Whitman, and from that time until the levy of the attachment they were subject to his disposition, being in his actual possession during part of the time. It was for the jury to say whether, as between Whitman and Elsom, there was sufficient delivery and change of possession to make the transfer valid as against Whitman's creditor Kane.

Plaintiff also contends that the court committed error in refusing to permit him on rebuttal to go into the matter of the sale from Jacobs & Malcolm to Kane. Testimony upon this subject was introduced by him in his case in chief, and the court did not abuse its discretion in permitting no further examination upon the subject. There is no merit in plaintiff's suggestion that the evidence does not show a sale of these potatoes from Jacobs & Malcolm to Kane.

At the request of the defendants, the court gave the jury seven instructions. The plaintiff proposed six instructions, some of which were given in a modified form, and the others were refused. The plaintiff in his specifications of errors of law says that the court erred in giving each of the seven instructions proposed by defendants; that it also erred in modifying certain of his proposed instructions and in refusing others; and in his brief he refers to the instructions twice as follows: "And the court gave all of the instructions requested by defendants, each of which, when applied to the facts of this case, is erroneous. It was also error for the court to refuse to give the instructions requested by plaintiff. The issue of ownership and possession was one of fact for the jury to decide." If counsel believes that the court committed error in reference to the instructions, he should point out definitely wherein the action of the court in this regard was erroneous. Such requirement is essential, not only out of fairness to opposing counsel, but also for the proper expedition of the business of this court. We should not be asked to search through the record for errors which we may suspect counsel to be relying upon.

Under somewhat similar circumstances, it was said, in Arnold v. Producers' Fruit Co., 141 Cal. 738, 75 Pac. 326: "The court will not examine the offered instructions, and go through the record to see whether or not any one of them was necessary to guide the jury in its verdict." In Dale v. Purvis, 78 Cal. 113, 20 Pac. 296, the court commended brevity, but thought it was overdone in that case, and held that appellant must put his finger on the instruction complained of, and not assail the instructions as a whole.

In the present case, the allegations of the complaint as to the damages suffered by plaintiff brought the amount of his claim up to over $300, but the value of the potatoes was $240.75 only. The record is needlessly long, consisting of 141 pages of closely printed matter. This being the condition of the record, and remembering the nature of the transaction involved, we feel no inclination and perceive no reason for departing from the rule just stated.

The judgment and order are affirmed.

We concur: COOPER, P. J.; HALL, J.

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11 Cal. App. 443

PEOPLE v. McKEEHAN. (Cr. 121.)

(Court of Appeal, Second District, California. Oct. 4, 1909.)

1. Gaming (§ 63*) — Regulation — Police Power.

The Legislature in the exercise of its police power may regulate or prohibit pool halls, as the exigencies of the community may require.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 120; Dec. Dig. § 63.*]

2. Homicide (§ 99*)—Assault with Intent to Murder Police Officer—Defense.

A police officer must keep all pool halls within his township under supervision, and, where he has reason to suppose that intoxicating liquors are unlawfully sold therein, he may enter and remain so long as is reasonably necessary to ascertain the facts, and the common-law doctrine as to the right of the manager of such hall to eject the officer is not in force, and cannot be urged by accused, the keeper of a pool hall, as a defense in a prosecution for assault with intent to murder a police officer who came into the hall in the course of his duty.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 129; Dec. Dig. § 99.*]

3. Criminal Law (§ 1163*)—Trial—Failure to Admonish Jury—Harmless Error.

The failure of the court to admonish the jury at each adjournment, as required by Pen. Code, § 1122, is not necessarily reversible error, and, while the statute ought to be complied with, yet, where no injury appears to have resulted from an omission to do so, prejudice will not be presumed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3098; Dec. Dig. § 1163.*]

4. Criminal Law (§ 1054*)—Appeal—Rulings on Evidence—Exceptions—Necessity.

Prior to the amendment in 1909 (St. 1909, p. 1088, c. 713) of Pen. Code, § 1259, defining what may be reviewed on appeal, rulings on the admission of evidence were not reviewable, unless exceptions were preserved.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2662–2664; Dec. Dig. § 1054.*]

5. Criminal Law (§ 1162*)—Appeal—Review—Prejudicial Error.

Courts of appeal will review such errors of the trial court as prejudice the rights of the party complaining, and will not set aside verdicts merely because some error has been committed on the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3085; Dec. Dig. § 1162.*]

6. Criminal Law (§ 1137*)—Invited Error.

The fact that accused introduced improper matter into the case may be considered in determining whether or not the error committed by the court at the request of the district attorney is or is not prejudicial to accused, though it be conceded that the introduction of the improper matter by accused does not justify the court in permitting the district attorney to pursue the same line of examination on cross or redirect examination, or that accused is estopped from objecting to such cross or redirect examination.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3009; Dec. Dig. § 1137.*]

7. Homicide (§ 338*)—Appeal—Harmless Error.

Where, on the trial of a pool hall keeper for an assault with intent to murder a police officer while in the hall to discover whether or not intoxicating liquors were unlawfully sold therein, accused did not move to strike out the answer of the officer given to a proper question that he went into the hall on a prior occasion to search the place and poured out intoxicating liquors, and accused brought out the fact on cross-examination that he had broken into other places to search for intoxicating liquors, the error, if any, in permitting the state to show that the officer had found intoxicating liquors on other premises, and had destroyed it, and that he had served a notice on accused requiring him to abate the liquor nuisance carried on at the pool hall, was not prejudicial to accused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 711; Dec. Dig. § 338.*]

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

George McKeehan was convicted of assault with a deadly weapon. From the judgment and from an order denying a motion for new trial, he appeals. Affirmed.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Conkling & Brown, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

TAGGART, J. Information for assault with a deadly weapon with intent to commit murder. Verdict of assault with a deadly weapon. Appeal from judgment and order denying defendant's motion for a new trial.

Defendant was the keeper of a pool and billiard hall, and the complaining witness, Martin, was at the time of the occurrence upon which the charge is based a constable at Brawley in the county of Imperial where the billiard hall was located. About two weeks prior to the trouble between them Martin raided the premises mentioned in search of "booze," as he testified, at which time he destroyed some bottles, as to the contents of which the respective parties disagree. At that time the brother of defendant, who was the owner of the place, told Martin "he wasn't wanted in the place and for him to get out and stay out." On the evening of the affray here in question Martin was sitting in the hall watching a game of pool, when defendant asked him "if he had any particular business there," and said, "if he had not, he had better get out while he could." Martin told defendant to bring on his gun, to which defendant replied that he did not need any gun for such people. Martin did not leave, but sent a friend to get his revolver for him. Some minutes thereafter, without any further conversation, defendant approached Martin, who was sitting quietly in a chair, and attempted to strike him over the head with a heavy billiard cue. Martin warded off the blows, first with his arm and later with a chair. At last, he took refuge under a table where he drew his gun, and prepared to use it, when some one else placed the defendant under arrest.

A reversal of the judgment is asked upon the grounds: (1) That the court erred in admitting certain evidence as to the raid made by Martin two weeks before; (2) that certain comments made by the district attorney during the trial were misconduct prejudicial to the defendant; (3) that the court did not properly admonish the jury at two of the adjournments taken during the trial; and (4) that the court erred in its statement of the law, relative to Martin's right to remain in the billiard hall after being ordered to leave by the defendant, in its instructions to the jury.

Places of amusement carried on for profit are quasi public in character, and the particular business here in question was one as to which it has been declared competent for the legislative branch of the government, in the exercise of its police power, to regulate or prohibit as the exigencies of the community may require. Ex parte Murphy, 8 Cal. App. 440, 97 Pac. 199; Ex parte Meyers, 7 Cal. App. 528, 94 Pac. 870. It was the right, if not the duty, of Martin as a police officer to keep all places of this kind within his township under supervision, and, whenever he had reason to suppose the law was being violated therein, to enter and remain so long as was reasonably necessary to ascertain whether or not "the drunken men whom he saw in the place" procured their liquor there. Pon v. Wittman, 147 Cal. 280, 81 Pac. 984, 2 L. R. A. (N. S.) 683. The common-law doctrine as to the right of a manager of such a place to eject a person (and particularly an officer of the peace) from his premises at his own pleasure, as declared in Burton v. Scherpf, 1 Allen (Mass.) 133, 79 Am. Dec. 717, is not the law of this state. Greenberg v. Western Turf Ass'n, 140 Cal. 357, 73 Pac. 1050, reaffirmed 148 Cal. 126, 128, 82 Pac. 684, 113 Am. St. Rep. 216. The court did not err in giving the instruction complained of.

The failure of the court to admonish the jury under section 1122 of the Penal Code is not necessarily reversible error. While the section should have been and always ought to be strictly complied with, yet, if no injury appears to have resulted from an omission to do so, prejudice will not be presumed. People v. Thompson, 84 Cal. 606, 24 Pac. 384; People v. Coyne, 116 Cal. 295, 48 Pac. 218. In the case at bar the error complained of was the failure to give the language of the section in full at two adjournments. It does not appear that it was not given at other adjournments, or that there were no other adjournments at which it may be presumed it was given. The language of the district attorney, the use of which is assigned as error, is not beyond that which is permissible as a matter of argument. The comment as to the testimony of a witness for the defendant, that the witness is "making a plausible story," is improper while the witness is testifying, but is not, or at least was not, under the circumstances here, sufficient to justify the setting aside of a verdict or a reversal of the judgment.

Some of the alleged errors assigned in connection with the admission of evidence as to the raid made by Martin two weeks prior to the date of the trouble cannot be considered, as no exceptions were preserved to the rulings of the court in relation thereto. Prior to the amendment of section 1259 of the Penal Code in 1909 (St. 1909, p. 1088, c. 713) this was necessary. People v. Miller, 122 Cal. 93, 54 Pac. 523. There are others, however, as to which exceptions were properly preserved. Defendant's brother, the proprietor of the billiard hall, was called as a witness for defendant, and on his direct examination gave his version of a raid or search for liquors made by Martin two weeks before, to the effect that Martin had forcibly entered some rear rooms on the witness's premises and destroyed some bottles of cherry cider or grape juice, but that he found no "booze." On cross-examination, the witness was asked by the district attorney: "Q. On this raid that you speak of, or this search, did he search any other premises?" This question was objected to generally, and on the ground that it was not proper cross-examination, and the court overruled the objection and an exception was noted. The answer was, "He did." He was then asked, "Did he find any booze?" to which question a general objection was interposed and the witness answered, "He did," before the court ruled. Defendant moved the answer be stricken out, without assigning grounds of motion, and the court denied it; an exception being preserved. The witness testified that Martin broke up and destroyed the booze, and was then asked the question: "I will ask if you had any notice served on you by the constable, Martin, five days or any other number of days prior, relative to this booze question?" An objection to this was overruled, and an exception taken and the witness answered: "I can't say that it had. I received a paper, but I don't know whether it would be considered a notice served."

This same matter had been gone into by the defendant on his cross-examination of Martin earlier in the trial and the statement made by defendant's counsel in one of his questions to Martin: "You are talking about some other place. You are willing to break into other people's places, aren't you?" Upon redirect examination of this witness, over the objection of defendant, the district attorney was permitted to show that Martin "had served notice on this defendant, proprietor of this pool hall, relative to abating the nuisance carried on there." All of these exceptions are presented as error.

The evidence relating to the prior occurrence seems to have been introduced by the people for the purpose of showing that there was a motive for defendant's attack upon Martin. A proper question was propounded by the district attorney to which an objection was made by the defendant, and the answer given was that the witness "went in to search the place and poured out some booze and whisky." No motion was made to strike this answer out, and on cross-examination defendant elicited Martin's story of the raid in detail, and finally made the declaration as to Martin's "breaking into other places" above mentioned. Under the circumstances of this case, we are unable to say that the defendant was prejudiced by any act of the district attorney or the court in its rulings in relation to this evidence. Courts of appeal sit to review such errors of the trial court and misconduct of the prevailing party as prejudice the rights of the party claiming to be aggrieved, and not to set aside verdicts or reverse judgments merely because some error has been committed upon the trial.

Conceding that the introduction of improper matter into a case by the defendant does not justify the court in permitting a district attorney to pursue this same line of examination on cross or redirect examination, or estop the defendant from objecting to such cross or redirect examination, as the case may be, nevertheless, the fact that the defendant has already called the same matter to the attention of the jury will be considered in determining whether or not the error committed at the request of the district attorney is, or is not, prejudicial to the defendant. So considering the rulings excepted to, we are unable to see how the defendant was prejudiced by the showing that Martin had found "booze" on other premises and destroyed it, while the fact that he had served a notice on defendant relative to abating a nuisance carried on at the pool hall can hardly be deemed to have been prejudicial. The latter tended in some degree to show that Martin's presence in the pool hall was in pursuance of his official duties, and to negative the theory of defendant that he was a trespasser.

No prejudicial error appearing in the record, we have not considered the objection of the Attorney General that the appeal from the order denying the motion is not before us, but from an examination and consideration of the entire record the judgment and order are both affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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11 Cal. App. 421

TREIS v. BERLIN DYE WORKS & LAUNDRY CO. (Civ. 686.)

(Court of Appeal, Second District, California. Sept. 30, 1909.)

1. TRIAL (§ 404*) — FINDINGS — "DUE AND OWING."

The finding that there was "due and owing" under the contract, though objectionable as in form a conclusion, is a sufficient finding of nonpayment.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 404.*

For other definitions, see Words and Phrases, vol. 3, pp. 2220, 2221.]

2. TRIAL (§ 404*)—FINDINGS—"WAS UNPAID."

The finding that a certain sum "was unpaid" relates back to the filing of the complaint, and from it, in the absence of anything to the contrary, it follows that it was unpaid at the time of the trial.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 404.*]

3. SALES (§ 176*)—SHIPPING LESS THAN ORDERED—ACTION FOR PRICE—ESTOPPEL.

Defendant having ordered of plaintiffs a certain number of boxes to be made and lettered according to specifications, plaintiffs thereafter notified it of their inability to furnish the full number, but that they could supply a certain smaller number; and after expiration of a reasonable time after such notice, for defendant to give notice, which it did not give, that it would not accept less than the full number, plaintiffs manufactured and shipped the smaller number. *Held*, that it was defendant's duty, if unwilling to accept less than the stipulated number, to signify its disapproval of the proposed shipment, so that, not having done so, it was estopped to defend against an action for the price thereof on the ground that the full number ordered was not shipped.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 176.*]

4. APPEAL AND ERROR (§ 934*)—PRESUMPTION AS TO EVIDENCE.

In the absence of the evidence, it will be presumed to support the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3777; Dec. Dig. § 934.*]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Nicholas Treis against the Berlin Dye Works & Laundry Company. Judgment for plaintiff. Defendant appeals on judgment roll. Affirmed.

Goldberg & Meily, for appellant. Adams, Schaertzer & Binford, for respondent.

SHAW, J. On September 28, 1906, defendant in writing ordered plaintiff's assignor, the Commercial Envelope & Box Company, to ship it (the defendant) 10,000 boxes. The order set forth in the complaint contained full specifications as to material, sizes, and quality of the boxes, and prescribed certain lettering to be printed thereon. It was also provided that 5,000 of the boxes so ordered should be shipped as soon as the box company could get them ready for shipment, and the remainder of said order to be shipped in January, 1907. It is alleged in the complaint that the Commercial Envelope & Box Company did ship to defendant the 10,000 boxes so ordered and did everything required of it to be done in filling said order; that the agreed value of said 10,000 boxes so ordered was $332.50, and that neither said sum nor any part thereof has been paid. The answer is a general denial. The court, in effect, found that in the month of October defendant received notice from the box company that it intended to ship a less number of boxes than called for, in the fulfillment of the contract, but, notwithstanding the fact that defendant had such notice, it failed to notify the box company that it would refuse to accept the boxes unless the full number called for by the order were shipped, although, had it so desired, it could have given notice of such intended refusal. The court further found that on November 6, 1906, said Commercial Envelope & Box Company, assignor of plaintiff, shipped to defendant 9,712 of the boxes so ordered, and no more, and that plaintiff's assignor, the box company, did fully comply with the terms of said order, except that it shipped 288 less than called for by the order. Defendant refused to receive the 9,712 boxes, or any part thereof. Judgment was rendered as prayed for in the complaint.

Issue was joined upon the question of nonpayment, as to which the court found "that there was due and owing under the contract" from defendant to plaintiff the sum of $322.09. Appellant insists that such finding is insufficient, in that it is not a finding of fact, but a mere conclusion of law, and that the finding that such sum was due does not negative a subsequent payment thereof. The finding is not one to be commended, and it is objectionable, both by reason of its being in the form of a conclusion and in the wording thereof, which relates to a time anterior to the trial. While the question is not free from difficulty, nevertheless the finding must be held sufficient upon the opinion in Stewart v. Burbridge, 102 Pac. 962, where it is expressly held by this court that a finding that a sum remains "due and owing" is a sufficient finding as to nonpayment. In the consideration of that case this court had before it the opinion of the Supreme Court in Ward v. Clay, 82 Cal. 502, 23 Pac. 227, where the court, in considering the sufficiency of a finding upon the issue of nonpayment based upon the use of the words "due and owing," says: "This implied that the balance found to be due and owing remained unpaid." It is true that in denying a petition for a rehearing therein Chief Justice Beatty expressed an opinion to the effect that such finding was a mere conclusion of law and insufficient as a finding of fact covering the issue of nonpayment, but holding that such issue in that case was covered by other facts found constituting a sufficient finding of nonpayment. In the subsequent case of Penrose v. Winter, 135 Cal. 289, 67 Pac. 772, the court held that an allegation in the complaint that a certain sum was "due and owing" implied that it was unpaid. The conclusion of this court in Stewart v. Burbridge, supra, is based upon the principle announced in the Penrose Case and appears to be supported by the opinion of the Supreme Court in Ward v. Clay, supra. If the use of the words "due and owing" in an allegation imply that the sum is unpaid, it would seem that a like implication must follow their use in a finding upon the issue of nonpayment. That it was unpaid relates back to the time of the filing of the complaint, and being then unpaid, and in the absence of any finding to the contrary, it follows that it was unpaid at the date of the trial.

The court found as a conclusion of law that defendant was estopped from any defense based upon the failure of the box company to ship the full number of boxes ordered. Appellant insists that this conclusion is erroneous. It appears from the record that the boxes were to be manufactured in accordance with specifications, which called for three different sizes, with certain matter printed upon them, as per sample of cover submitted to the box company. The court, in effect, found that prior to shipping the boxes plaintiff's assignor notified defendant of the former's inability to supply the full number of boxes ordered, and that defendant had time within which it could have notified plaintiff's assignor that it would not accept less than the full number called for in the order, but that it did not do so. It does not appear from the findings when plaintiff's assignor gave this notice, other than in the month of October prior to shipment on November 6th; neither does it appear that the box company notified defendant of the exact number of boxes which it was able to furnish. In the absence of the evidence, which is not brought up, every intendment must be resolved in favor of the judgment. We must therefore assume, the contrary not appearing, that plaintiff's assignor notified defendant that it could supply the number of boxes which it did, in fact, ship, namely, 9,712. The fact that the boxes ordered were in size and manufacture to comply with particular specifications contained in the order, and that the evidence may have shown that all the work required to fill an order specially adapted to the wants of defendant was done subsequent to the expiration of a reasonable time after the giving of the notice, brings the case within the well-recognized equitable rule that he who is silent when he ought to speak shall not be heard to speak when he ought to be silent. The circumstances were such that the notice given by plaintiff's assignor to defendant in October imposed upon defendant, if it was unwilling to accept less than the stipulated number of boxes, the duty of signifying its disapproval of the proposed shipment of 9,712 towards filling the order. The defendant's silence must be construed to have been intended to influence the box company to engage in an undertaking prejudicial to its interest. The obvious effect of such conduct on the part of defendant was to mislead the box company to do otherwise than it would have done if the defendant had expressed its disapproval of such proposed action. By reason thereof plaintiff's assignor incurred the expense of making and shipping the boxes, which defendant knew was 288 less than the number ordered. Alvord v. United States, 8 Ct. Cl. 364; Scharman v. Scharman et al., 38 Neb. 39, 56 N. W. 704; Newmarket Iron Foundry v. Harvey, 23 N. H. 395; Maxwell v. Bay City Bridge Co., 46 Mich. 278, 9 N. W. 410. The case at bar is easily distinguishable from those cases like Deane v. Gray Bros., etc., Co., 109 Cal. 433, 42 Pac. 443, and Mickelson v. New East Tintic Ry. Co., 23 Utah, 42, 64 Pac. 463, wherein the court held that the defendants were not required to take affirmative action under the circumstances existing in those cases.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The price agreed to be paid for the 10,000 boxes, as shown by the order, was $332.50. The court gave judgment for $322.09. We assume the difference in the amounts to be the value of the 288 boxes not delivered.

Upon such theory, the judgment is correct, and it is therefore affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

11 Cal. App. 399

RECLAMATION DIST. NO. 70 v. SHERMAN et al. (Civ. 533.)

(Court of Appeal, Third District, California. Sept. 29, 1909.)

1. APPEAL AND ERROR (§ 640*)—RECORD—TRANSCRIPT.

The transcript on an appeal under Code Civ. Proc. § 941b, authorizing an appeal by filing with the trial court a notice, etc., must conform to court rule 7 (78 Pac. ix), and no transcript will be filed, nor appeal reviewed, except as to questions reviewable on the judgment roll alone, unless the transcript conforms to the rule.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 640.*]

2. COURTS (§ 85*)—RULES OF COURT—EFFECT.

The rules of the Supreme Court for the government of appellate practice are as much a part of the system of procedure as the rules promulgated for that purpose by the Legislature, and they must be complied with.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 294; Dec. Dig. § 85.*]

3. STATUTES (§ 80*)—SPECIAL STATUTES—CREATION OF "CORPORATION."

St. 1905, p. 717, c. 552, creating a reclamation district and fixing its boundaries, creates a governmental agency merely for specific purposes, and does not creates a corporation within Const. art. 12. § 1, prohibiting the creating of corporations by special act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 86; Dec. Dig. § 80.*

For other definitions, see Words and Phrases, vol. 2, pp. 1608–1621; vol. 8, pp. 7619, 7620.]

4. DRAINS (§ 8*)—RECLAMATION DISTRICTS—LEGISLATIVE POWER.

The state may accomplish the work of reclaiming swamp lands, ceded to it by the federal government, without organizing a district as such, and without giving the landowners within the district any voice in the selection of the trustees, and the Legislature may appoint commissioners to perform the functions which under existing schemes are performed by trustees and assessors.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 1, 3; Dec. Dig. § 8.*]

5. DRAINS (§ 73*)—RECLAMATION DISTRICTS—ASSESSMENTS—DEFENSES.

One assessed for reclamation purposes may not attack the legal existence of the district created by a law on its face valid by showing that the act creating the district embraced within its limits existing districts, resulting in the taking of the property of landowners within the old districts without due process of law, but the matter is one for the Attorney General, on the relation of landowners of one or both of the old districts.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 73.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

6. Constitutional Law (§ 48*)—Validity of Statute—Presumption.

The Legislature may repeal laws creating reclamation districts to reclaim swamp lands granted to the state by the federal government, and, where the Legislature creates a district embracing existing districts, it will not be presumed that the enforcement of the act creating the new district will destroy vested rights or take property without due process of law, where such effect is not made clear from the language of the act itself.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.*]

7. Public Lands (§ 144*)—Swamp Lands—Obligation of Purchaser.

A purchaser from the state of swamp lands granted to the state by the federal government, on condition that it would reclaim the same and make the same suitable for cultivation, takes the lands subject to the obligation to perform the same condition.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 144.*]

8. Constitutional Law (§ 70*)—Wisdom of Legislation—Judicial Interference.

Where the Legislature deems it wise to the end that the state's obligation to reclaim swamp lands ceded to it by the general government shall be performed to put out of existence any particular reclamation district, which it has created, or to combine two or more into one, or to create a new district, embracing lands within other districts, it will be conclusively presumed, in a collateral attack on the legality of such new district, that the Legislature has acted with due regard to the rights of the owners of the land in the old districts, and that the act is valid, as the wisdom of schemes for the reclamation of such lands is for the exclusive determination of the Legislature.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129, 132, 137; Dec. Dig. § 70.*]

9. Drains (§ 18*)—Reclamation Districts—Power of Trustees.

Under Pol. Code, § 3452, providing that the landowners of a reclamation district shall adopt by-laws for the government thereof, and that they may be amended in the same manner that the original by-laws were adopted, the trustees of a reclamation district have no power to amend the by-laws of the district adopted by the landowners.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 18.*]

10. Drains (§ 76*)—Reclamation Districts—Assessments—Validity.

A provision in the by-laws of a reclamation district, fixing the time when regular meetings of the trustees shall be held, and prescribing the prerequisites to the calling of a special meeting, is not so vital as to materially affect the assessment levied for reclamation purposes, and, where the board has discharged its duties honestly and the assessment commissioners have been fair in the assessment, and there is no suggestion of fraud in any of the proceedings, nor that any of the meetings of the board were not attended by all the members thereof, an assessment will not be set aside merely because meetings were held in accordance with an unauthorized amendment of the by-laws adopted by the trustees fixing the time of meeting.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 76–81; Dec. Dig. § 76.*]

11. Trial (§ 43*) — Technical Rules — Enforcement.

Where the defense is technical, the court may hold the party engaged in making the defense to the strictest letter of the rules governing the admission and exclusion of testimony.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 43.*]

12. Drains (§ 76*)—Reclamation Districts—Assessments—Validity.

A substantial compliance with the law governing the organization of reclamation districts and the administration of their affairs is sufficient to render an assessment for reclamation purposes valid.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 76–81; Dec. Dig. § 76.*]

13. Drains (§ 73*)—Reclamation Districts—Assessments—Validity.

Under Pol. Code, § 15, providing that words giving a joint authority to three or more public officers shall be construed as giving such authority to a majority, an assessment for reclamation purposes will not be disturbed merely because one of the assessment commissioners, after his appointment, furnished money to his wife, who made a loan secured by mortgage on lands in the district, though it be assumed that the mortgage held by the wife removed him from the class of disinterested persons within Pol. Code, § 3456, providing that the three commissioners appointed to assess the lands in a district shall be disinterested persons, as there is no inhibition against the majority of the commissioners performing the duty required of them.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 73.*]

14. Drains (§ 76*)—Reclamation Districts—Assessments—Validity—"De Facto Officer."

The office of commissioner to make an assessment for reclamation purposes is created by statute, and is a de jure officer, and, when one who is appointed, qualifies and participates in the performance of the duties of the commissioners, he acts under color of office and is a de facto officer, and as such his acts are valid; an "officer de facto" being one whose acts the law, upon principles of policy and justice, will hold valid as far as they involve the interests of the public and third persons where he holds under color of a known appointment, void because the officer is not eligible, such ineligibility being unknown to the public.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 76.*

For other definitions, see Words and Phrases, vol. 2, pp. 1845–1851.]

15. Drains (§ 76*)—Reclamation Districts—Assumption—Validity—Presumptions.

Pol. Code, § 3456, providing that the commissioners appointed to make an assessment for reclamation purposes must view and assess on the land within the district, a charge proportionate to the whole expense and to the benefits from the reclamation works requires the commissioners to estimate the whole expense of the proposed works, and then assess the lands in the district proportionally to the whole expense thereof, according to the benefits resulting to each parcel, and considerable discretion is conferred on the commissioners in the determination of the benefits to the several tracts, so that an assessment after a view of the land is presumptively valid under section 3463, making a list of the charges assessed on any tract of land prima facie evidence of the matters therein contained.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 76.*]

16. Drains (§ 90*)—Reclamation Districts—Boundaries—Conclusiveness.

Where the Legislature establishes the boundaries of a reclamation district and embraces therein the land of individuals, it must be conclusively presumed, in an action to enforce the collection of an assessment for reclamation purposes, that the lands included in the district will be benefited by the reclamation works.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 90.*]

17. DRAINS (§ 90*)—RECLAMATION DISTRICTS —ACTIONS FOR ASSESSMENTS—FINDINGS.

A finding, in an action to enforce an assessment for reclamation purposes, that the amount of the charge levied on each tract of land in the district was proportionate to the whole expense, and to the benefits resulting from the reclamation works, means that a party objecting to the assessment has failed to sustain the burden of rebutting the presumption in favor of the validity of the assessment.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 90.*]

18. EVIDENCE (§§ 87, 89*)—TRIAL (§ 139*)—PRESUMPTIONS—CONCLUSIVENESS.

Code Civ. Proc. § 2061, subd. 2, providing that jurors must be instructed that they are not bound to decide in conformity with the declarations of any number of witnesses against a presumption, recognizes that a presumption is evidence which may outweigh the positive testimony of witnesses against it, and while against a fact proved or admitted a disputable presumption has no weight, yet where it is undertaken to prove a fact against the presumption it remains for the jury to determine whether the fact has been proven.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 109, 111; Dec. Dig. §§ 87, 89;* Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.*]

19. EVIDENCE (§ 591*)—WEIGHT AND SUFFICIENCY.

A party bringing out testimony of a witness by making the witness his own witness is bound by his statements, though they may be a conclusion of the witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2440-2443; Dec. Dig. § 591.*]

20. APPEAL AND ERROR (§ 1043*)—HARMLESS ERROR—CONTINUANCE.

Where the findings of the trial court would have been the same if an absent witness had been present and had testified, the refusal to grant a continuance on the ground of the absence of witness will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4121; Dec. Dig. § 1043.*]

Appeal from Superior Court, Sutter County; K. F. Mahan, Judge.

Action by Reclamation District No. 70 against Mary May Sherman and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Milton Shepardson and E. A. Bridgeford, for appellants. A. L. Shinn and A. H. Hewitt, for respondent.

HART, J. This is a suit for the enforcement of a lien upon certain land of defendants, situated within the limits of Reclamation District No. 70, under an assessment for reclamation purposes. Judgment passed for the plaintiff, and this appeal is from said judgment under section 941b of the Code of Civil Procedure. The transcript of the proceedings, etc., as authorized by said section, is not in form as required by rule 7 (78 Pac. ix) of this court, and we will, therefore, take occasion to here say that hereafter no transcript in an appeal taken directly to this court under the section mentioned will be filed, nor the appeal, except as to such questions as may be reviewed on an appeal from the judgment on the judgment roll alone where the judgment roll is, as here, presented in a proper and separate and distinct form from the transcript of the proceedings, will be considered by this court, unless such transcript conforms to the requirements of said rule 7. It would seem scarcely necessary to say that rules laid down by the Supreme Court for the government in many particulars of the appellate practice are as much a part of our system of procedure as the rules promulgated for that purpose by the Legislature, and they are, therefore, as much the necessary learning of the practicing lawyer as either the rules of procedure and practice established by the Legislature or the principles of substantive law. The consequences of failure to observe these rules are upon the lawyer, and not upon the court. The cumbersome and unwieldy form of the record here is excused in this instance only because the section under which the appeal is prosecuted is new, and, further, because the litigation involved in the action is of more than ordinary importance for the reason that the defendants' land has been decreed to be sold for the satisfaction of the assessment levied by the plaintiff.

The validity of the assessment is challenged by appellants on the grounds: (1) That the act of the Legislature by which the plaintiff was organized as a reclamation district (St. 1905, p. 717, c. 552) is unconstitutional and void, because, it is claimed, it is a special law, and therefore violative of article 12, section 1, of the Constitution. (2) That embraced within the boundaries of plaintiff are two other reclamation districts, which were created under the provisions of general laws and which were in existence at the time of the enactment of the law establishing and organizing plaintiff. (3) That the board of trustees of plaintiff by resolution amended the by-laws adopted, in pursuance of section 3452 of the Political Code, by the landowners within the district. (4) That the assessment commissioners were not disinterested persons, as required by and within the meaning of the language of section 3456 of the Political Code. (5) That the commissioners "did not take into consideration the quality and grade of the lands of the district in fixing the assessments and had nothing before them to show the relative heights of the land."

1. Upon the first point, the contention is, as stated, that a reclamation district is a "corporation" within the meaning of article 12, § 1, Const., which, in part, provides: "Corporations may be formed under general laws, but shall not be created by special

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

act." In support of this contention, counsel cite a number of early California cases in which reclamation districts are declared to be corporations. Dean v. Davis, 51 Cal. 410; People v. Reclamation District 108, 53 Cal. 348; People v. Williams, 56 Cal. 647; People v. Larue, 67 Cal. 526, 8 Pac. 84; Irrigation District v. De Lappe, 79 Cal. 353, 21 Pac. 825. And as late as Angus v. Browning, 130 Cal. 503, 62 Pac. 827, it was held that Reclamation District 108 was a corporation, citing People v. District 108, 53 Cal. 348, supra, but it is not therein expressly declared, nor do we think the court intended to hold in that case, that reclamation districts belong to any of the classes of corporations defined by section 284 of the Civil Code or that they come within the purview of the article and section of the Constitution enjoining the creation of corporations except by general laws. Long before the decision in Angus v. Browning, 130 Cal. 503, 62 Pac. 827, supra, the Supreme Court declared in the case of Reclamation Dist. No. 551, 117 Cal. 121, 48 Pac. 1016, that reclamation districts, even if, for the want of a better term, they may be called corporations, were not within the definition of "corporations" as given by section 284 of the Civil Code, and this view has not only been adopted by the Supreme Court in a case decided subsequently to the case of Angus v. Browning, 130 Cal. 503, 62 Pac. 827, but it has been expressly held that such districts may be formed and organized by special acts. People v. Levee Dist. 706, 131 Cal. 30, 63 Pac. 676.

In People v. Reclamation District No. 551, supra, the court, referring to the corporations defined by the section of the Civil Code referred to, says: "These [reclamation] districts in my opinion belong to neither of these classes. They are special organizations, formed to perform a certain work, which the policy of the state requires or permits to be done, and to which the state has given a certain degree of discretion in making the improvements contemplated. They are described by Dillon in his work on Municipal Corporations, §§ 24, 25, 26. He calls them 'quasi corporations.' Perhaps it would have been more accurate to say that they are not corporations at all, but are so classed because many of the presumptions and rules which apply to corporations have been made applicable to them. They are public agencies, which would cease to exist when the policy of the state has changed so that they are no longer required, or when there is no further function for them to perform. And there is nothing in the Constitution relating to municipal corporations which would prevent the state from so changing its policy as to put them out of existence." See Hensley v. Reclamation Dist. No. 556, 121 Cal. 96, 53 Pac. 401.

The case of People v. Levee Dist. No. 6, 131 Cal. 30, 63 Pac. 676, before referred to, sets at rest and completely dissipates all doubt which may have existed as to the nature of reclamation and irrigation districts and the extent of the power of the Legislature in forming them. It is there said: "Section 1 of article 12 of the Constitution, having reference to private corporations, provides that they may be formed under general laws, but shall not be created by a special act. Article 11, § 6, of the Constitution, declares that corporations for municipal purposes shall not be created by special laws. Act 1891, p. 235, c. 164, is unquestionably a special law. If Levee District No. 6 be a corporation, it is certainly not a private corporation, and must, if it be recognized by the Constitution at all, come under the designation of article 11, § 6—'a corporation for municipal purposes.' And if it be a corporation for municipal purposes within the meaning of that article and section, then indubitably, the act of March, 1891, forcing upon it a new, distinct, and different organization, is special and inhibited legislation. But is Levee District No. 6 a corporation for municipal purposes within the meaning of the Constitution? Expressions will be found in the cases where such organizations have been designated 'corporations for municipal purposes,' or 'public corporations,' or 'corporations for public purposes,' but these were convenient phrases of designation and description, rather than judicial declarations as to the nature and character of these agencies. The question propounded is conclusively answered by People v. Reclamation Dist. No. 551, 117 Cal. 114, 48 Pac. 1016. It is there held that a reclamation district, conceding it to be a corporation, is not a corporation for municipal purpose within the meaning of the Constitution. But, as such levee districts, or reclamation districts, are distinctly not private corporations, they are corporations in a class by themselves, and the general powers of the Legislature for their creation, organization, and control are in no wise limited by the Constitution of the state." See, also, Rec. Dist. No. 551 v. County of Sacramento, 134 Cal. 478, 66 Pac. 668, and People ex rel. Chapman v. Sacramento Drainage District, 103 Pac. 207. In the last mentioned case it is said: "The act does no violence to article 1, § 11, nor to article 4, § 25, nor to article 11, § 6, of the Constitution of the state. That the district here organized, if it be considered a corporation at all, is not a corporation organized for municipal purposes within the contemplation of article 11, section 6, of the Constitution, must be taken as well settled. People v. Reclamation District 551, 117 Cal. 114, 48 Pac. 1016; People v. Levee District No. 6, 131 Cal. 30, 63 Pac. 676; Reclamation District v. County of Sacramento, 134 Cal. 477, 66 Pac. 668. It is unnecessary to repeat the reasons set forth in the decisions in those cases by which the conclusion there reached was expressed, to the effect that such districts are in strictness not corporations at all, but rather governmental agencies to carry out a specific purpose—the agency ceasing with the accomplishment of the purpose. But, additionally, it may be said that the likeness of these agencies to corporations is superficial, and that the similitude—for it is no more than this—ceases if consideration be paid to the fact that the state could accomplish this very work without organizing a district as such at all, and without giving the landowners within the district any voice in the selection of the managers or trustees. Thus it would be perfectly legal and competent for the Legislature, delimiting a tract of land, itself to appoint a commissioner or commissioners to perform all of the functions which, under the existing schemes, are performed by the trustees and the assessors. * * * Nor, while a special act, is the law obnoxious to the other sections of the Constitution above cited. The considerations dictating the necessities of a special law are plain as above set forth. It would require a clear showing upon the face of the law itself that a special act was not required before a court would interfere with the determination of a coordinate branch of the government upon this subject, and, generally, as is said in People v. McFadden, 81 Cal. 489, 22 Pac. 851, 15 Am. St. Rep. 66, the determination of such a matter 'depends upon questions of fact which this court has no means of investigating, and upon the solution of which it would not attempt to substitute its judgment in place of that of the Legislature.'" Nothing more can be said upon the point under consideration than is expressed in the foregoing authorities, which, it is clear, conclusively settle the proposition adversely to the claim of the appellant.

2. The proposition that the assessment is invalid because the act creating plaintiff embraced within the limits of the latter two reclamation districts existing at the time of the creation of plaintiff cannot be maintained. Counsel argue that the destruction of the two districts in the manner suggested must result in the taking of the property of the landowners within the old districts without due process of law. In reply to this argument, it is to be said that, even if the point were one which could be appropriately urged against the validity of the assessment in the case at bar, there is nothing in the record before us showing or tending to show in the slightest degree that the property of the landowners in the old districts has been taken without just compensation having been paid for it, or, without due process of law, by the act of the Legislature establishing the boundaries of plaintiff and authorizing its organization as a reclamation district. But the point is one which the defendants cannot urge in this proceeding against the legality of the assessment. If the Legislature has, by its act creating the plaintiff, trespassed upon or usurped any of the rights of other reclamation districts existing before and at the time of the establishment of the boundaries of plaintiff, the matter is one for the Attorney General, upon the relation of some landowner of one or both of the old districts, to inquire into through appropriate legal proceedings. In other words, the point under consideration involves a collateral attack upon the legal existence of plaintiff and such an attack is not within the right of the defendants in this case to interpose; for, if it be a fact that plaintiff has no legal existence for the reason here suggested by appellants, it does not so appear from the face of the act creating plaintiff, and therefore such fact cannot, obviously, constitute a defense against the legality of the assessment. People v. La Rue, 67 Cal. 526, 8 Pac. 84. The act creating the plaintiff is upon its face in all respects perfectly valid, and, if facts extrinsic to the act itself may disclose the invalidity of the enactment and consequently the illegality of the district, an inquiry to that end, if there exists authority for any such inquiry, must be prosecuted directly against the district, and not against any of the acts of its own officers or the other public officers who are charged with the administration of its affairs. It is well settled that the legality of reclamation districts and like quasi public corporations or public agencies established for similar purposes cannot, in a suit to enforce an assessment for the purpose of their creation and organization, be challenged; or, in other words, their legality cannot be collaterally attacked. Hoke v. Perdue, 62 Cal. 545; Reclamation Dist. v. Gray, 95 Cal. 601, 30 Pac. 779; Swamp Land Dist. v. Silver, 98 Cal. 51, 32 Pac. 866; Quint v. Hoffman, 103 Cal. 506, 37 Pac. 514, 777; Reclamation Dist. v. Turner, 104 Cal. 334, 37 Pac. 1038.

The act, by express language, repeals all acts and parts of acts inconsistent with its provisions, and manifestly, if there existed at the time of its passage any law authorizing the maintenance of districts which were made a part of the district created by said act, such law was repealed, at least by necessary implication. The Legislature is to be presumed to have known of the existence of such other districts and to have considered and weighed all vital matters with respect to their operation and expenditures as such and the extent of their efficiency to accomplish, in full measure, the purposes for which they were created. There can be indulged no presumption that the effect of an act of the Legislature, if enforced, will be to destroy vested rights or to take property without due process of law, where such effect is not made clear from the language of the act itself. That it is within the power of the Legislature to repeal laws creating reclamation districts is a proposition well established. The swamp and overflowed lands of California were granted by the general government to the state upon condition that the latter would reclaim the same so that they might become suitable for the purposes of cultivation, and those who become purchasers of such lands from the state so take them subject to the obligation to perform the same condition. Kimball v. Reclamation Fund Com., 45 Cal. 344; Lamb v. Rec. Dist., 73 Cal. 133, 14 Pac. 625, 2 Am. St. Rep. 775; County of Kings v. County of Tulare, 119 Cal. 509, 51 Pac. 866; Miller & Lux v. Batz, 142 Cal. 447, 76 Pac. 42; Reclamation Dist. v. County of Sacramento, 134 Cal. 477, 66 Pac. 668. Therefore the state may adopt any policy consistent with reason for the prosecution of the work of reclaiming such lands; for there is no limitation placed by the Constitution upon the power of the Legislature to change its policy with regard to this subject. As is said is People v. Rec. Dist., 117 Cal. 114, 48 Pac. 1016, supra, speaking of reclamation districts, "they are public agencies which would cease to exist when the policy of the state has changed, * * * and there is nothing in the Constitution relating to municipal corporations which would prevent the state from so changing its policy as to put them out of existence." If, therefore, the Legislature deems it to be a wise and beneficent policy, to the end that the state's obligation to reclaim and conserve the vast bodies of swamp and overflowed lands ceded to it by the general government, to put out of existence any particular reclamation district which it has created or to combine two or more districts already in existence into one or to form a new district embracing lands included within the boundaries of other existing districts, it must be conclusively presumed, in a collateral attack upon the legality of such new district so formed, that the law-making department has acted with due regard to the rights of the landowners of the old districts, and that, in fact, the latter act is in all respects legal and valid. In short, the policy of our schemes for the reclamation of swamp and overflowed lands is one for exclusive determination by the Legislature, and, as before declared, if the acts of that body upon the subject are, upon their face, regular and valid, they cannot be impeached in any collateral proceeding.

3. It appears from the record that the owners of the land embraced in District 70, or those owning a majority in acreage of such land, in pursuance of section 3452 of the Political Code, adopted a set of by-laws for the government of the business of said district, and that subsequently the board of trustees amended said by-laws so as to change the time for holding the regular meetings of said board from the last Saturday in each month to the first Monday in each month; and further amended the by-laws with respect to the extent of the notice to be given the members of the board of trustees of special meetings of the board. Section 3452 of the Political Code, supra, provides that the landowners of the district shall adopt by-laws for the government thereof, and that such by-laws "may be amended at any time in the same manner that the original by-laws were adopted." It is not seriously contended that the effect of the mere unauthorized act of the board of trustees in amending or attempting to amend the by-laws is to vitiate the assessment; but appellants complain in this connection that the trial court committed prejudicial error by its alleged refusal to permit them to prove that the regular meetings of the board at which all the important business of the district committed to that body was transacted were held on the first Monday of each month, in accordance with the requirement of the amendment which the board undertook to make to the by-laws in that particular, instead of on the last Saturday of each month as prescribed by the by-laws, and, further, that the court would not permit proof as to the notice given, if any, to the members of the board of trustees of any special meetings at which the business of the board was transacted. The rulings complained of were upon questions propounded by counsel for the appellants to the secretary of the board of trustees.

Directing his attention to the resolution adopted by the board purporting to change the regular meeting days of said board to the first Monday in each month, this witness was asked if said board had held its meetings "pursuant to" said resolution and whether said board had "met upon any other day as a regular meeting than Monday as provided by this resolution"; and whether, "after the passage of that resolution your board adopted Monday as the regular meeting day of said board." To these questions the objection was made by the plaintiff, and, upon that ground sustained by the court, that they called for the opinion or conclusion of the witness and as well called for immaterial testimony. Objection was sustained on the same ground to the following question by appellants to the same witness: "I will ask you if pursuant to a resolution contained on page 2 of your minutes in relation to special meetings that if you pursued the method therein provided for giving notice of special meetings as therein provided for alone?" The object sought to be attained by the questions thus propounded to the secretary was undoubtedly to show that the board of trustees had held the meetings for the transaction of their official business upon days other than those prescribed for either regular or special meetings by the by-laws as adopted by the landowners. The by-laws, as so adopted, provide that, in the case of special meetings, the same may be held at any time at the call of the president of the board, "upon notice given to each trustee by mail, at least one day before such special meeting." The purported amendment by the board provided that special meetings may be held "upon five hours' previous notice thereof given personally by the president to each member of said board or without such notice if all members are present." The trial court made no specific finding as to the days upon which the meetings were held, but the judge, in rendering his decision, said: "I think the evidence clearly shows it was done at some meeting other than a regular meeting of the board, but as to what notice was given of the meeting at which these acts were performed there is no testimony."

It is very plain that the trustees of a reclamation district have no right or power to amend or change the by-laws of such district adopted by the landowners. The statute places this power in the landowners, and they alone may exercise it. But we do not look upon a provision in such by-laws fixing the time at which regular meetings of the board of trustees shall be held and prescribing the prerequisites to the calling of a special meeting as being so vital as to materially affect an assessment levied for the purposes of such an organization. The object of such a provision is, of course, to guarantee the proper observance of the greater and paramount consideration involved in all reclamation schemes whose prosecution is authorized by the state to wit: That the business for which such districts have been formed shall be faithfully transacted and their purpose finally accomplished by those charged with that duty. If the law has been substantially followed in the organization of such districts; if the election of the trustees has been unattended by fraud or dishonest practices; if the board has discharged its duties honestly and fairly; if the assessment commissioners have been fair and honest in the assessment of the lands in the district, taking into consideration in the performance of that duty all the elements essential to a just and equitable apportionment of the assessment of each piece or tract of land, according to the benefits which will accrue to it by reason of the reclamation works—then, under these circumstances, it is not vitally material in our opinion whether all the meetings of the board of trustees, whether regular or special have been held or called according to the strict letter of the provision of the by-laws fixing the time at which regular meetings shall be held or prescribing the prerequisites to the calling of special meetings. There is no suggestion here that there was any fraud in any of the proceedings leading to the organization of the district or in the assessment. Nor is there any claim that any of the meetings of the board were not attended by all the members of said board, and, if it could be assumed that the appellants could have proved, if the court had permitted the testimony, that certain special meetings of the board had been held without the notice prescribed by the by-laws having been previously given to the members of the board, and it appeared, as is conceded here, because it is not questioned, that all the members were present at such meetings, we hardly think any court could be found that would set at naught an assessment levied for so important a purpose and thus undo the fruition of long and laborious work and thereby impede the progress of an enterprise which the state itself has obligated itself to press to a successful termination, merely because of the omission to give a notice, the sole and only purpose of which had in fact been realized. If at such meetings all the members of the board were present, then whether the notice required was given of course became immaterial.

But the objection to some of the questions put to the secretary of the board that they called for the conclusion of the witness was well taken. Ordinarily there is little harm to be apprehended from answers to such questions as were objected to here. But the defense in this case is, in every aspect of it technical in the extreme, and we approve the course of a trial court in a case where a defense, as here, is founded entirely upon technicalities behind which there is little substance, in holding counsel who are engaged in making such a defense down to the strictest letter of the rule governing the admission and exclusion of testimony. We make this observation with no intention of challenging the right of counsel to make such a defense if they choose to do so, or believe the exigencies of their cause require it. The defense here, as we have thus far considered the case, is based altogether upon alleged slight departures from the strict letter of the law governing the organization of reclamation districts, and we think that the great purpose of those districts—a purpose in which the state as well as the owners of land embraced therein are vitally interested, because the reclamation of the large areas of swamp and overflowed lands within the borders of this commonwealth means increased prosperity to the whole state—should not be circumvented or impeded by any mere omission to dot an "i" or cross a "t." For the result of a reversal of the judgment in an action this character, the law by which it is authorized being in all respects valid, because of slight deviations from the procedure by which the assessment is required to be levied, could only be to cause the extra expense to the landowners necessarily incident to levying the assessment again, and for this reason, among those stated, a departure from the prescribed procedure should be of a very material and substantial nature before a reversal of the cause should be ordered. We therefore think that a substantial compliance with the provisions of the law governing the organization of such districts and the administration of their affairs ought to be all that should be required, for, unlike municipal corporations, they are brought into existence to serve, as public agencies, a special purpose for the whole state and to pass out with the achievement of that purpose.

4. It is next contended that the evidence discloses that the assessment commissioners were not disinterested persons. This contention is based upon testimony showing that the wife of Commissioner McRae was the holder of a mortgage on certain lands situated in the district. Section 3456 of the Political Code provides that the three commissioners appointed by the board of supervisors to assess the lands constituting the district shall be "disinterested persons." McRae testified that the mortgage referred to was given to secure the loan of money acquired during marriage, but that he gave the money to his wife so that she could make the loan, and thus prevent, by reason of that transaction, his disqualification to serve as an assessment commissioner of the "Sacramento Drainage District." The point is, however, devoid of merit. The mortgage was executed some three weeks after McRae had been selected by the board of supervisors as one of the assessment commissioners of plaintiff, and conceding, without deciding, that a mortgage held by the wife of a commissioner on lands within the district for which he was appointed a commissioner would be a sufficient reason for his disqualification, or would remove him from the class of "disinterested persons" from which the assessment commissioners must be selected, we do not think that the assessment can be affected or disturbed by that circumstance. There is no inhibition in the statute authorizing the appointment of these commissioners or in any part of the law relating to the organization and management of reclamation districts against a majority of such commissioners performing the duty required of them. Section 15 of the Political Code provides that "words giving a joint authority to three or more public officers or other persons are construed as giving such authority to a majority of them, unless it is otherwise expressed in the act giving the authority." Prior to the adoption of the foregoing section, the rule was the reverse, but the rule now is that, in the absence of an express provision to the contrary, "for all practical purposes the majority becomes the full board. It is," as is said in People v. Hecht, 105 Cal. 627, 38 Pac. 941, 27 L. R. A. 203, 45 Am. St. Rep. 96, "the receptacle—the reservoir—of all the authority conferred upon the whole, and its action, it is submitted, cannot be stayed by the nonaction, failure to qualify, absence, death, or want of eligibility of the minority." Moreover, the office of assessment commissioner is created by the statute, and is a de jure office. When McRae was appointed and qualified as an assessment commissioner and participated in the performance of the duties of the commissioners, he was acting under color of office, and presumptively entitled to the office and to discharge its duties. He was a de facto officer engaged in the discharge of the duties of a de jure office, and as such his acts were as valid and binding as those of a de jure officer. People v. Hecht, supra; Kitts v. Superior Court, 5 Cal. App. 462, 90 Pac. 977. An interesting case upon the subject of officers de facto is that of State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409, where it is said: "A definition sufficiently accurate and comprehensive to cover the whole ground must, I think, be substantially as follows: An officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons where the duties of the office were exercised: * * * (3) Under color of a known election or appointment, void because the officer was not eligible, * * * such ineligibility * * * being unknown to the public." See, also, People v. La Rue, supra. It will further be observed that at the time of McRae's appointment as commissioner by the board of supervisors he was, so far as the mortgage to his wife might have affected his qualifications to serve as such, a "disinterested person."

5. The claim is urged that the commissioners in making the assessment failed to take into consideration "the quality and grade of the lands of the district in fixing the assessments, and had nothing before them to show the relative heights of the land." Section 3456 of the Political Code provides that the commissioners "must view and assess upon the land situated within the district a charge proportionate to the whole expense and to the benefits of which will result from such works," etc. It is thus to be seen that the duty of the commissioners is to make an estimate of the whole expense of the proposed reclamation works, and then assess the lands embraced in the district proportionate to the whole expense thereof and according to the benefits which will result to each parcel of land from such reclamation. It is clear that the statute contemplates that considerable discretion shall be exercised by the commissioners in the determination of the question as to benefits which will accrue to the several tracts of land included in the district. By this we mean to say that, while an arbitrary assessment cannot be levied, the judgment of the commissioners upon the assessment, after a view of the land as contemplated by the statute, must be presumed to have been the result of a consideration of all the elements necessary to a just apportionment of the assessment. In fact, section 3463 of the Political Code so provides. It reads as follows: "From and after the filing of the list or certified copy thereof, the char-

ges assessed upon any tract of land within the county constitute a lien thereon, and in any action to enforce said lien or to determine its validity, said list, duly executed by said commissioners, or a certified copy thereof, shall be prima facie evidence of the matters therein contained, and that said commissioners were duly appointed and qualified, as required by law, and that they did view and assess upon the lands set forth in said lists the charges therein contained, and that said charges are in proportion to the whole expense and the benefits of which will result from the works of reclamation for which said assessment is so levied." In other words, after the assessment list or a certified copy thereof has been filed, the presumption is that the assessment was apportioned in obedience to the law. Therefore, when the plaintiff introduced in evidence the assessment book, a prima facie case was thereupon made out in favor of the lien against the lands of the appellants, and the burden was then cast upon the latter to overcome, if they could, the presumption thus arising.

McRae, one of the commissioners, was examined as to the methods of levying the assessment adopted by the commissioners, and other testimony was received bearing upon the character of the land of the appellants as to elevation and other elements which should be considered in properly apportioning an assessment for reclamation purposes. McRae, among other things, said that the land of appellants was assessed according to "the benefit it derived from the district, the lands and the drainage." Testimony was offered by the appellants to show that the land involved here was peculiarly suitable and adapted to the culture and growing of prunes, and some of the witnesses testified that the effect of water flowing upon lands of the same quality was to enrich it for prune-producing purposes, to which it could well be devoted where the water could be drained off in the winter season. The purpose of this testimony was obviously to show that the land of appellants could derive no practical benefit whatsoever from reclamation, and that any assessment levied thereon for reclamation purposes should not be sustained. But the question whether the land will or will not be benefited by reclamation works, or in other words, whether it should have been included within the boundaries of a district formed for reclamation purposes, is one which cannot arise or be urged in a suit of the nature of the one here. The Legislature having established the boundaries of the district and embraced therein the land of the appellants, it must be conclusively presumed, in an action to enforce the collection of the assessment, that such land will be benefited by reclamation works. If the rule were otherwise, a reclamation district could easily be dissolved or destroyed by the claim and some proof of exemption from assessment of every tract of land therein in a suit to compel the payment of the assessment for the alleged reason that such land would not be benefited by the reclamation schemes authorized by the legislature.

The ultimate and only question in this respect which it is competent to adjudicate in an action of this character is: Has the assessment been levied as the law prescribes and according to benefits which will result to the land from reclamation works? Viewing, therefore, the testimony presented by the defendants in the light of proof offered as tending to show only the alleged inequality of the assessment levied upon the lands of appellants, all that can be said with regard to it is that its probative force or value constituted a matter purely and entirely for the determination of the trial court. The court found that the amount of the charge levied upon each and every tract of land in said district was proportionate to the whole expense and to the benefits which would result from the said works of reclamation, and with this finding we have discovered no reason, after an examination of the record evidence, justifying interference by this court. This finding simply means that the defendants failed to sustain the burden which rested upon them of rebutting the presumption in favor of the validity of the assessment, and we are unable to declare, as a matter of law, that the trial judge was not justified in so finding. The declaration of counsel that a presumption of law "is an arbitrary rule which does not weigh against evidence taken in opposition thereto" does not harmonize with section 2061, subd. 2, Code Civ. Proc., which provides that jurors are to be instructed "that they are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in their minds, against a less number, or against a presumption or other evidence satisfying their minds." "In this," says the Supreme Court, in the case of People v. Milner, 122 Cal. 179, 54 Pac. 837, "is a distinct recognition of the facts: (1) That a presumption is evidence; and (2) that it is evidence which may outweigh the positive testimony of the witnesses against it. * * * Against a proved fact, or a fact admitted, a disputable presumption has no weight, but, where it is undertaken to prove the fact against the presumption, it still *remains with the jury to say whether or not the fact has been proven; and, if they are not satisfied with the proof offered in its support, they are at liberty to accept the evidence of the presumption.*" (Italics ours.) As we have seen, McRae testified that the land of defendants, as were all the lands in the district, was assessed proportionate to the whole expense of the reclamation works and to the benefits which would accrue to said land therefrom, and, while this statement might be said to be a conclusion of the witness, the testimony thus brought out was by the defendants themselves, they having made McRae their witness, and they, therefore, are bound by his statements. In any event, as already declared, it was for the court to say, after listening to the testimony directly from the witnesses themselves, whether the presumption of the legality of the assessment had been dispelled.

6. Appellants declare that the court erred to their prejudice by refusing to adjourn the trial of the case until they could produce as a witness one Blackmar, who, so alleges the affidavit upon which the motion for the continuance was made, resided on land adjoining that of the defendants for a period of 40 years, and who would have given testimony tending to show that the assessment was not levied in accordance with benefits, "and, in fact, that the defendants' land was not benefited at all by the works of reclamation." It appears that Blackmar had been subpœnaed, but failed to respond to the process, and was not present when his name was called. Opposition to the motion was interposed by the plaintiff on the ground that the testimony of Blackmar would be purely cumulative; a large amount of testimony to the same point having already been introduced.

We do not think the court abused its discretion in refusing to grant the motion for a continuance. We cannot say, as against the judgment of the judge who tried the case upon the facts, that any different result would likely have been attained had Blackmar's testimony been received. It is very probable that, had that witness testified as appellants claim that he would and no different findings deduced by the court from those crystallized into the judgment from which this appeal is prosecuted, this court would be in no better position than it now finds itself to declare that the finding of the trial court against the evidence offered in opposition to the presumption favoring the legality of the assessment was not warranted.

For the reasons expressed in the foregoing, the judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

156 Cal. 472

WESSLING v. NYE, State Controller.
(Sac. 1,700.)

(Supreme Court of California. Nov. 18, 1909.)

1. STATES (§ 119*)— PUBLIC FUNDS—APPROPRIATIONS—GIFTS TO INDIVIDUAL.

While under Const. art. 4, § 7, providing that each house of the Legislature shall judge of the qualifications and elections of its members, any expense lawfully incurred by either house in the exercise of this power would be a legitimate charge on its contingent fund, the Legislature cannot reimburse one who has expended money in the preparation of a contest which is not prosecuted before it or any of its committees, there being in such case no contractual relation between the Legislature and those to whom the compensation is due, and such reimbursement would violate Const. art. 4, § 31, prohibiting the making of any gift of public money to individuals by the Legislature.

[Ed. Note.—For other cases, see States, Cent. Dig. § 118; Dec. Dig. § 119.*]

2. ELECTIONS (§ 307*)—CONTESTS—EXPENSES.

Under Pol. Code, § 280, the fees of officers for duties performed in the preliminary steps of a contested election case must be paid by the contesting parties.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 307.*]

In Bank. Appeal from Superior Court, Sacramento County; C. N. Post, Judge.

Mandamus by John Wessling against A. B. Nye, Controller of the State of California. Demurrer to the petition was sustained, and plaintiff appeals. Affirmed.

Henry N. Beatty, Thos. E. Curran, and Francis Dunn, for appellant. U. S. Webb, Atty. Gen., and R. C. Van Fleet, Deputy Atty. Gen., for respondent.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

MELVIN, J. Appellant was elected a member of the assembly of the state of California, and his right to a seat in that body was contested by one Pfaeffle. The election took place on the 6th of November, 1906. The petitioner received his certificate of election from the registrar of voters of the city and county of San Francisco on November 26, 1906, and Pfaeffle's contest was filed on December 25th of the same year. Testimony with reference to the rights of the parties to the contest was thereafter given before two justices of the peace who had been appointed commissioners according to the requirements of section 275 of the Political Code, and their certificates, with the depositions of the witnesses, having been duly returned through the Secretary of State to the assembly, that body, on March 1, 1907, dismissed the contest on the ground that it had not been inaugurated within the period set by the statute of limitations. Section 274, Pol. Code. Thereafter, the assembly, by resolution, directed the controller to draw his warrant on the treasurer for the sum of $394, payable to Mr. Wessling out of the contingent fund of the assembly, for expenses incurred for attorney's fees, witnesses' fees, mileage, and incidental expenses in said election contest. The controller refused to draw such warrant, and this appellant petitioned the superior court for a writ of mandate to compel compliance with the aforesaid resolution. Respondent's demurrer to the petition was sustained, and this is an appeal from that judgment.

It is conceded by appellant that there is no direct statutory authority for the payment by either branch of the Legislature of the expenses of an election contest; but he insists that the power of the assembly to judge of the qualifications of those asserting the right to membership in that house carries with it the implied authority to expend any sum of money reasonably necessary to the determination of conflicting claims to a seat in that branch of the Legislature. Section 7 of article 4 of the Constitution provides that "Each house shall choose its officers and judge of the qualifications, elections and returns of its members." In our opinion, any expense lawfully incurred by either house in the exercise of the power thus given by the Constitution would be a legitimate charge to be paid out of its contingent fund; but it is here brought to our attention that this contest was not tried before the assembly. That body merely and properly dismissed the proceeding because it had not been instituted within the prescribed time after the issuance of the certificate of election. The real question presented to us is this: May the assembly reimburse one who has paid witnesses' and attorney's fees, costs, and personal expenses, in the preparation for a contest which is not prosecuted before the assembly? In answering this interrogatory it is not necessary to determine whether or not upon a trial of a contested election before the assembly that body might order the payment of the fees of witnesses whose testimony as certified by the commissioners should be used in that proceeding, the personal expenses of the contestee, or the fees of attorneys who might have prepared and presented the case of the contestee, either before the commissioners or the assembly; although it is earnestly submitted by the Attorney General that a legislative committee has no power to employ an attorney, but must seek any required legal advice from his office.

It sufficiently appears upon the face of the petition here considered that no proceedings were had before the assembly or any one of its committees. Therefore no contractual relation between the attorney for Mr. Wessling and the assembly had arisen. In the absence of such contractual relation, we think there was no legal liability upon the assembly to pay for his services, and that any attempt to do so must fail because of the prohibition against gifts of public funds. Const. Cal. art. 4, § 31; Powell v. Phelan, 138 Cal. 273, 72 Pac. 335. The same principles apply with equal force to the items of personal expenses and witnesses' fees.

It may be that the Legislature might by statute provide for the payment by a county, or by the state, of costs in certain election contests. Such laws have existed in other states. See In re Contested Election of O'Neil, 98 Pa. 461. Our Legislature, however, has passed no such law, but, on the contrary, has provided that the fees of officers for duties performed in the preliminary stages of a contested election case shall be paid by the contesting parties. Pol. Code, § 280. And we do not see how any implied duty for reimbursement of a contestee arises from the Constitution, or from the statutes that merely prescribe the procedure in election contests.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.; SHAW, J.; ANGELLOTTI, J.

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156 Cal. 475

WRIGHT v. SONOMA COUNTY.

(S. F. 4,996.)

(Supreme Court of California. Nov. 19, 1909.)

1. WATERS AND WATER COURSES (§ 158*)—SALE OF WATER—OFFER TO SELL.

Where there was no assent by plaintiff to the use of water by defendant, a notice by plaintiff forbidding the use of the water, and demanding a certain sum for every day the notice was violated, was not a proposition to sell water at that rate.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 186; Dec. Dig. § 158.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. WATERS AND WATER COURSES (§ 158*)—SALE OF WATER—ACCEPTANCE OF PROPOSAL.

Where plaintiff notified defendant not to take water from his premises, and that he would demand a certain sum for every day the notice was violated, and afterwards obtained a decree restraining defendant from taking the water, the taking of water after the notice was not an acceptance of a proposition to sell at a specified price.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 186; Dec. Dig. § 158.*]

3. CONTRACTS (§ 346*)—ACTION ON EXPRESS CONTRACT—VARIANCE.

Where plaintiff relied wholly on an alleged express contract, he cannot recover on a quantum meruit; no contract being proved.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1748; Dec. Dig. § 346.*]

In Bank. Appeal from Superior Court, Sonoma County; Albert G. Burnett, Judge.

Action by Sampson B. Wright against the County of Sonoma. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Affirmed.

Transferred from Court of Appeal to Supreme Court in 7 Cal. App. 567, 96 Pac. 333.

T. J. Butts, for appellant. Clarence F. Lea and G. W. Hoyle, for respondent.

ANGELLOTTI, J. This is an appeal by plaintiff from a judgment for defendant and from an order denying his motion for a new trial, in an action to recover the sum of $8,600 for water taken by defendant, by one of its road commissioners, for the purpose of sprinkling a public highway, from a well bored by it in said public highway.

The plaintiff is the life tenant of the land traversed by that portion of said highway on which said well is situated, subject to such rights therein as are possessed by defendant and the public by reason of the fact that the same constitutes a public highway. Defendant took and used water for sprinkling said highway from June 10, 1903, to October 8, 1903, 120 days—and on 52 days, from May 10, 1904, to July 12, 1904. Plaintiff's claim is based solely on the theory that there was an express contract for the payment by defendant to plaintiff of the sum of $50 for each day on which water was taken by it from said well; there being no allegation in the complaint as to the reasonable value of the water taken, or any allegation of damage to plaintiff by reason of such taking. In view of the findings based on evidence without conflict, there can be no dispute as to the facts material on the issue of express contract, and those facts completely disprove the theory of any such contract. About May 27, 1903, defendant's road commissioner commenced the construction of said well, and, the same having been completed, commenced to take water therefrom for the purpose of sprinkling said highway, all without the consent of plaintiff. Plaintiff and others interested in the land, thereupon, on June 10, 1903, notified such road commissioner in writing that he was forbidden to take any water from said well, and that, in case he disregarded such notice, the owners "hereby demand" $50 per day for each and every day on which he removed water in violation of the notice, "as compensation for the taking of said water." The well was bored and the water used for sprinkling purposes, with the knowledge of the board of supervisors of Sonoma county solely under the bona fide claim that the county had the lawful right to so take and use the water. On June 20, 1903, plaintiff commenced an action in the superior court of Sonoma county to obtain a decree enjoining said road commissioner from taking said water. On September 22, 1903, the superior court rendered judgment in said cause that plaintiff take nothing by his action. An appeal was taken by plaintiff from said judgment to the Supreme Court, and on May 11, 1904, the Supreme Court rendered a decision holding that defendant had no right to take or use said water, and directing the entry of judgment by the lower court in favor of plaintiff. Wright v. Austin, 143 Cal. 236, 76 Pac. 1023, 65 L. R. A. 949, 101 Am. St. Rep. 97. The road commissioner and law officers of the county had knowledge of this decision within a few days after the opinion was filed, but the remittitur from the Supreme Court was not returned and filed in the clerk's office of Sonoma county until July 11, 1904. There is no claim that any water was taken subsequent to July 12, 1904.

It appears too clear for question that there was no express contract between the parties for the use of this water. There was never any assent on the part of plaintiff to the use by defendant of such water on any terms, and all water taken was taken against the will, and without the consent, of plaintiff. The notice given by plaintiff and his co-owners expressly forbade the use of the water at all. The provision therein to the effect that the owners demand $50 for each and every day on which the notice to refrain from taking water is violated cannot be construed as a proposition to sell water at that rate. It amounted to no more than a notice of the amount of damage that the owners would claim for the taking of the water without their consent. And the taking of the water by defendant under the circumstances shown, even after the decision of the Supreme Court in regard to the relative rights of the parties became known to it, cannot be held to show any acceptance by it of the proposition to sell the water for a specified price. The cases cited by learned counsel for plaintiff in this regard are all cases in which the conduct of the party was such as to afford reasonable evidence of his consent to a proposition theretofore made.

So far as any right to compensation for water actually taken is concerned, which is the only right asserted in this action, as was said by the learned trial judge, "the only claim open to plaintiff was for the reasonable value of the water." No such claim has been asserted; the plaintiff, both in his complaint and throughout the proceeding, relying exclusively on his claim that there was an express contract for $50 for each day on which water was used from said well.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The judgment and order denying a new trial are affirmed.

We concur: SLOSS, J; SHAW, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

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156 Cal. 466

GENERAL CONFERENCE OF FREE BAPTISTS v. BERKEY et al. (Sac. 1,526.)

(Supreme Court of California. Nov. 18, 1909. Rehearing Denied Dec. 16, 1909.)

1. Corporations (§ 642*) — Foreign Corporations—Business Transactions.

A single act of business by a foreign corporation, within Const. art. 12, § 15, providing that no foreign corporation shall be allowed to transact business in the state on more favorable conditions than are prescribed by law to similar domestic corporations, must be an act within the ordinary business of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2526; Dec. Dig. § 642.*]

2. Corporations (§ 642*)—Foreign Corporations—Business Transactions.

A single sale of real estate by a foreign corporation organized for religious, missionary, educational, and charitable purposes with the incidental power to take and sell real estate is not a transaction of business within Const. art. 12, § 15, providing that no foreign corporation shall be allowed to transact business within the state on more favorable conditions than are prescribed by law to domestic corporations, and the failure of the corporation to comply with Civ. Code, § 598, and obtain an order for the sale of the property does not render the sale invalid.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2526; Dec. Dig. § 642.*]

3. Charities (§ 48*) — Business Transactions.

The power of a religious, missionary, educational, and charitable corporation to take and sell real estate is purely incidental in the prosecution of its main purpose.

[Ed. Note.—For other cases, see Charities, Dec. Dig. § 48.*]

4. Corporations (§ 642*)—Foreign Corporations—"Doing Business"—"Transacting Business."

"Doing business," as used in statutes prohibiting a foreign corporation from doing business until it has filed a certificate, etc., is equivalent to the words "transacting business," and in most jurisdictions it is held that such statutes have reference to a continuation in some form of business, and do not apply where a foreign corporation does a single act of business within the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2520–2527; Dec. Dig. § 642.*

For other definitions, see Words and Phrases, vol. 3, pp. 2155–2160; vol. 8, pp. 7640, 7641, 7058–7060, 7818.]

Shaw, J., dissenting.

In Bank. Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

Action by the General Conference of Free Baptists against T. H. Berkey and others. There was a judgment for defendants, and, from an order denying a new trial, plaintiff appeals. Affirmed.

Dudley Kinsell, for appellant. Devlin & Devlin, for respondents.

SLOSS, J. The plaintiff, a corporation organized under the laws of the state of Maine, appeals from an order denying its motion for a new trial.

The action is one to quiet title to a lot in the city of Sacramento. There were several defendants, all of whom, except the respondent Berkey, disclaimed or suffered default. Berkey answered alleging title in himself, and further setting up certain facts, which, as he claimed, estopped the plaintiff from asserting title adversely to him. The court found in his favor on both defenses. At the trial it was stipulated that on the 1st day of February, 1902, one S. P. Meads was the owner of the property. The plaintiff offered in evidence a deed of grant, bargain, and sale, whereby said Meads, on the last-named date, conveyed the said premises to plaintiff. After introducing a duly certified copy of its character or articles of incorporation, and showing compliance with the requirements of section 405 of the Civil Code, the plaintiff rested. The defendant Berkey offered in evidence a deed bearing date the 14th day of April, 1903, whereby the General Conference of Free Baptists, plaintiff herein, purported to grant, bargain, and sell to T. H. Berkey (the respondent) the property in question. This deed was signed on behalf of the corporation by its president and secretary and bore the corporate seal. Objection to its introduction in evidence was made on the ground that it had not been shown that before the execution of the instrument application for leave to sell the property had been made to or granted by the superior court of the county of Sacramento. The objection was overruled, and plaintiff excepted. This deed, if sufficient to convey title, fully sustains the finding in favor of Berkey's ownership. The appellant makes no point other than that involved in the objection to the admission of the deed which could affect this finding or the judgment based on it. If, then, the deed was properly admitted in evidence, it will be unnecessary to consider whether or not the defense of estoppel was made out.

The plaintiff was incorporated by an act of the Legislature of the state of Maine, approved January 19, 1891 (Priv. & Sp. Laws Me. 1891, p. 3, c. 1). Section 1 of the act provides that Oren B. Cheney, and 26 other persons named, "their associates and successors, are hereby constituted a corporation for religious, missionary, educational and charitable purposes under the name of the General Conference of Free Baptists, and by that name shall have power to prosecute and defend suits at law, to use a common seal and to change the same at pleasure, to take and hold for the objects of said corporation by gift, grant, bequest, purchase or otherwise, any estate, real or personal, or both, the annual income of which shall not exceed one hundred thousand dollars, and to sell and convey any estate, real or personal, or both, which the interests of said corporation may require to be sold and conveyed." Section 593 of the Civil Code of California, a part of title 12, headed "Religious, Social and Benevolent Corporations," authorizes the incorporation of any number of persons, "for any purpose where pecuniary profit is not their object and for which individuals may lawfully associate themselves." Section 598 of the same Code provides that corporations of the character mentioned in section 593 may sell the real property held by them upon obtaining an order for that purpose from the superior court held in the county in which the property is situated. The section provides for the filing of a petition for leave to sell such real estate and the giving of notice by publication of such application. Section 593 deals with the formation of corporations in this state, and section 598, applying by its terms to corporations of the character mentioned in section 593, is intended, so far as its language goes, to refer only to domestic corporations. The sole question, then, is whether the terms of section 598 are made applicable to the plaintiff corporation by the provision of article 12, § 15, of the Constitution of this state, that "no corporation organized outside the limits of this state shall be allowed to transact business within this state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state." Whether this provision is self-executing, or is addressed to the Legislature alone as a prohibition against the passing of laws affirmatively giving superior privileges to foreign corporations, is a question which may be open to doubt. See Uihlein v. Caplice Com'l Co. (Mont.) 102 Pac. 564; First Nat. Bank v. Weidenbeck, 97 Fed. 896, 38 C. C. A. 131; Coler v. Tacoma R. & P. Co., 65 N. J. Eq. 347, 54 Atl. 413, 103 Am. St. Rep. 786. It need not be here decided. For the purposes of this appeal, we shall assume that the constitutional provision is self-executing, and that by its own force it attaches to such transactions of foreign corporations as are within its scope the restrictions imposed upon similar domestic corporations.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It seems clear that the plaintiff herein is a corporation similar in character to those whose creation is authorized by section 593 of the Civil Code. That section authorizes incorporation of persons for any purpose "where pecuniary profit is not their object." The purposes for which the plaintiff was organized are defined in its charter as "religious, missionary, educational and charitable," and the power granted to it to acquire and sell property is a power to be exercised in subordination to the main purposes for which the corporation is created. The act of incorporation does not confer any power to enter into the business of buying and selling property for the purpose of advancing the pecuniary profit of the corporators. The corporation is therefore, in all essential particulars, similar in character to those described in section 593.

It remains to be considered, then, whether a sale of real estate by such a corporation is a transaction of business by it within the meaning of the constitutional provision above referred to. The phrase "to transact business," as used in this provision, is equivalent to the words "to do business," found in the statutes of many states, prohibiting a foreign corporation from "doing business" in such states until it has filed a certificate designating a place of business and a resident agent upon whom process may be served, or complied with other conditions. See, for example, Civ. Code, §§ 405–408. There have been many decisions construing the words "doing business," under such statutes, and the cases upon the subject are not in harmony. In most jurisdictions it is held that such statutes have reference to a continuation in some form of business, and do not apply where a foreign corporation does a single act of business within the state. 3 Clark & Marshall on Private Corporations, § 846, and cases cited. There are decisions, however, which hold that a foreign corporation may come within the purview of such statutes by the doing of a single act. See, for example, Farrior v. Security Co., 88 Ala. 275, 7 South. 200. But even in the states which announce this doctrine it is held that the single act which will bring the corporation within the purview of the statute must be an act of the ordinary business of the corporation. In the language of the Supreme Court of Alabama: "There must be a doing of some of the works, or an exercise of some of the functions, for which the corporation was created, to bring the case within that clause." Beard v. Union, etc., Co., 71 Ala. 60; Sullivan v. Timber Co., 103 Ala. 371, 15 South. 941, 25 L. R. A. 543. Thus, a statute of this kind has been held not to apply to the soliciting and receiving of subscriptions for a newspaper published in another state, by a corporation organized under the laws of that other state (Beard v. Union, etc., Co., supra), to the care of unused property and payment of taxes thereon (Sullivan v. Timber Co., supra), the owning and leasing of its land in the state for agricultural purposes by a foreign corporation organized for the purpose of mining and selling, handling and manufacturing coke (Missouri Coal & Mining Co. v. Ladd, 160 Mo. 435, 61 S. W. 191), the soliciting by a foreign corporation of subscriptions to its capital stock (Payson v. Withers, 5 Biss. 269, Fed. Cas. No. 10,864), or the making by a foreign corporation within the state of a contract adjusting a judgment debt arising out of business transacted outside the state (Security Co. v. Panhandle National Bank, 93 Tex. 575, 57 S. W. 22).

We think the single sale of property by the plaintiff in the case at bar comes within the principle of the cases last cited. This corporation was certainly not engaged in the business of buying and selling land. As we have said, in another connection, its charter plainly indicates that the power conferred upon it to make such purchase and sale was not granted for the purpose of enabling it to do such acts as a means of making a profit thereon. The buying and selling permitted to it were merely incidental to the carrying on of the main purposes of the corporation. A distinction is to be drawn between the purposes of a corporation and its powers (Floyd v. Perrin, 30 S. C. 1, 12, 8 S. E. 14, 2 L. R. A. 242). The purposes of the plaintiff, as defined in the articles of incorporation, are "religious, missionary, educational and charitable." As incidental to these purposes, it is granted a variety of powers, i. e., the power to prosecute and defend suits at law, the power to use a common seal, the power to take and hold for the objects of said corporation any real or personal property, and the power to sell and convey any estate which the interests of the corporation may require to be sold and conveyed. All of these powers are to be exercised in subordination to the main purposes as first declared. The purchase and sale of property by such a corporation is not one of the ends for which it is organized, but is merely a means to enable it to accomplish those ends. Property is to be acquired only for the objects of the corporation, and to be sold only when the interests of the corporation require such sale. The power to sell property by a corporation of this character is as purely incidental to the prosecution of its main purposes as are the other powers enumerated in the charter, as, for example, the power to prosecute and defend suits at law. It is quite generally held that the mere prosecuting or defending of suits by a foreign corporation is not "doing business," within the meaning of statutes of the kind we have been discussing. Clark & Marshall on Private Corporations, § 860; Utley v. Clark-Gardner Lode Mining Co., 4 Colo. 369; Mandel v. Swan Land Co., 154 Ill. 177, 40 N. E. 462, 27 L. R. A. 313, 45 Am. St. Rep. 124; Ware Cattle Co. v. Anderson, 107 Iowa, 231, 77 N. W. 1026; M. B. Faxon Co. v. Lovett, 60 N. J. Law, 128, 36 Atl. 692.

If the construction we have put upon the charter of the plaintiff be correct, it must be held that the sale by such corporation of real estate is not the "transacting of business" by it, within the meaning of the constitutional provision relied upon. It follows therefore that the objection to the admission in evidence of the deed to Berkey was properly overruled.

In the foregoing discussion we have assumed that article 12, § 15, of the Constitution, applies to all corporations, including those organized for purely religious or eleemosynary purposes. Under the views above expressed, it is unnecessary to resolve any doubt that may exist on this point.

The order denying a new trial is affirmed.

We concur: ANGELLOTTI, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

SHAW, J. I dissent. The opinion of the court assumes that the conveyance of this land was the only business ever transacted in this state by the plaintiff corporation. The evidence does not show that this is true, and it does not appear from the record that any contention to that effect was presented to the court below. If such claim had been made, it is probable that the plaintiff could have shown that, in the accomplishment of its purposes in this state, it often advanced money to pay the price of lots upon which churches were to be built, took the title in trust for the local congregation, to be reconveyed as soon as the money advanced was repaid, precisely as it did in this case, and that this was only one of many similar transactions. The evidence indicates that the plaintiff was accustomed to do this, though no other specific instances were proven, and that, so far as it may be said to do business at all, business of this kind, and the obtaining of money therefor, constituted its principal occupation.

If the opinion had been based on the ground that benevolent enterprises of this character are not within the meaning of the constitutional provision that a foreign corporation may not "transact business" in this state on more favorable terms than domestic corporations, and that that provision referred only to corporations for gain, I should not be disposed to differ with my associates; but, as the opinion does not discuss this question, I express no opinion concerning it.

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156 Cal. 460

SOUSA v. LUCAS et al. (L. A. 2,157.)

(Supreme Court of California. Nov. 18, 1909.)

ATTACHMENT (§ 164*)—CHATTEL MORTGAGES (§ 170*)—MORTGAGED PROPERTY—TENDER OF DEBT DUE.

Civ. Code, §§ 2968, 2969, providing that mortgaged chattels may be taken under attachment by a creditor of a mortgagor on payment or tender to the mortgagee of the amount of the mortgage debt, etc., authorize an attachment only after payment or tender of the amount of the debt, and an attachment levied without first paying or tendering the debt is invalid, and is as against the mortgagee a conversion, though the officer merely puts a keeper in charge.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 472; Dec. Dig. § 164;* Chattel Mortgages, Cent. Dig. § 305; Dec. Dig. § 170.*]

Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by A. J. Sousa against Frank G. Lucas and others. There was a judgment of the Court of Appeal (100 Pac. 115) affirming a judgment for plaintiff, and the Supreme Court ordered the cause transferred to it for determination. Affirmed.

C. P. Kaetzel and R. V. Bouldin, for appellants. C. N. Armstrong and Paul M. Gregg, for respondent.

SLOSS, J. The appeal in this case was first considered by the District Court of Appeal in and for the Second Appellate District, and the judgment and order appealed from were there affirmed upon the grounds stated in the following opinion:

"Appeal by defendants Sinsheimer Bros. and McFadden from a judgment in favor of plaintiff, and from an order denying a new trial.

"The complaint was one for the foreclosure of a chattel mortgage theretofore given upon a growing crop of hay, barley, and beans by defendant Lucas to plaintiff as security for a note of $600 and such other sums of money as might thereafter be loaned or advanced, or merchandise sold to or for account of said mortgagor during the continuance of the mortgage, not to exceed $1,000 exclusive of the amount mentioned in the promissory note. The complaint alleges facts showing the due execution of the mortgage, the affidavit required by statute, and its recordation. Further, that a part of the growing crop, to wit, the beans, while on the premises where grown, was seized by defendant McFadden as sheriff in a certain attachment proceeding instituted against Lucas by Sinsheimer Bros., and the beans which had been thrashed and upon the ground were seized by the sheriff without tender to the mortgagee of the amount of the mortgage, or by deposit with the county clerk or treasurer of the amount as provided by section 2969, Civ. Code. It is further alleged that defendants Sinsheimer Bros. and McFadden still retain possession of said beans, and claim some interest in said mortgaged property under such attachment, which claim is subsequent and subordinate to plaintiff's claim under the mortgage. It is alleged that certain advances, aggregating $372.73, have been made by plaintiff to Lucas under the terms of said mortgage, and that the note and the advances remain unpaid. The usual prayer for relief is found. Defendant demurred to the complaint generally and because of a misjoinder of causes of action, which demurrer was overruled. The defendants who appeal filed a joint answer denying specifically most of the allegations of the complaint, admitting, however, the seizure of the crop of beans under the writ and that they claim an interest therein, but allege that the same is superior in right to the mortgage. The court found all of the allegations of the complaint to be true, except as to the amounts unpaid; that the mortgage was made in good faith without any design to hinder, delay, or defraud creditors; that the claim of lien under the attachment was subordinate to the mortgage, and directed a sale of the property described in the mortgage, which included the beans, and the application of the proceeds so far as required to the payment of the judgment and costs.

"It is appellants' contention that the complaint is insufficient in that facts are not stated to entitle plaintiff to any relief, and, further, that there was a misjoinder of an action to foreclose with an action for conversion of the property mortgaged. With this we do not agree. The complaint sets out such a mortgage as under the laws of this state may be executed and enforced. The default which entitled plaintiff to a decree, and the subordinate character of the claim of the other defendants are made to appear. The mere fact that the sheriff, in violation of section 2969, Civ. Code, attempted to levy and remove a part of the property from the premises where it was raised, did not impair plaintiff's right to foreclose. It is true that such wrongful act upon the part of the sheriff would render him liable as in conversion, but plaintiff may nevertheless elect to pursue the remedy in equity guaranteed by section 2967, Civ. Code, when it is made to appear that the judgment and decree of the court in such foreclosure can be carried into effect. There is nothing in the complaint indicating an attempt upon the part of plaintiff to enforce any right against the sheriff for the conversion, nor allegations which would warrant a judgment against him for the value of the property taken. The levy of the writ of attachment, under the circumstances of the case, placed the sheriff and the creditor for whom he was acting in no better position than that which would be occupied by any other trespasser who might surreptitiously remove from the premises a portion of a crop covered by a chattel mortgage. The tortious removal from the premises where raised does not impair the mortgagee's right. Chittenden v. Pratt, 89 Cal. 183, 26 Pac. 626. Proceedings by attachment are statutory and special, and the provisions of the statute must be strictly followed or no rights will be acquired thereunder. Gow v. Marshall, 90 Cal. 567, 27 Pac. 422. The provisions of the statute which require the tender of payment into the hands of the county clerk or treasurer of the amount of the debt secured by chattel mortgage before levy can be made measures the power of the officer in effecting a legal attachment. When these conditions are not observed, the writ affords no justification, and the officer becomes a wrongdoer. Neither the sheriff nor the judgment creditor by such attachment acquired any lien upon the property. Appellants, then, having no lien or legal right to the property in controversy in this proceeding, the action of the court in allowing certain advances to be charged was a matter which did not concern appellants as parties to the proceedings, and of which they cannot be heard to complain upon this appeal.

"It is further urged by appellants that there was a material variance in the proof, in that the note offered in evidence was not the same note set out in the complaint or in the chattel mortgage for the reason that the note offered in evidence bore the signature of Emelia Lucas, the wife of Frank G. Lucas, in addition to that of the husband. It will be observed, however, that the answer admits the execution of the mortgage as described in said complaint, which mortgage describes the note which the court finds was executed. While it may be true that the wife subsequent to its execution signed the note as surety, such signing would have no effect, there being no pretense of any consideration going to the wife on account of the same; and, in any event, the additional name of the wife on the note after the execution of the mortgage, the alteration not being material, would not affect or impair the lien of the mortgage, nor affect the right of the plaintiff in seeking relief by foreclosure of the mortgage to proceed only against the principal and the property covered by the mortgage.

"The court properly denied the motion for nonsuit and rendered a proper decree in the premises." (App.) 100 P. 115.

Upon application of the appellants, an order was made by this court transferring the cause here for determination. The point which we desired to consider further was whether or not a creditor who causes personal property, subject to a valid mortgage, to be attached without compliance with the requirements of Civ. Code, § 2969, acquires by the levy of the writ a valid lien, subordinate only to the lien of the mortgage. If this question be answered in the affirmative, it is apparent that the appellant Sinsheimer Bros., as junior lienor, was entitled to have the plaintiff limited to the recovery of such advances as he had made under his mortgage prior to the receipt of actual notice of the vesting of the junior lien. Tapia v. Demartini, 77 Cal. 383, 387, 19 Pac. 641, 11 Am. St. Rep. 288. Upon fuller consideration, we are satisfied with the opinion of the District Court of Appeal upon this point, as upon others discussed by it. Section 2968 of the Civil Code provides that "personal property mortgaged may be taken under attachment or execution issued at the suit of a creditor of the mortgagor." The following section, entitled "Limitations on right of levy," provides that, "before the property is so taken, the officer must pay or tender to the mortgagee the amount of the mortgage debt and interest, or must deposit the amount thereof with the county clerk or treasurer, payable to the order of the mortgagee." The two sections are obviously to be read together, and, so read, they provide that the right to attach mortgaged personal property is to be exercised only after compliance with the condition of payment, tender, or deposit of the amount of the mortgage debt. The natural conclusion would seem to be that drawn by the district court of appeal, namely, that the provisions of the statute requiring tender or payment measure the power of the officer in effecting a legal attachment, and that, without compliance with these requirements, no lien is created by the attempted levy.

To hold that a levy made without first paying or tendering payment of the amount of the mortgage debt creates a valid lien subject to the mortgage debt necessarily involves the proposition that such levy is a valid and lawful seizure of all the mortgagor's interest in the property. The property would, on this theory, be held by the sheriff, subject to the mortgagee's right to enforce his lien against the attaching creditor and the sheriff, to the same extent as he could have enforced it against the mortgagor. The levy would operate only upon the mortgagor's interest, leaving the rights of the mortgagee unaffected. If the levy of an attachment, such as that in the case at bar, creates a valid lien upon the interest remaining in the mortgagor, it is difficult to see how such levy can constitute any invasion of the mortgagee's rights. It has, however, been held by this court that an attachment so levied is, as against the mortgagee, a conversion of the property upon the part of the sheriff (Berson v. Nunan, 63 Cal. 550; Irwin v. McDowell, 91 Cal. 119, 27 Pac. 601), and this is so, even though the sheriff merely puts a keeper in charge and does not move or otherwise disturb the property (Rider v. Edgar, 54 Cal. 127). These cases, deciding that the levy of the writ confers an immediate right of action upon the mortgagee, necessarily decide that the levy is in itself unlawful. This doctrine cannot be reconciled with the view that such levy is a valid seizure of the interest remaining in the mortgagor or creates any lien whatever.

For these reasons, as well as those stated in the opinion of the district court of appeal, the judgment and order appealed from are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; MELVIN, J.; HENSHAW, J.; LORIGAN, J.

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156 Cal. 450

PEOPLE v. RUSSELL. (Cr. 1542.)

(Supreme Court of California. Nov. 8, 1909.)

1. False Pretenses (§ 28*)—Information—Sufficiency.

Where defendant was charged under Pen. Code, § 476a, with drawing a check on a bank where he had no funds, with intent to defraud, and the information alleged that the intent was to defraud "Lesser Bros. Co., a corporation," the check being payable to "Lesser Bros. Co.," the information was definite enough to enable a person of common understanding to know what was intended to be charged and was therefore sufficient.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 33; Dec. Dig. § 28.*]

2. False Pretenses (§ 28*)—Information—Sufficiency—Designation of Defendant.

An information which stated that a check was drawn with intent to defraud "Lesser Bros. Co., a corporation," clearly apprised defendant of the corporate character of the party the information charged him with intending to defraud.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 33; Dec. Dig. § 28.*]

3. Criminal Law (§ 1032*)—Appeal—Right of Defendant to Review.

An objection that an information did not specify the person to whom a check, which had been unlawfully drawn, was delivered, as thereby failing to state a public offense, has to do rather with the uncertainty of the information and will not be considered on appeal where the objection to its omission as constituting uncertainty was not specially made in defendant's demurrer.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2627; Dec. Dig. § 1032.*]

4. Criminal Law (§ 1043*)—Appeal—Reservation of Objections—Sufficiency.

Where the ground of demurrer to an information was that certain matters therein specifically mentioned were uncertain, other matters not specified in the demurrer, cannot be taken advantage of as uncertain, on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2654, 2655; Dec. Dig. § 1043.*]

5. False Pretenses (§ 26*)—Information—Sufficiency.

An information charging that defendant "uttered" a check, taken with other allegations to the effect that he asserted by words or actions to another, with intent to defraud, that the check was good for what it called for and attempted to pass it as a valid check, clearly states a public offense.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 31; Dec. Dig. § 26.*]

6. Criminal Law (§ 593*) — Continuance — Absence of Counsel.

Where defendant personally requested that his trial be set for a certain month, which was done, the date being about 60 days distant, and upon the day fixed a jury was present and the prosecution ready with its witnesses, a request for a continuance upon the ground that defendant's attorney was engaged in another city where he had been for some weeks, there being no certainty as to the time of his return, and no intimation previous to the calling of the case had been made that such a request would be asked, the continuance was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1320; Dec. Dig. § 593.*]

7. Criminal Law (§ 1137*)—Appeal—Estoppel to Allege Error.

Where defendant's case was called for trial at the time he requested to have it, and his request for continuance on the ground that his attorney was in another city where he had been for some weeks, there being no certainty when he would return, was refused, but the court offered to appoint counsel for his defense which offer was declined, and defendant conducted his own defense, the objection cannot be raised on appeal that he was not represented by counsel.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3008; Dec. Dig. § 1137.*]

8. Criminal Law (§ 594*)—Continuance—Absence of Witness.

A continuance will not be granted in order to obtain a deposition from a person whose whereabouts are not known and as to whom there is no apparent probability that any knowledge could be obtained.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1332; Dec. Dig. § 594.*]

9. Criminal Law (§ 1151*)—Appeal—Continuance—Discretion of Trial Court.

The granting or refusing of an application for a continuance in a criminal case is discretionary with the trial court, whose ruling in the absence of abuse will not be considered on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3045–3049; Dec. Dig. § 1151.*]

10. False Pretenses (§ 38*)—Information—Variance.

Where defendant drew a check payable to "Lesser Bros. Co.," in their place of business, and delivered it to one of the firm who cashed it, he having no funds in the bank upon which it was drawn, it was immaterial whether he knew that the concern was a corporation or not, as he intended to defraud the party named in either case, so that there was no material variance between the information, alleging the corporate capacity of Lesser Bros. Co., and the evidence even if such corporate capacity was not shown.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 53; Dec. Dig. § 38.*]

11. Criminal Law (§ 1141*)—Appeal—Bill of Exceptions—Presumption.

Where the minutes of the court and bill of exceptions failed to show whether the trial court had or had not complied with Pen. Code, § 1066, providing that where a juror is called the defendant must be informed that if he intends to challenge he must do so when the juror appears and before he is sworn, it will not be assumed on appeal that the trial court failed to so inform defendant, it being incumbent upon appellant to affirmatively show error, in the absence of which it will be presumed the court did what was required by statute.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3014, 3015; Dec. Dig. § 1141.*]

12. Criminal Law (§ 1141*)—Appeal—Presumption.

Under a statute requiring the clerk to keep minutes of the proceedings in a criminal case but not definitely prescribing what the minutes shall contain except in certain cases, there being no express provision that he shall enter a statement of the court informing a defendant when he must object to a juror, as required by Pen. Code, § 1066, it will be presumed that the court made the statement required though the clerk's minutes were silent on the matter.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3014, 3015; Dec. Dig. § 1141.*]

13. STATUTES (§ 86*) — CONSTITUTIONALITY — SPECIAL LEGISLATION.

Pen. Code, § 476a, providing that every person who willfully, with intent to defraud, draws a check on a bank, banker or depositary for the payment of money knowing that he has not sufficient funds for its payment upon presentation, shall be punished, etc., is uniform and applies alike to all persons who violate it and is not unconstitutional as special legislation because not applicable to those who draw checks upon persons not named in the statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 96; Dec. Dig. § 86.*]

In Bank. Appeal from Superior Court, Alameda County; Henry A. Melvin, Judge.

J. H. Russell was convicted of obtaining money on his check on a depositary, where he knew he had no funds, and he appeals. Affirmed.

Louis P. Boardman, Philip M. Walsh, and Carroll Cook, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

ANGELLOTTI, J. The defendant was convicted upon an information the charging part of which was as follows: "The said J. H. Russell prior to the time of filing this information, and on the 22d day of June, A. D. 1907, at the said county of Alameda, state of California, did then and there willfully, unlawfully, knowingly, fraudulently, feloniously, and with intent to defraud Lesser Bros. Co. (a corporation), make, draw, and utter a certain check and draft on a bank and depositary, to wit, the Union Trust Company of San Francisco, for the payment of money, which said check and draft was and is in words and figures following, to wit: 'San Francisco, June 22, 1907. No. 11. Union Trust Company of San Francisco. Pay to the order of Lesser Bros. Co. $20.00. Twenty ——— dollars. Clearing House No. 16. J. H. Russell.' Whereas in truth and in fact the said J. H. Russell then and there at the time he made, drew, and uttered said check and draft, as aforesaid, did not have sufficient funds in, nor any funds at all, nor sufficient credit with, nor any credit at all with, said Union Trust Company of San Francisco, to meet such check and draft as aforesaid, in full, or at all, upon its presentation. And he, the said J. H. Russell, then and there well knew at the time he made, drew and uttered said check and draft, as aforesaid, that he, the said J. H. Russell, did not have sufficient funds in, nor at all, nor sufficient credit with, nor any credit at all, with said Union Trust Company of San Francisco, to meet such check and draft, as aforesaid, in full or at all upon its presentation." He appeals from the judgment pronounced on such conviction and an order denying his motion for a new trial.

The offense charged in the information is defined by section 476a of the Penal Code as follows: "Every person who, willfully, with intent to defraud, makes or draws, or utters, or delivers to another person any check or draft on a bank, banker or depositary for the payment of money, knowing at the time of such making, drawing, uttering or delivery, that he has not sufficient funds in or credit with such bank, banker or depositary to meet such check or draft in full upon its presentation, is punishable by imprisonment in the state prison for not less than one year nor more than fourteen years. The word 'credit' as used herein shall be construed to be an arrangement or understanding with the bank or depositary for the payment of such check or draft."

1. There is no force whatever in the claim that the information was in any way substantially defective. Defendant strenuously urges that there is a material variance on the face of the information, in that the allegation is that the check was made and uttered "with intent to defraud Lesser Bros. Co. (a corporation)," while the check set forth in the information showed that it was payable to the order of "Lesser Bros. Co." simply, with no mention of its corporate character, and that there is no allegation elsewhere that the "Lesser Bros. Co." mentioned in the check is the corporation before mentioned. It is objected that for this reason, the information was not certain and definite enough to enable a person of common understanding to know what was intended to be charged in this regard, an intent to defraud Lesser Bros. Co., a corporation, or some other Lesser Bros. Co. This objection appears to us to be unworthy of discussion. The allegation is positive and unequivocal that the check was made and uttered with intent to defraud "Lesser Bros. Co., a corporation," and there is nothing in the check with which the offense is alleged to have been committed inconsistent with this allegation, or detracting from its force in the slightest degree. It certainly cannot be claimed with any show of reason that the check as set forth was not "available to accomplish the fraud intended," which defendant's counsel insists must be shown by the information. It is claimed that the information is defective, in that it does not allege that Lesser Bros. Co. is a corporation. This point was not specially made in the demurrer, the demurrer in fact proceeding upon the theory that it was so alleged, and that herein was the variance between the allegation and the check. Assuming such an allegation to be essential to a proper description of the

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

party intended to be defrauded, it was sufficiently made in the information, at least in the absence of special objection on that ground in the demurrer. There can be no doubt that defendant was clearly apprised by the information of the corporate character of the party whom he was alleged to have intended to defraud. See Crocker-Woolworth Bank v. Carle, 133 Cal. 409, 411, 65 Pac. 951. It is claimed that the information fails to state a public offense, in that, while it alleges that defendant did make, draw, and utter a check, it does not specify the person to whom the check was delivered or attempted to be delivered. The argument of the defendant in this behalf goes rather to the question of uncertainty in the information than to its failure to state a public offense, and the point that it was uncertain in this regard was not specially made by demurrer. We are satisfied that the uncertainty was not of such a nature that it can be taken advantage of upon appeal in the absence of a specification in the demurrer, especially where the demurrer did specifically state the matters as to which he claimed uncertainty. People v. Bradbury (Cal.) 103 Pac. 215. The information clearly stated a public offense. The allegation that he uttered the check, taken in connection with the other allegations, means that with intent to defraud Lesser Bros. Co., a corporation, he asserted by words or actions to another that the check was good for what it called for, and attempted to pass the same as such a valid check. See People v. Tomlinson, 35 Cal. 503, 509; People v. Compton, 123 Cal. 403, 410, 56 Pac. 44. What we have said disposes in effect of all the contentions made against the information.

2. It is claimed that the trial court erred in refusing to grant a continuance upon the application of defendant. On October 29, 1907, the case was set for trial on December 30, 1907; the defendant personally requesting that it be set for some time in December. At the time so fixed the case was called. Defendant said he was not ready for trial because his attorney was not present, but was in Seattle, where he had been trying a case for some weeks. This attorney had represented defendant up to this point. No continuance had previously been requested, or any intimation made that one would be asked by defendant, and a jury was present for the trial, as well as the prosecution and its witnesses. There was nothing, according to the showing made, to warrant the assumption that the case would not be tried at the time set. The trial court was not required to indefinitely wait for the return of defendant's counsel before proceeding with the trial. We can conceive of such a showing in regard to the inability of counsel selected by a defendant to be present as would make it an abuse of discretion for a court to refuse to wait a reasonable time for such counsel, but such a showing was not made here, either at the time of the application for a continuance or subsequently on motion for new trial, where the affidavits in that regard were carefully prepared by counsel. There was no request on the part of defendant that he be given time to obtain other counsel, and no intimation on his part that he was not ready to proceed with the trial in any other respect, except that he wished to get a deposition from a witness in the East, whose whereabouts were absolutely unknown, and, so far as appeared, never would be ascertained. The trial court stated to the defendant that he would appoint counsel for him, but defendant practically declined to avail himself of this offer, insisting that his original attorney should be present, and he subsequently conducted his own defense. Defendant would have had counsel designated to assist him in his defense if he had availed himself of the offer of the court, and doubtless, if counsel so designated had found a reasonable continuance necessary to enable a proper presentation of defendant's cause, the trial court would have granted it. Defendant cannot now complain that he was not represented by counsel; that fact being due entirely to the further fact that he declined to accept the offer of the court in regard thereto. Of course, there was nothing in the claim that a continuance should be granted to enable defendant to obtain the deposition of an alleged witness as to whose whereabouts nobody had any knowledge, and concerning whom there was no apparent probability that any knowledge would ever be obtained. An application for a continuance in a criminal case is a matter in which much is left to the discretion of the trial court, and it cannot be here held that there was any abuse of that discretion.

3. There was no variance between the charge in the information and proof, and the evidence was sufficient to sustain the verdict. The testimony given was sufficient to warrant the jury in finding that defendant intended to defraud "Lesser Bros. Co." According to the evidence, he himself drew the check payable to "Lesser Bros. Co." in their place of business, and there delivered it to Mr. Lesser in return for $20. Whether he in fact knew that the party so named was a corporation was immaterial. He intended to defraud that party, whether it was a corporation or not. The evidence was also sufficient to warrant the jury in concluding that the defendant knew that he had no funds in or credit with the Union Trust Company to meet the check upon its presentation. There was also sufficient proof to support a conclusion that Lesser Bros. Co. was a corporation.

4. An examination of the record fails to disclose that there was any error in the matter of the cross-examination of the defendant as a witness, or in the instructions given by the court to the jury, or that there was any abuse of discretion in denying defendant's motion for a new trial on the ground of newly discovered evidence.

5. Neither the minutes of the court nor the

bill of exceptions, prepared by defendant's original attorney, affirmatively shows that the trial court complied with the provisions of section 1066, Pen. Code, which is as follows: "Before a juror is called, the defendant must be informed by the court, or under its direction, that, if he intends to challenge an individual juror, he must do so when the juror appears and before he is sworn." Neither does it appear therefrom that the court did not do so. Both minutes and bill of exceptions are absolutely silent in regard thereto. It does not appear that defendant exercised the right of challenge as to any juror. As to this also, there was complete silence in both minutes and bill of exceptions. It is contended that it must be assumed that the trial court did not comply with this provision of law, and that its failure to do so when a defendant is not represented by counsel and is not aware of his rights must be held to be prejudicial error. This point does not appear to have been made until after a decision was given in this case by the District Court of Appeal for the First District, when a rehearing was asked in that court by reason thereof. The rehearing was granted, and, the justices of that court disagreeing upon this question, the case was certified to this court for decision. We shall not discuss the latter portion of the claim made in this behalf, for we are satisfied that it should not be assumed on the record before us that the trial court did fail to comply with the requirements of section 1066, Pen. Code. It is too well settled in this state to require the citation of authorities that, where an appellant alleges error, it is incumbent upon him to show it affirmatively, and that we will not presume that a trial judge failed to do what the law required him to do, but, in the absence of a showing to the contrary, will presume that he did what he was directed by statute to do. We can conceive of no good reason why this general rule is not applicable here. The claim appears to be that, if the minutes of the court do not affirmatively show such compliance, a sufficient showing of noncompliance is made. While the law requires the clerk to keep minutes of the proceedings in a criminal case, it nowhere provides in terms that he must enter thereon such an occurrence as this, the mere making of a statement by the court to the defendant for the purpose of informing him when he must make his objection to any juror. Our statutes do not definitely prescribe what the minutes shall contain except in certain cases. For instance, it is provided that a ruling on demurrer (section 1007, Pen. Code), the plea of a defendant (section 1017, Pen. Code), the ruling of the court on a challenge to a juror (section 1083, Pen. Code), the verdict of a jury (section 1164, Pen. Code), and the judgment (section 1207, Pen. Code) must be so entered. These are only instances of various things that the Penal Code expressly requires must be recorded in the minutes. There is no such provision as to the matter covered by section 1066, Pen. Code, and, in the absence of any such express requirement practically making the minutes evidence of the thing, we do not think that the failure of the minutes to indicate action by the trial court affords any evidence of failure to act as against the well-settled presumption we have already referred to. In the case of People v. Yee Foo, 4 Cal. App. 730, 89 Pac. 450, in which a rehearing was denied by this court, it was expressly held that where the record failed to show whether the court admonished the jury at each adjournment, as required by section 1122, Penal Code, it will be presumed, in the absence of a showing to the contrary, that the court did its duty, and gave the proper admonition at each adjournment. In People v. Holmes, 118 Cal. 444, 449, 50 Pac. 675, the minutes failed to show that the defendants were present when the verdict was rendered, as required by section 1148, Pen. Code, and it was held that error would not be presumed, and that, if the defendants were in fact absent it should have been made to appear affirmatively in the record. See, also, People v. Douglass, 100 Cal. 1, 4, 34 Pac. 490. We are satisfied that these cases must be held to state the correct rule, at least as to matters not expressly required by statute to be entered on the minutes.

People v. Moore, 103 Cal. 508, 37 Pac. 510, is, in effect, clearly against the conclusion we have reached. It is impossible, in our judgment, to distinguish this case from that so far as the material facts are concerned. In People v. Moore, the minutes were silent upon the matter of a compliance by the court with the provisions of section 1066, Pen. Code, and there was no bill of exceptions. This being the situation, the case was assumed to be one in which the trial court had in fact failed to give the defendant the information required by the section. For that reason, the judgment was reversed. The court stated no reason for so assuming, nor did it discuss at all the question whether the minutes must make any showing in regard to the matter, and apparently the well-settled presumption in favor of the action of the court below was not invoked at all, nor brought to the attention of the court. We are satisfied for the reasons we have stated that this decision should not be followed. The error therein lies in the assumption on the facts stated that the court failed to comply with the provisions of the law; there being no affirmative showing to that effect. It is clear in view of the fact that this defendant made no point in this regard until after the decision by the District Court of Appeal, that he had no complaint to make on this ground at the time of the preparation of his bill of exceptions, and that consequently no reliance was placed on the decision in People v. Moore, supra, in making up the record on appeal. There is, therefore, no unfairness to him in now overruling that decision.

6. We are satisfied that the objection that section 476a is unconstitutional, in that it is special legislation, is not well founded. Learned counsel for defendant appears to construe the word "banker" contained therein as merely descriptio personæ, saying that there is no good reason warranting a classification that makes it a felony to draw an order for the payment of money on an individual who is engaged in the banking business as one branch of his financial ventures, while it is not a felony to draw such an order on an individual who does not happen to be engaged in the banking business at all. This, of course, is not the proper construction of the word as used in the section. An order drawn on "John Smith" personally would not be within the purview of the section, unless he was conducting a banking business in his own name. The check or draft must, in effect, be drawn on a banker as such. The majority of the justices of the District Court of Appeal said upon this point, in the opinion certified to us: "The intent of the Legislature evidently was to make it a crime to draw and utter a draft or check upon a bank or depositary for the payment of money, for the reason that such drafts or checks are not usually drawn unless the drawer has funds in such bank or with such depositary to meet the check or draft. Such check or draft, drawn upon such banker or depositary for the payment of money, is regarded somewhat in the nature of a circulating medium. It is generally supposed, when the check is drawn upon a bank, that the drawer has funds in such bank to meet it. It was to prevent the fraudulent making and uttering of such drafts or checks that the section was enacted. The act applies to the whole class of persons who draw and utter checks or drafts, with intent to defraud, upon the persons named in the section. It is uniform, and applies alike to all persons who willfully violate it. The defendant cannot complain because persons who draw drafts or checks upon persons other than those named in the statute are not made subject to its provisions." In this we concur.

The judgment and order denying a new trial are affirmed.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.

11 Cal. App. 431

PEOPLE v. SOTO. (Cr. 124.)

(Court of Appeal, Second District, California. Oct. 1, 1909. Rehearing Denied by Supreme Court, Nov. 30, 1909.)

1. Criminal Law (§ 678*)—Trial—Election Between Offenses.

The selection on a prosecution for statutory rape, under an information charging its commission on or about January 15th, of the particular offense for which defendant should be tried, was sufficient, being in the statement of the court to the district attorney: "The act you select is the first act of sexual intercourse between these parties, and you claim it occurred in the latter part of January, or the first part of February, and prior to February 20th, * * * and you admit that there were one or two subsequent acts at about that date, prior to February 20th."

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 678.*]

2. Criminal Law (§ 1159*)—Appeal—Review—Credibility of Witnesses.

The credibility of the witnesses is for the jury, subject only to review by the trial court on motion for new trial, and not a question for consideration on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3077; Dec. Dig. § 1159.*]

3. Criminal Law (§ 1137*)—Appeal—Necessity of Showing Injury—Irregularities Consented To.

Defendant having consented to the adjournments of the case, any irregularity therein is not ground for new trial, in the absence of an affirmative showing of injury or prejudice therefrom.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3008; Dec. Dig. § 1137.*]

4. Criminal Law (§ 1134*)—Appeal—Review—Finding of Fact on Motion for New Trial.

The finding by the trial court, on motion for new trial for misconduct of jurors, guilt of which depended on the truth of conflicting affidavits, is one of fact, not reviewable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3067, 3071; Dec. Dig. § 1134.*]

5. Criminal Law (§ 1153*)—Review—Re-Examination on Rebuttal—Discretion.

While re-examination on rebuttal of prosecutrix on matters as to which she was examined in chief ought not, except for special reasons, to be permitted, it rests largely in the discretion of the trial court, so that its action will not be disturbed, unless a clear case of abuse is shown.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061, 3064; Dec. Dig. § 1153.*]

6. Criminal Law (§ 369*)—Statutory Rape—Evidence of Other Acts.

The rule that other acts of intercourse, both before and after the principal act charged, may be shown, as tending to sustain the main allegation, is applicable in statutory rape of one under the age of consent.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 369.*]

7. Rape (§ 43*)—Statutory Rape—Proof of Pregnancy.

Proof of pregnancy, while admissible to show commission of statutory rape, is admissible only where it tends to prove the corpus delicti.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 65; Dec. Dig. § 43.*]

8. Criminal Law (§ 404*)—Statutory Rape—Exhibition of Child—Evidence of Other Acts.

The rule allowing on prosecution for statutory rape proof of other acts of intercourse than the principal act charged does not allow the exhibit of a child born of some one of the collateral acts of intercourse six or more months from the act constituting the offense.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 404.*]

9. Criminal Law (§ 1169*)—Appeal—Harmless Error.

Any error in introduction of testimony is made harmless by defendant's admission in open court to the same effect.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3138, 3139; Dec. Dig. § 1169.*]

10. Criminal Law (§ 1163*) — Appeal — Harmless Error—Matters Cured by Instructions.

Though, by the manner of conducting the prosecution for a statutory rape, the act alleged in the information was rendered less important than the matter of the paternity of a child born to prosecutrix of some one of the collateral acts of intercourse occurring several months from the act selected as the one for which defendant should be tried, and though the matter of paternity was urged on the jury by the district attorney as if it were the one for determination, yet the court having instructed that in arriving at a verdict the jury must confine themselves to the one act selected, taking place at a stated time, and that, if not satisfied of the commission of this act, they must acquit, though satisfied of defendant's having had intercourse with prosecutrix at some subsequent date, it must be assumed the jury obeyed the instruction, and that defendant was not prejudiced.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1163.*]

Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Rosemver E. Soto was convicted of statutory rape, and appeals. Affirmed.

See, also, 8 Cal. App. 322, 96 Pac. 913.

Lamy & Putnam and A. E. Campbell, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

TAGGART, J. Information for rape of female child under the age of 16. Verdict of guilty and sentence of 20 years in state prison. Appeal from judgment and order denying defendant's motion for a new trial.

The crime is charged in the information to have been committed on or about the 15th day of January, 1906. The district attorney in his opening statement said that he would prove that the defendant had intercourse with the prosecutrix once in January, 1906, and twice in the month of February prior to the 20th of that month, whereupon the defendant moved the court to require the district attorney to select the date or particular act as to which he would ask a conviction. The motion being granted, the district attorney declared that he would stand upon the act of sexual intercourse which would fasten upon the defendant the paternity of a child of which the prosecutrix was delivered June 9, 1907. A more specific selection being demanded, the district attorney then stated that he would stand upon the first act proved, and, upon further objection, made his selection in the following language: "The prosecution will stand upon the first act of sexual intercourse which they claim that the defendant had with the prosecuting witness, and which act occurred some time either during the month of January, or during the month of February, up to the 20th of February of the year 1906; it being the first act of intercourse claimed to have taken place between the prosecutrix and the defendant." This selection was still objected to, and it is now urged was not sufficiently specific to enable the defendant to know which act was selected as the basis of the prosecution. If the selection or election rested upon the above, we might be disposed to sustain the appellant's contention that it was insufficient, but, after the formal election by the district attorney above mentioned, the court said: "The act you select is the first act of sexual intercourse between these parties, and you claim it occurred in the latter part of January or the first part of February and prior to the 20th day of February, * * * and you admit that there were two subsequent acts at about that date, prior to the 20th day of February." To which the district attorney replied: "One or two. I don't know." Accepting the language of the court as the selection of the one specific offense for the commission of which the defendant was to be put upon trial, we think it comes within the requirements prescribed in People v. Williams, 133 Cal. 165, 65 Pac. 323.

The language of Justice Temple on page 166 of 133 Cal., and page 323 of 65 Pac., of the opinion in that case, is applicable to and meets the presentation of the appeal here upon the sufficiency of the evidence to support the verdict. If the evidence of the prosecuting witness is entitled to credence, the case was established, and the verdict a proper one. The credibility of the witnesses was for the jury, in the first instance, subject to review by the trial court upon the motion for a new trial, and no question of this kind can be considered by this court. While the attorney for defendant was arguing the case before the jury, it was suggested to the court that the Governor had declared the day (October 30, 1907) to be a legal holiday. This was followed by other proclamations creating a series of holidays lasting until December 2, 1907, and during this period the jurors were not put in charge of an officer, but were allowed to separate and go about their respective occupations It is contended this was error. It is not necessary to pass upon this question, as the record discloses that the defendant consented to the various adjournments of the case between the dates named, and, in the absence of any affirmative showing of injury or prejudice from an irregularity to which a defendant has consented, it cannot be regarded as ground for a new trial. Whether or not one of the jurors was guilty of misconduct depended upon the truth of the affidavits presented to the trial court on the motion for a new trial. The affidavits filed by the respective parties were conflicting and the finding made by the trial court upon the question of fact will not be disturbed. While the trial court ought not, except there be special reasons therefor, to permit the reexamination on rebuttal of the prosecutrix upon matters about which she was examined in chief, this matter rests largely in the discretion of the trial court, and its action will not be disturbed unless a clear case of abuse is shown. Such a showing is not made here. People v. Rigby, 104 Pac. 840.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

In respect to the admission of evidence of other acts of sexual intercourse, it was said in People v. Castro, 133 Cal. 12, 65 Pac. 13, in the majority opinion, that those occurring both before and after the principal act charged may be introduced in evidence as tending to sustain the main allegation. This was affirmed in People v. Williams, 133 Cal. 168, 65 Pac. 323, where Temple, J., says other like offenses may be shown to prove that the parties are lewdly inclined, and that the barriers of modesty have been broken down with reference to each other—not primarily to prove habitual or continuous criminality or other offenses. And again, in People v. Koller, 142 Cal. 624, 76 Pac. 501, Lorigan, J., after laying down the rule that acts occurring both before and subsequent to the act constituting the crime charged may be admitted, adds: "Not to prove distinct offenses, or continuous criminality, but as corrobative evidence tending to support the one specific offense for which the defendant is being tried." While all the authorities relied upon in support of this rule limit the application to cases involving intercourse by consent, it is nevertheless held applicable in this state in the case of statutory rape of a child under the age of consent. People v. Mathews, 139 Cal. 527, 73 Pac. 416. The evidence introduced here took an exceedingly wide range in this regard; the trial becoming, in effect, a trial of the issue suggested by the act first selected by the district attorney, to wit, the one resulting in prosecutrix's pregnancy. The examination as to this act stopped only with the question: "Who is the father of that child?" While proof of pregnancy of a child under the age of consent has been held to be evidence that the statutory crime of rape has been committed, it has never been held admissible, so far as we are aware, except it tends to prove the corpus delicti. People v. Tarbox, 115 Cal. 57, 62, 46 Pac. 896. That was not the case here. We know of no case extending the rule declared in People v. Castro, supra, to include the right of the district attorney to produce and exhibit before the jury a child born of some one of the collateral acts of intercourse six or more months removed from the act constituting the offense. The error, however, if any, committed by the introduction of this kind of testimony was rendered harmless by the admissions of the defendant in open court to the same effect.

While an objection to each of the two direct questions propounded to the prosecutrix as to who was the father of the child born to her on June 9, 1907, was sustained, the district attorney was permitted to ask the prosecutrix over the objection of defendant: "Now, from the time that you had this act of sexual intercourse with your Uncle Dave which you say you told Ross Soto (defendant) about until you had this child on June 9th last, had you had sexual intercourse with anybody else besides the defendant?" To which she replied: "No sir." In line with this a series of questions were propounded to the prosecutrix as to her comparative liking for the defendant and her Uncle Dave (it being admitted that the prosecutrix had intercourse with the latter prior to the date of her intercourse with defendant), with a view of further strengthening the foregoing statement as to the paternity of the child. Some of these were: "Did you like him (defendant) up to the time that you had left in November?" "Did you like your Uncle Dave at that time?" "Now which one did you like better at that time, Josie, your Uncle Dave or the defendant?" "You think a great deal of him (defendant)?" "How long did you continue to think a great deal of him? A. Till he got me in the family way." If the instructions of the trial court had not been so full and complete in this regard, it would be difficult not to adopt the view of appellant that the jury was misled by the persistent efforts of the district attorney to secure a conviction upon the act which resulted in the conception of the child born June 9, 1907, notwithstanding another act was selected by the court and such selection assented to by the district attorney. Unquestionably the act alleged in the information, by the manner of conducting the case, was rendered less important than the matter of the paternity of the child, and the latter was urged upon the jury as if this were the matter for determination. This course of the district attorney is not to be commended, but as the jury were instructed by the court that they must, in arriving at a verdict, confine themselves to the one act selected, the one taking place between January 15, 1906, and the 20th day of February, 1906, and that they must acquit the defendant if they were not satisfied of the commission of this act, notwithstanding they were convinced beyond a reasonable doubt as to his having had illicit relations with the prosecutrix at some subsequent date. We must assume the jury obeyed the court's instructions in this respect.

As hereinabove stated, the examination took a wide range. This was true as to the questions of the people, and also those propounded on behalf of defendant. While demand was made by defendant for the selection of a particular act as the basis of a conviction, the testimony of both parties with respect to the continued relations between the defendant and the prosecutrix was introduced as if the offense were laid with a continuando. Equally unlimited was the examination as to the relations of the prosecutrix with her uncle and her statements in respect to those relations; and in the same manner the relations of defendant with his wife were inquired into by the district attorney, both on the cross-examination of the wife and the cross-examination of the defendant. We are not prepared to say that these questions were not cross-examination, and, in so far as they were immaterial, or irrelevant, or incompetent, the manner of conducting the case relieved the evidence elicited by them from any harmful effect.

Recognizing the rule that each of the acts between the defendant and the prosecutrix constituted a separate and distinct offense for which he may be prosecuted, the instructions given by the court were so worded that the conviction in this case could not be predicated upon any act but that selected by the court, with the district attorney's assent, and, had he been acquitted, there would have been no doubt as to which act was covered by such an acquittal. While under our system of pleading one particular act or some special time is required to be selected for the purpose of a conviction in cases of this character, the records in this court disclose that this offense, the debauching of a child, is frequently accompanied by a series of acts of sexual intercourse, and the punishment for this most infamous crime ought not to be made to hang upon a technical application of the rules of pleading and evidence, where the only question is which one of innumerable acts was selected by the district attorney as the basis of the prosecution.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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11 Cal. App. 427

PEOPLE v. KWPR SINGH. (Cr. 103.)

(Court of Appeal, Third District, California. Oct. 1, 1909.)

1. Criminal Law (§ 938*) — New Trial — Newly Discovered Evidence.

One moving for a new trial on the ground of newly discovered evidence must make a clear showing of diligence, and of the truth and materiality of such evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2306; Dec. Dig. § 938.*]

2. Criminal Law (§ 1156*)—Appeal—Discretion of Trial Court.

The ruling of the trial court on a motion for a new trial on the ground of newly discovered evidence will not be disturbed on appeal, unless there has been a clear abuse of discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3067–3071; Dec. Dig. § 1156.*]

3. Criminal Law (§ 938*)—New Trial—Newly Discovered Evidence.

On a motion for a new trial on the ground of newly discovered evidence, the same, as shown in the affidavits, was material and important, and defendant made a prima facie showing of diligence, but by counter affidavits it appeared that the witnesses were during the whole period within a short distance of the city where the trial was held; that defendant was at all times represented by counsel with whom he had frequent interviews, and while preparing for his trial was on different occasions visited by his countrymen who spoke his language; and that an interpreter was present to aid him in his communications with his counsel, and that the evidence was merely cumulative. *Held*, that there was no abuse of discretion in denying the motion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2306–2317; Dec. Dig. § 938.*]

4. Criminal Law (§ 829*) — Trial—Instructions—Requests—Instructions Given.

Accused requested an instruction that every fact relied on by the state must be proved beyond all reasonable doubt, and that, if the jury were not satisfied beyond such a doubt that every fact had been proven, they should acquit, and that all the facts must be proved conclusively in their nature tending to the conclusion with moral certainty that defendant, and no other, committed the crime, and that, if from the evidence or want of it the jury could account for the facts in evidence upon any theory consistent with innocence, they should acquit. The instructions were refused, but the court charged that, in case of a reasonable doubt as to one of the facts essential to establish guilt, the jury should acquit, and that the presumption of innocence attached to every fact essential to a conviction, and remained with defendant until the jury were convinced of guilt beyond a reasonable doubt. *Held*, that there was no error in refusing the requests; the substance of the requested charge being covered by that given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Kwpr Singh was convicted of a criminal offense, and he appeals. Affirmed.

L. L. Chamberlain and W. H. Slade, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for respondent.

BURNETT, J. Only two points are made by appellant in furtherance of his contention that the judgment and order denying his motion for a new trial should be reversed. The first relates to newly discovered evidence, and the second to two instructions requested by him and refused by the court. The considerations to be observed in reviewing the action of the trial judge in declining to accord to the affidavits submitted by appellant the significance asserted for them are so familiar as hardly to need restatement. It is admitted that the general rule is as stated in Tibbet v. Sue, 125 Cal. 548, 58 Pac. 160, that "the moving party must make a clear case, showing due diligence on his part and the truth and materiality of such evidence. Newly discovered evidence after defeat is looked upon with suspicion, and this court is always reluctant to interfere with the ruling of the trial court on a motion for a new trial on that ground, and will not do so unless there has been a clear abuse of discretion." It cannot be said that in the case before us the court transcended the limits of judicial discretion. The evidence set out in the affidavits was, indeed, material and important and a prima facie showing of diligence was made by appellant, but by counter affidavits it was made to appear that the witnesses were, during the whole period, within a short distance of the city where the trial was held; that defendant was at all times represented by counsel with whom he had frequent interviews, and while preparing for his trial was on different occasions visited by his countrymen who spoke his language; and, furthermore, that an interpreter was present to aid him in his communications with his counsel. It is stated in People v. Freeman, 92 Cal. 367, 28 Pac. 261, that "the law requires at the hands of the defendant that he make careful and diligent preparation for his trial; and it is to be presumed more especially in a case of the importance of this that, in preparing for a trial, he should go over very carefully and diligently with his attorney every fact and circumstance which might in any way bear upon his defense." Assuming that he and his attorney exercised the diligence which the law enjoins, it is altogether probable that inquiries would have been instituted leading to the discovery of the identity and location of those additional witnesses who claimed to be present at the scene of the alleged crime. Indeed, this vital question as to the eyewitnesses would immediately suggest itself, and, under the circumstances disclosed by the record, the court was entirely justified in concluding either that the defendant was inexcusably remiss in his preparation for the trial, or else that he preferred to submit his case without the testimony of these other witnesses. No further discussion of this point seems necessary. We merely add that the "newly discovered evidence" would be merely cumulative, as several witnesses actually testified to substantially the same matters as those set out in the affidavits, and, besides, as the judge of the court, in the trial of another defendant, heard the testimony of affiants, he was in a more favorable position than he would otherwise have been to determine their credibility and whether their statements were worthy of credence and would likely produce a different verdict in case of a new trial. At any rate, in view of the record before us, we cannot, nor should we, hold that the court abused its discretion in denying the motion.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The said instructions refused by the court were as follows:

"(1) You are instructed that each and every fact and circumstance relied upon by the prosecution must be proved by the evidence in the case beyond all reasonable doubt; and, if the jury are not satisfied beyond a reasonable doubt that such fact and circumstance has been proven, it is your duty to find a verdict of not guilty."

"(2) The court instructs the jury that in this case each necessary fact must be proved beyond a reasonable doubt; that all the facts must be proved conclusively in their nature tending to the conclusion with moral certainty that the defendant, and no other person, committed the crime charged in the information, and that, if you from the evidence or want of evidence could account for the facts and circumstances in evidence upon any theory or hypothesis consistent with the innocence of the accused, then it is your duty to acquit."

Upon No. 1 the learned trial judge made the following indorsement: "Refused because it is incorrect. The prosecution may rely upon facts which are nevertheless not essential to a conviction and such facts may not be proven beyond a reasonable doubt"; and upon No. 2: "Refused because the facts are not required to be conclusive in their nature." Regarded with technical discernment, the instructions are undoubtedly subject to said objections, but, if we concede force to appellant's position that the court's reasons are somewhat hypercritical, still his contention can be of no avail. This follows for the reason that extending the most favorable indulgence to the instructions appellant sought by them to have the jury directed that it was incumbent upon the prosecution to prove every fact essential to a conviction beyond a reasonable doubt, and, if it failed to do so, a verdict of not guilty must be rendered. But the court entirely covered this principle by instructing the jury "that when there is a reasonable doubt as to one of the facts essential to establish guilt it is the duty of the jury to acquit," and "the jury are also instructed that the presumption of innocence attaches at every stage of the case and to every fact and circumstance essential to a conviction and remains with the defendant throughout the trial until you are convinced beyond a reasonable doubt of the guilt of the defendant."

We see no prejudicial error in the record, and the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

11 Cal. App. 465

PEOPLE v. MATEZUSKI. (Cr. 131.)

(Court of Appeal. Second District, California. Oct. 5, 1909.)

1. LARCENY (§ 68*)—QUESTION FOR JURY.

On the trial of a charge of grand larceny, where the evidence tends to sustain both larceny and burglary, it is for the jury to determine which crime was actually committed.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 180, 181; Dec. Dig. § 68.*]

2. CRIMINAL LAW (§ 1158*)—APPEAL AND ERROR—QUESTIONS OF FACT.

A finding, on the trial of a charge of grand larceny, as to whether the evidence shows larceny or burglary, is one of fact, and will not be disturbed on appeal if there is evidence to support it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3074; Dec. Dig. § 1158.*]

3. CRIMINAL LAW (§ 1159*)—APPEAL AND ERROR—QUESTIONS OF FACT.

A conviction based on conflicting evidence will not be disturbed on appeal, though the conflict was between testimony of witnesses for the state.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3076; Dec. Dig. § 1159.*]

4. LARCENY (§ 41*)—BURDEN OF PROOF—POSSESSION OF PROPERTY.

Possession of property recently stolen puts on the possessor the burden of explaining such possession, and, if his explanation fails to show that the property was honestly obtained, this may be considered by the jury as tending to show his guilt.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 129; Dec. Dig. § 41.*]

5. LARCENY (§ 77*)—POSSESSION OF STOLEN PROPERTY—INSTRUCTIONS.

An instruction that possession of property recently stolen puts upon the possessor the burden of explaining such possession, and that, if his explanation fails to show that the property was honestly obtained, this may be considered by the jury as a circumstance tending to show his guilt, is correct, and is not open to the objection that the conviction might be rested upon such possession alone.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 199, 202–204; Dec. Dig. § 77.*]

6. LARCENY (§ 79*)—INSTRUCTIONS.

In a trial for larceny, the jury were instructed that if defendant feloniously stole the property, "or any part thereof, as charged in the information," they should find him guilty. The property alleged to have been stolen was such that proof of its value was necessary to determine whether the crime committed was grand or petit larceny. *Held*, that the jury having been instructed as to the distinction between grand and petit larceny, and having brought in a verdict of guilty of grand larceny, the instruction is not open to the objection that defendant could not have been found guilty of the crime charged in the information if he had stolen "any part" of the property.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 187, 188; Dec. Dig. § 79.*]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

A. J. Matezuski was convicted of grand larceny, and appeals from judgment and an order denying his motion for a new trial. Affirmed.

W. G. Abbott and Henry H. Roser, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

TAGGART, J. It is contended by appellant that the verdict is not supported by the evidence because it tends to establish burglary as well as grand larceny. If it be conceded that larceny is not included in a charge of burglary, and that evidence of a conviction of one of these crimes would not sustain a plea of former conviction, upon a trial of a charge of the other (People v. Devlin, 143 Cal. 128, 76 Pac. 900), the jury may nevertheless determine, from evidence which tends to sustain both, which crime was actually committed. The finding upon such an issue is one of fact and will not be disturbed, if there is evidence to support it.

Another reason assigned for reversal on the ground that the evidence does not support the verdict is that the testimony of the witnesses for the prosecution was conflicting, and that the preponderance of such evidence shows the defendant to be innocent rather than guilty. An argument based upon the weight of evidence, which is admittedly conflicting, will not be considered by an appellate court in reviewing the conclusions of a jury, and it is not material, in the application of this rule, whether the conflict be between the testimony of witnesses for opposite sides, or between witnesses all on the same side. The rule of finality and conclusiveness of the finding of fact by the jury or the trial court is the same in either case.

The instruction which appellant contends is erroneous because an invasion of the province of the jury, and violative of the provisions of section 19 of article 6 of the state Constitution, "that judges shall not charge juries with respect to matters of fact," is substantially section 1847 of the Code of Civil Procedure, to which has been added certain language which was held to be proper by the Supreme Court in People v. Amaya, 134 Cal. 539, 66 Pac. 794, and People v. Miles, 143 Cal. 640, 77 Pac. 666. In the first of these cases the court considered the addition of the words "his interest in the case, or his prejudice against one of the parties," and in the second, "his degree of intelligence." The cases cited by appellant are distinguished in these opinions, and in the latter case it is said that the trial court is not limited in its instructions, as to the effect of the circumstances surrounding the witness, to those facts and circumstances enumerated in section 1847.

The instruction defining the word "abet" was correct, and this is true of that relating to a conviction upon the testimony of an accomplice. The latter instruction is to be distinguished from the one before the court in People v. Compton, 123 Cal. 403, 56 Pac. 44. The objection to the instruction in that case was that it informed the jury the corroborative evidence required by section 1111 of the Penal Code was sufficient "if it in any way tended to connect the defendant with the commission of the crime." The words "in any way" do not appear in the instruction before us, which is substantially the same as the one approved in People v. Balkwell, 143 Cal. 259, 264, 76 Pac. 1017.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Possession of property recently stolen puts upon the possessor the burden of explaining such possession, and, if his explanation fails to show that the property was honestly obtained, this may be considered by the jury as a circumstance tending to show his guilt, and the instruction to this effect was correct. It was not open to the objection that a conviction might be rested upon this possession alone. People v. Wilson, 135 Cal. 331, 67 Pac. 322.

The jury were instructed, at the request of the people: "That if you believe from the evidence, beyond a reasonable doubt, that the defendant feloniously stole the personal property of the Los Angeles Elastic Pulp Plaster Company, or any part thereof, as charged in the information, or aided, abetted, etc., * * * then you should find the defendant guilty." It is contended that the defendant could not have been found guilty of the crime charged in the information if he had stolen "any part" of the property. The jury were instructed as to the distinction between grand and petit larceny, and the verdict is "guilty of grand larceny." If the verdict had been one of guilty of petit larceny, the defendant would have been none the less guilty, and such a verdict might have been rendered under the information. The property alleged to have been stolen was such that proof of its value was necessary to determine whether the crime committed was grand or petit larceny.

We see no prejudicial error in the record, and the judgment and order are therefore affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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11 Cal. App. 492

PEOPLE v. BELLAFONT et al. (Civ. 619.)

(Court of Appeal, Third District, California. Oct. 11, 1909.)

1. Bail (§ 89*) — Action on Bond — Complaint.

A complaint on a bail bond, alleging that, after the order fixing the bail, defendants appeared and executed to plaintiff an undertaking of bail, by which defendants agreed to pay plaintiff a particular sum, etc., and that on the giving of the undertaking and its approval, the principal was released from custody, sufficiently alleged that the undertaking was executed by defendants, and that, in consideration thereof, the principal was discharged from custody.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 384–400; Dec. Dig. § 89.*]

2. Bail (§ 89*)—Bond—Action—Complaint.

A bail bond was conditioned that the principal should appear and answer the charge mentioned in whatever court it might be prosecuted, and would at all times hold himself amenable to the orders and processes of the court. A complaint on the bond alleged that the case was regularly set for trial on December 7, 1908, in the superior court of S. county, and on that day was duly called, and that the principal, having been theretofore duly advised of the time and place of trial, failed to appear. *Held*, that the complaint sufficiently alleged a breach of the sureties' covenant and their liability for the penalty.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 384–400; Dec. Dig. § 89.*]

Appeal from Superior Court, Shasta County; J. M. Head, Judge.

Action by the People against Y. Bellafont and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Braynard & Kimball, for appellants. W. D. Tillotson and O. M. Chenowith, for the People.

BURNETT, J. The action brought upon a criminal bail bond resulted in a judgment by default against the defendants, from which the appeal was taken.

The sufficiency of the complaint is assailed for the reasons: (1) That there is no allegation that Juan Santos (the principal) "was released from custody upon the execution and delivery of the bond"; and (2) "there is no allegation that any condition of defendants' obligation as set forth in the bond has been broken." Neither of these contentions can be maintained. As to the first, the allegation of the complaint is: "That after said order fixing the bail of said Santos in the sum of $1,500 was made by said judge, the defendants herein appeared before the said judge, and executed to this plaintiff an undertaking of bail in the sum of $1,500, in which undertaking of bail the defendants herein agreed to pay to the people of the state of California the sum of $1,500. * * * That upon the giving of said undertaking of bail by the defendants herein, and the same having been approved by the said judge, George J. Hoadley, the said Juan Santos was released from the custody of the constable of the said Delta township." It would, indeed, be difficult to aver more explicitly that the undertaking was executed by defendants, and that in consideration thereof the principal was discharged from custody. The cases cited by appellants are not at all relevant, since they "all go to the point," as stated in Coburn v. Pearson, 57 Cal. 308, "that in actions like the present the consideration for which the undertaking was executed and delivered must be alleged and proved."

The condition of the bond which is alleged to have been broken is that "The above-named Juan Santos will appear and answer the charge above mentioned, in whatever court it may be prosecuted, and will at all times hold himself amenable to the orders and process of the court." The complaint shows that the case was regularly set for trial for December 7, 1908, in the superior court of Shasta county, and on said day "the said case was duly called to trial in said superior court, and the said Juan Santos having been theretofore duly advised of the time and place of said trial, then and there failed to appear for trial," etc. That the sureties undertook to produce Santos at the trial of the cause in the superior court when they promised that he would "appear and answer the charge in whatever court it may be prosecuted" is too plain for argument. It is true that the liability of sureties is not to be extended beyond the terms of their contract, but we are at a loss to understand how it could have been shown more clearly that their covenant had been broken, and their liability for the penalty had attached.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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11 Cal. App. 494

RAUER LAW & COLLECTION CO. v. LEFFINGWELL. (Civ. 644.)

(Court of Appeal, First District, California. Oct. 13, 1909. Rehearing Denied by Supreme Court Dec. 6, 1909.)

1. LIMITATION OF ACTIONS (§ 127*)—AMENDED COMPLAINT—NEW CAUSE OF ACTION.

When a new and different cause of action is for the first time stated in an amended complaint, the statute of limitations runs to the filing of the amended complaint.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543–547; Dec. Dig. § 127.*]

2. LIMITATION OF ACTIONS (§ 127*) — COMMENCEMENT OF ACTION — AMENDMENT—NEW CAUSE OF ACTION.

Under Code Civ. Proc. § 405, providing that an action is commenced by the filing of a complaint, where a complaint in an action on a note filed within the period of limitations was defective only, in that it failed to sufficiently allege nonpayment, an amended complaint filed after the time limited had expired, curing such defect, did not state a new cause of action, but was a mere continuance of the same action on the same obligation, and was therefore not barred.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543–547; Dec. Dig. § 127.*]

3. APPEAL AND ERROR (§ 704*) — REVIEW — FAILURE TO FIND — BILL OF EXCEPTIONS — STATEMENT OF CASE.

The court's alleged failure to find on an affirmative defense cannot be reviewed in the absence of a bill of exceptions, or statement of the case, showing that evidence was submitted sufficient to sustain such defense.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2939–2941; Dec. Dig. § 704.*]

Appeal from Superior Court, City and County of San Francisco; Geo. H. Buck, Judge.

Action by the Rauer Law & Collection Company against Elmore C. Leffingwell. Judgment for plaintiff, and defendant appeals. Affirmed.

J. J. Lermen, for appellant. Macks & Tomsky, for respondent.

HALL, J. This is an appeal from a judgment for plaintiff, and is presented to this court upon the judgment roll alone. The action is upon a promissory note executed by defendant to one George W. Wittman, who prior to the commencement of the action indorsed the note to plaintiff. The original complaint was demurred to upon the sole ground that it did not state facts sufficient to constitute a cause of action; the point of the demurrer being that the complaint did not sufficiently allege nonpayment of the note The allegation in the complaint in this regard is "that no part of said sum of $630, or interest due on said note, has been paid to plaintiff," which, of course, is not inconsistent with full payment to Wittman, the assignor of plaintiff. The demurrer was sustained, and an amended complaint was filed, which is in all respects the same as the original complaint, save that it sufficiently alleges nonpayment of the note. More than four years elapsed between the maturity of the note and the filing of the amended complaint, so that, unless the filing of the original complaint tolled the running of the statute, the action was barred. Defendant pleaded the bar of the statute by demurrer to the amended complaint, and the action of the trial court in overruling this demurrer presents the only important question to be determined upon this appeal.

Undoubtedly when a new and different cause of action is for the first time set up in an amended complaint, the statute of limitations runs to the filing of such amended complaint. The argument of appellant is that as the original complaint stated no cause of action, while the amended complaint stated a perfect cause of action, the latter necessarily stated a new and different cause of action; or, in other words, that the cause of action out of which the judgment resulted was for the first time put in suit when the amended complaint was filed. In a narrow sense this may be true, but not in the sense in which we ordinarily and judicially speak of the commencement of actions or of causes of actions. The purpose of each complaint was to enforce the very same obligation. The first complaint was defective only in that it did not sufficiently allege a breach of the obligation. An attempt to allege such breach was made. The second complaint simply remedied the defect of the first complaint. There can be no question but that, if the running of the statute was not involved in this matter, no lawyer would for one moment contend that the amendment filed in this case was not a proper one; that is, that the amended complaint was not a departure in pleading. "An action is commenced in this state by the filing of a complaint." Code Civ. Proc. § 405. An action upon any obligation founded upon an instrument in writing executed within this state may be brought within four years from its maturity. Code Civ. Proc. § 337. The obligation in this case was the obligation to pay the money promised in the note. The filing of the first complaint was the bringing of an action on this particular obligation. The filing of the amended complaint did not bring an action on a new obligation, but it was a continuance of the same action upon the same obligation. It cannot be properly said that no action was brought on the obligation sought to be enforced by the amended complaint until the amended complaint was filed. An action was brought on this same obligation when the original complaint was filed, and we have no doubt that it was sufficient to bar the running of the statute on the obligation.

We have not overlooked the cases cited by appellant from the state of Illinois, which certainly do lend support to his contention. McAndrews v. Chicago, etc., Ry. Co., 222 Ill. 232, 78 N. E. 603; Eylenfeldt v. Illinois Steel Co., 165 Ill. 185, 46 N. E. 266; Foster v. St. Luke's Hospital, 191 Ill. 94, 60 N. E. 803, and other cases. The reasoning of those cases does not commend itself to our judgment. The Illinois rule has been followed by a divided court in Missouri (Missouri, etc., Co. v. Bagley, 65 Kan. 188, 69 Pac. 189, 3 L. R. A. [N. S.] 259). The contrary rule has been followed in Iowa. Myers v. Kirt, 68 Iowa, 124, 2(N. W. 22. In this state the precise question involved has never been determined by any appellate court; but in Frost v. Witter, 132 Cal. 421, 64 Pac. 705, 84 Am. St. Rep. 53, it was held that a complaint that counted on a promissory note might be amended by setting up a mortgage given to secure the payment of the promissory note, although in the meantime the statute had run against the mortgage. This ruling was predicated upon the proposition that the "obligation sought to be enforced; that is to say, the obligation to pay the money agreed to be paid" was the same in either case. Much more is the obligation sought to be enforced in either complaint in the case at bar the same. The court therefore did not err in overruling defendant's demurrer to the amended complaint.

The contention that the court erred in failing to find upon certain affirmative matters, showing want of consideration, pleaded as a defense, cannot be sustained in the absence of any bill of exceptions or statement of the case, showing that evidence was submitted sufficient to sustain such defense. Winslow v. Gohransen, 88 Cal. 450, 26 Pac. 504; Himmelman v. Henry, 84 Cal. 104, 23 Pac. 1098.

The findings made fully support the judgment. There is no bill of exceptions or statement of the case, and we find nothing in the record showing that evidence was introduced to support the defense of want of consideration.

The judgment is affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

11 Cal. App. 487

CANTY v. BROWN et al. (Civ. 645.)

(Court of Appeal. Third District, California. Oct. 9, 1909.)

1. Vendor and Purchaser (§ 18*) — Option Contracts—Revocation—Acceptance.

Where an option is without consideration, the owner may revoke it before the expiration of the time limit if an acceptance has not been communicated to the owner.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23; Dec. Dig. § 18.*]

2. Vendor and Purchaser (§ 18*) — Option Contracts—Revocation—Acceptance.

Where a contract gave an option to purchase, during a term of six months from date of the agreement, lands described, on terms specified, without specifying the mode of the communication of an acceptance, the purchaser could adopt any reasonable or usual mode to communicate his acceptance as authorized by Civ. Code, § 1582; but, where he failed to communicate his acceptance until the day after the time limited in the option, he lost his rights under the contract, though he had previously attempted to communicate his acceptance.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23; Dec. Dig. § 18.*]

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by D. J. Canty against Jesse Andrew Brown and others. From a judgment of nonsuit and from an order denying a new trial, plaintiff appeals. Affirmed.

Stanton L. Carter, John J. Wells, and Carter & Carter, for appellant. P. H. Coffman, for respondents.

CHIPMAN, P. J. This is an action for specific performance of a certain contract relating to the sale of real estate. The court granted defendants' motion for a nonsuit, and plaintiff appeals from the judgment thereupon entered in favor of defendants and from the order denying his motion for a new trial.

The real point at issue arises out of the construction to be given the contract in question which latter is as follows: "Memorandum of agreement made and entered into this fifth day of June, 1906, between Jesse Andrew Brown, of Tehama county, state of California, the party of the first part, and D. J. Canty, of Alameda county, state of California, the party of the second part;

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

witnesseth: The party of the first part, for and in consideration of the sum of four thousand dollars (4,000), does hereby grant and sell to the party of the second part all fruit on trees now standing in orchard of said first party situate on Thomas Creek, in the county of Tehama, state of California, and known as the 'Westlake Place,' and more particularly described as follows, to wit: Bounded on the north by the Henleyville and Paskenta road, on the west by the lands of Mrs. Barker, on the south by fence between said orchard and Thomas Creek, on the east by fence enclosing said orchard as it now stands from farmed land owned by said first party, and containing 120 acres, more or less. The party of the second part shall have the free use of all trays, lug-boxes, cars and other equipment that is now on said place, and which is necessary for the proper harvesting of said fruit. The party of the first part agrees to furnish, free of charge, one span of mules and harness and wagon during the harvest season. The party of the second part agrees to make payment of said $4,000 as follows: $1,000 paid this 5th day of June, 1906, the receipt of which is hereby acknowledged by the party of the first part, the balance, $3,000 to be paid as said fruit is sold. All fruit on said orchard to belong to and be the property of the party of the first part until said rental of $4,000 is paid in full. In consideration of the party of the second part complying with the terms of this agreement, the party of the first part does hereby grant unto the party of the second part an option to purchase, during a term of six months from the date of this agreement, all of the lands hereinbefore described, with all permanent improvements now standing on said lands, and a one-half interest in all water rights used in connection with said orchard and other lands, and recorded by said party of the first part as 3,000 miner's inches; the purchase price of said land to be eight thousand five hundred dollars ($8,500), to be paid by the party of the second part to the party of the first part in sums as follows: $3,500 to be paid on delivery of good and sufficient deed to above premises; the balance, $5,000, to be secured by mortgage on said premises, and to be paid in three equal payments, in one, two and three years from date of deed, with interest at 7 per cent. In the event of the party of the second part making payments as above, the party of the first part agrees to deliver to the party of the second part the above described orchard and enough farming land adjoining on the east side of said orchard to make up 120 acres. It is mutually agreed that this agreement, and every part and portion thereof will bind and inure to the benefit of the heirs, administrators and assigns of the respective parties to this agreement. In witness whereof, the parties to this agreement have hereunto set their hands and seals in duplicate the day and year first above written. Jesse Andrew Brown. [Seal.] D. J. Canty. [Seal.]" The motion for nonsuit was upon the following grounds: "That the evidence fails to establish the contract alleged in the complaint; that the evidence fails to establish any agreement between the parties to the action for the sale and purchase of the lands mentioned in the complaint or in the evidence; that the evidence fails to establish any mutual contract between the parties to the action for the sale or purchase of any real estate; that the evidence shows that the plaintiff is not entitled to any relief."

The contention of appellant is that the judgment is against the law and the evidence, and is thus stated in his specification of errors: "The evidence shows that defendant Brown entered into a contract in writing with plaintiff to sell to plaintiff the crops of fruit then here growing on the land, and to subsequently sell to plaintiff, within six months thereafter, the land on which said crops were growing, together with a water right for 3,000 miner's inches of water, at plaintiff's option for the full sum of $12,500," of which "payments were to be made as set forth in the contract"; that "it is a single contract, although severable into two parts, the intent being that the property shall be sold for $12,500; but that there is no obligation upon plaintiff to take anything more than the fruit, for which he was to pay $4,000. If he wanted the real estate, he was to pay the balance."

Where an option is without consideration, it was held in Brown v. S. F. Sav. Un., 134 Cal. 448, 66 Pac. 592, that the owner could revoke the option before the expiration of the time given the optionee if an acceptance of the option had not been communicated to the owner. In White v. Bank of Hanford, 148 Cal. 552, 83 Pac. 698, we have the case of an option to purchase real estate, with the crops growing thereon, where there was a consideration. In that case it was held that there was no mutuality of obligation inasmuch as the agreement nowhere imposed any liability on the proposed purchaser, optionee, to make the purchase. His right, the court said, was "to complete the purchase and compel the execution of a deed (by the owners) upon performance of the terms of the agreement, within the time limited by it." The correlative duties of the owners of the land "were no other than appear upon the face of the agreement—to make the deed upon demand of White and a tender by him within the time specified in the contract." The distinction between a contract to sell and an option is clearly stated in Menzel v. Primm, 6 Cal. App. 204, 91 Pac. 754. We can discover nothing in the present case that distinguishes it from the ordinary case of an option to sell land upon specified conditions, such as White v. Bank of Hanford, supra.

Plaintiff resided at Oakland, and, after making the contract, took possession of the property and harvested the fruit crop. He testified that he made inquiries as to defendant Brown's whereabouts between June and November 1st, 1906, and on November 1st he was told that Brown "was on his way down from Oregon somewhere, but not within reach at that time, with a band of sheep." He further testified: "After the 1st day of December, 1906, and before the 5th day of the same month, I tried twice to get Mr. Brown on the telephone. But I was not successful. I couldn't find him. My telephone was directed to Corning, because I always understood that was his post-office address. * * * The contract was made in Kauffman's store at Corning. On the 5th of December, 1906, I again tried to get Mr. Brown on the telephone, and he couldn't be found in Corning. So on the morning of the 6th day of December, 1906, I telegraphed Mr. Brown. I read from the carbon copy of the telegram sent. It is as follows: 'Fresno, December 6, ——6. Jesse Andrew Brown, Corning. Survey that orchard. I want it at price named in contract. D. J. Canty.'" Witness learned later that the telegram was delivered, but that Brown said it came too late, and he refused to make the sale. It was one day after the time limited in the option. We cannot see that these facts changed the relation of the parties or gave plaintiff any rights not accorded by the contract. Plaintiff could have adopted any reasonable or usual mode to communicate his acceptance (Civ. Code, § 1582); and "consent is deemed to be fully communicated between the parties as soon as the party accepting the proposal has put his acceptance in the course of transmission to the proposer." Civ. Code, § 1583. Not having communicated his acceptance within the time limited by the contract, he lost his right to demand a deed. For a comprehensive citation of cases upon the subject, see note to Mier v. Hadden, 118 Am. St. Rep. 592; Pollock v. Brookover, 60 W. Va. 75, 53 S. E. 795, 6 L. R. A. (N. S.) 403, and note. See, also, Pomeroy, Spec. Per. § 387.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

156 Cal. 478

CHINN et al. v. SUPERIOR COURT OF SAN JOAQUIN COUNTY. (S. F. 5,298.)

(Supreme Court of California. Nov. 19, 1909.)

1. Courts (§ 1*)—Source of Judicial Power—Legislative Interference.

Where the jurisdiction of courts, original or appellate, is fixed by the Constitution, the Legislature cannot limit or extend it.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 2; Dec. Dig. § 1.*]

2. Courts (§ 212*)—Appellate Jurisdiction of Superior Court—Power of Legislature to Confer.

Const. art. 6, §§ 1, 5, providing that the judicial power shall be vested in enumerated courts, including superior courts, and that the superior court shall have appellate jurisdiction "in such cases arising in justices' and other inferior courts * * * as may be prescribed by law," confers on the Legislature power to provide the method and extent to which an appeal from justices' and inferior courts may be taken, but the right of appeal cannot be given from any other tribunal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 515; Dec. Dig. § 212.*]

3. Courts (§ 212*)—Appellate Jurisdiction of Superior Courts—Power of Legislature to Confer—"Inferior Courts."

The board of supervisors of a county, though exercising judicial functions, is not an inferior court within Const. art. 6, § 5, providing that the superior court shall have appellate jurisdiction in cases arising in justices' and other inferior courts, as the term "inferior courts" are courts established for the administration of justice, charged with the exercise of judicial power as a substantive duty, but with limited jurisdiction usually confined to the limits of the city or town for which they are mainly created, and police, municipal, and recorders' courts are examples of inferior courts within the Constitution.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 515; Dec. Dig. § 212.*

For other definitions, see Words and Phrases, vol. 4, pp. 3580–3582.]

4. Courts (§ 212*)—Appellate Jurisdiction of Superior Court—Power of Legislature to Confer—Inferior Courts.

Irrigation Act (St. 1897, p. 254, c. 189) § 4, authorizing an appeal to the superior court from an order of the board of supervisors of the county, in proceedings for the formation of an irrigation district, is in conflict with Const. art. 6, § 5, providing that the superior court shall have appellate jurisdiction in cases arising in justices' and other inferior courts, as the act attempts to authorize an appeal from an order of the board of supervisors which is not an inferior court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 515; Dec. Dig. § 212.*]

In Bank. Original petition for a writ of mandate by Walter Chinn and others against the Superior Court of San Joaquin County to compel the court to proceed with the hearing and determination of an appeal. Writ denied.

Benj. F. Wulff, for petitioners. L. L. Dennett, for defendant.

LORIGAN, J. It appears from the petition for the writ that P. E. Lindstrom and others made application to the board of supervisors of San Joaquin county for the formation of an irrigation district in said county to be known as "the South San Joaquin Irrigation District." The application was made under the provisions of the act of 1897 (St. 1897, p. 254, c. 189, Gen. Laws 1906, p. 501), and such proceedings were had in the matter that on March 22, 1909, an order granting the application for the formation of the district was made by the board, and the objections of the petitioners for this writ against the inclusion of their land within said district were overruled. Section 4 of the irrigation act provides for an appeal directly to the superior court of the county from such order of the board of supervisors, said appeal to be taken and heard in the same manner as appeals from the justice's court to the superior court, with power con-

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ferred on the superior court to enter a judgment affirming, modifying, or reversing the order of the board of supervisors appealed from. The present petitioners, being dissatisfied with the order made by the board of supervisors in the matter of the formation of said irrigation district, perfected an appeal to the superior court of San Joaquin county, in conformity to said section 4 of the act, and, the matter coming up for hearing before said court, the appeal was dismissed, the superior court holding that it had no jurisdiction to entertain it for the reason that the provision of the act attempting to confer appellate jurisdiction on the superior court, to entertain an appeal from the order of the board of supervisors, was unconstitutional and void. The petitioners thereupon applied to this court for a writ of mandate to compel the respondent—the superior court of San Joaquin county—to proceed with a hearing and determination of said appeal. An alternative writ was issued, to which a demurrer was interposed, and the matter is submitted for decision on that demurrer.

It is provided by the Constitution (article 6, § 1) that the judicial power of the state shall be vested in the Senate, in the Supreme Court, District Courts of Appeal, superior courts, justices of the peace, and "such inferior courts as the Legislature may establish in any incorporated city or town, or city and county." Section 5 of the same article, after declaring in what cases the superior court shall have original jurisdiction, provides that they "shall have appellate jurisdiction in such cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law." It is a well-recognized principle that where the judicial power of courts, either original or appellate, is fixed by constitutional provisions, the Legislature cannot either limit or extend that jurisdiction. While it is true that under the constitutional provisions conferring appellate jurisdiction upon the superior courts the matters to which that jurisdiction on appeal shall pertain—to what extent and in what manner the proceedings or action of justices' or inferior courts may be reviewed—is not provided for, but is left solely to the determination of the Legislature, still an express limitation is imposed as to the character of tribunals whose proceedings may be reviewed in the exercise of its appellate jurisdiction, and it can be exercised in case of appeals from "justices'" or "inferior courts" only. All the authority that is given to the Legislature, under the constitutional provision last referred to, is to provide the method and extent to which an appeal from these courts may be taken. It has no power to enlarge the tribunals from which it may be taken, because the constitutional provision has expressly declared of what those shall consist. The appeal to the superior court, when provided for by the Legislature, can only be from a court—either a justice or inferior court—and the right of appeal cannot be given from any other tribunal.

The contention of the petitioners here necessarily is that, because the board of supervisors in the exercise of powers conferred upon it may sometimes act judicially, therefore it constitutes a court—an inferior court—from whose judicial action the Legislature may provide an appeal under the constitutional provision pertaining to the appellate jurisdiction of the superior court. Undoubtedly a board of supervisors may perform functions which are judicial in their character, as it may perform, and mainly does, those that are executive and ministerial. It exercises, in fact, in a minor degree, the powers of the general government—executive, judicial, and ministerial. As said in People v. Provines, 34 Cal. 521, 528: "The word 'supervisors' when applied to county officers has a legal signification. The duties of the officers are various and manifold—sometimes judicial and at others legislative and executive. From the necessity of the case it would be impossible to reconcile it to any particular head; and therefore in matters relating to police and fiscal regulations of counties they are allowed to perform such duties as may be enjoined upon them by law, without any nice examination into the exact character of the powers conferred. But, because a board of supervisors may exercise judicial functions, it is by no means an inferior court within the meaning of that term as employed in the Constitution relative to the appellate jurisdiction of the superior courts. The term "inferior courts" has a well-recognized meaning. They are courts established for the administration of justice, charged with the exercise of judicial power as a substantive duty, but with limited jurisdiction in that regard, and that jurisdiction usually confined to the limits of the city or town for which they are mainly created. Police courts, municipal courts, and recorders' courts are, for example, inferior courts. But they are courts—inferior courts—as that term is employed in the constitutional provision bearing on the appellate jurisdiction of the superior court, and are the character of courts to which that appellate jurisdiction applies. Courts are tribunals which exercise functions of a strictly judicial character, and it is only inferior courts, as such, that the constitutional provisions respecting appeals to the superior court has reference to. Boards of supervisors, common councils, and other local boards, while they may be invested with mixed powers, including, among others, the power to act judicially in a matter before them, are not courts. At best, they are, in the exercise of that power, proceeding as quasi judicial bodies, something quite distinct from courts, and in no manner do they constitute inferior courts, as that term is used in the Constitution. The respondent—the superior court of San Joaquin county—was correct in its view that the portion of the irrigation act attempting to authorize an appeal to the superior court from the order of the board of supervisors was unconstitutional and void.

The application for a writ is denied.

We concur: ANGELLOTTI, J.; SLOSS, J.; MELVIN, J.; SHAW, J.; HENSHAW, J.

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11 Cal. App. 483

INGLIN et al. v. HOPPIN et al. (Sac. 1,715.)

(Supreme Court of California. Nov. 19, 1909. Rehearing Denied Dec. 16, 1909.)

1. CONSTITUTIONAL LAW (§ 50*) — GOVERNMENTAL POWERS.

The creation of reclamation districts and the setting off of lands and the fixing of the boundaries of such districts are legislative acts, within the power of the Legislature, and the Legislature can neither be compelled to act or to refrain from acting, or controlled by any other power of government when it has acted within constitutional limitations.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 48, 49; Dec. Dig. § 50.*]

2. CONSTITUTIONAL LAW (§ 70*) — GOVERNMENTAL POWERS.

Where the Legislature has established a reclamation district, it will be conclusively presumed that the Legislature took evidence in its determination, and its decision is not subject to judicial review.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129–132, 137; Dec. Dig. § 70.*]

3. CONSTITUTIONAL LAW (§ 70*) — GOVERNMENTAL POWERS.

The rule that, where the Legislature has created a reclamation district, it is conclusively presumed that it took evidence in its determination, and its decision is not subject to judicial review, is modified when applied to subordinate agencies of the Legislature charged by it with the duty of executing the legislative will, and the same exemption from judicial interference applies to the subordinate agencies only so far as their legislative discretion extends, and, where discretion other than legislative is vested in subordinate agencies, the exercise of that discretion is subject to judicial control when abused.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129–132, 137; Dec. Dig. § 70.*]

4. MANDAMUS (§ 70*)—ACTS SUBJECT TO REVIEW.

Where an act is in its nature ministerial and depends on the existence or nonexistence of facts, and the jurisdiction to determine that fact is vested in the first instance in an inferior tribunal, its determination, made on conflicting evidence, will not be reviewed on mandamus.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 132; Dec. Dig. § 70.*]

5. MANDAMUS (§ 70*)—REMEDY.

Mandamus will not lie to control discretion by forcing the exercise of discretion in a particular manner; but it will lie to correct abuses of discretion and to force a particular action by the inferior tribunal or officer when the law and uncontroverted facts clearly establish the petitioner's right to such action. And hence, in mandamus to compel the board of supervisors of a county to establish a reclamation district, the hearing in the superior court being on the same evidence presented to the board of supervisors, where the question of fact is doubtful or disputed, the court will not interfere with the determination of the board; but where it is established that the evidence before the board was uncontradicted, competent, and sufficient to prove all the matters required by Pol. Code, § 3446 et seq., relating to the establishment of reclamation districts, the superior court must issue its mandate to the board of supervisors to compel the establishment of the district.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 132; Dec. Dig. § 70.*]

6. DRAINS (§ 2*)—INVADING JUDICIAL POWER —"INFERIOR COURT."

St. 1893, p. 174, c. 147, providing for an appeal to the superior court from the decision of the board of supervisors in proceedings for establishment of reclamation districts, is in conflict with Const. art. 6, § 5, limiting the appellate jurisdiction of the superior court to cases arising in justices and other inferior courts, for the board of supervisors, though exercising quasi judicial functions, is not an inferior court.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 2.*

For other definitions, see Words and Phrases, vol. 4, pp. 3580–3582.]

7. DRAINS (§ 14*)—MANDAMUS (§ 81*)—RECLAMATION DISTRICTS—REVIEW.

The writ of review and mandamus are sufficient for the correction of errors of the board of supervisors in proceedings for the establishment of reclamation districts.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 14;* Mandamus, Cent. Dig. §§ 138, 139; Dec. Dig. § 81.*]

In Bank. Appeal from Superior Court, Yolo County; E. E. Gaddis, Judge.

Application for mandamus by M. Inglin and others against C. H. Hoppin and others to compel the Board of Supervisors of a county to set aside an order in proceedings to establish a reclamation district and to enter an order granting the petition. From a judgment denying relief, plaintiffs appeal. Reversed and remanded.

Hudson Grant, for appellants. Arthur C. Huston and Harry L. Huston, for respondents.

HENSHAW, J. This is an application for a writ of mandate directing the board of supervisors of Yolo county to set aside a specific order heretofore given by them in the matter of the petition of plaintiffs to have certain lands situated in reclamation district No. 730 of said Yolo county set off and erected into an independent district, by which order the petition was denied, and to enter an order granting the petition. To this application a general demurrer was interposed and sustained. The question presented therefore is: Accepting as true the facts stated in the application for mandate, is any ground shown for the issuance of the writ? The petition filed by and on behalf of Inglin and his coplaintiffs herein with the board of supervisors sought to have their lands in reclamation district No. 730 set off from said district pursuant to the provisions of sections 3481, 3472,

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3446 et seq. of the Political Code. Their complaint here avers that they took all the steps and proceedings to that end required by law, and upon the hearing of their petition established all of the facts required by law by uncontradicted, material, sufficient, and competent evidence, but that notwithstanding this the board of supervisors arbitrarily denied their petition. Section 3449 of the Political Code requires that, if the board of supervisors find on the hearing of the petition that its statements are correct, they must make an order approving the same. The gravamen of plaintiffs' complaint here is that, with sufficient competent and uncontradicted evidence establishing the statements of their petition to be correct, the board of supervisors arbitrarily denied instead of approved it. Upon this state of facts they apply for mandate succinctly stating their contention in the following language: "Where the petitioners are entitled upon the admitted facts to the relief demanded, may the board of supervisors arbitrarily deny it?" The general demurrer was sustained upon the grounds: That the creation of reclamation districts is referable to the legislative branch of the government, and is therefore beyond the control of the action of the courts; that exclusive jurisdiction to determine these questions has by the general Legislature been vested in one of its subordinate agencies—the board of supervisors—and that in the exercise of its powers to determine facts the board of supervisors may not be controlled; and, finally, that the board of supervisors having acted by denying the petition, mandate will not run against it to force an avoidance of its former order and the entry of another and different order.

It has been repeatedly held by this court, and is unquestionably true, that the creation of reclamation districts and the setting off of lands and the delimiting of the boundaries of such districts are legislative acts. Bixler v. Supervisors, 59 Cal. 698; Glide v. Superior Court, 147 Cal. 25, 81 Pac. 225; People v. Sacramento Drainage District, 103 Pac. 207. The creation of such districts is legislative in the true sense that the Legislature has the power, as it has in the case of any civil or penal law, to create or to withhold creation. No other power of the government can compel the Legislature to act in such a matter or to refrain from acting, or, when it has acted, to control the action, other than to declare whether or not it may have been taken within constitutional limitations. This right to act or to withhold action within the discretion or, indeed, within the arbitrary whim of the lawmaking body, is an essential attribute of its powers; but from this it does not follow that where legislative action is not itself complete, where the Legislature intrusts the determination of a fact or the doing of an act to some one or another of its agents or mandatories, this act itself takes on the attributes of legislation and becomes legislative in the sense that its due performance may not be controlled by the courts, for to so hold would in many instances thwart, rather than give effect to, the legislative will. Thus the granting of state lands is a legislative power and prerogative; but if, in a proper case, the Legislature should ordain that a grant be made of lands to an individual, and direct the issuance of that grant in the name of and on behalf of the state by some agent appointed thereto, such agent could not resist mandate upon the ground that the act, performance of which was sought to be compelled, was legislative in character, even if the agent were himself an officer of the state as provided by article 5, § 14, of the Constitution. The question was considered and this principle announced in State v. Elder, 31 Neb. 169, 47 N. W. 710, 10 L. R. A. 796, where the law declared the speaker of the assembly should open election returns, and declare the result. A writ of mandate directed against him to compel the performance of this duty was resisted upon the ground that he was a legislative officer exercising judicial functions; but the court declared that the law made no distinction in the persons to be compelled to perform an act which the law specially enjoins as a duty resulting from an office on account of any one of the three departments to which the person may belong. So, here, the Legislature has provided a plan of which landowners may avail themselves for the formation of reclamation districts. It has declared that when the facts exist, and are shown to exist within the method prescribed by the law, the supervisors shall make an order accordingly, by virtue of which order a reclamation district is created. There is a broad distinction to be recognized between the control by courts over the general Legislature acting within its powers, and the control which may be exercised over inferior boards and tribunals charged with the performance of an act enjoined by the Legislature. As was pointed out in People v. Sacramento Drainage District, supra, where the Legislature has itself spoken in the creation of a district such as this, and where the legislative determination may be deemed to have depended upon a question of fact, it is conclusively presumed that the Legislature took evidence in its determination, and the decision which it reached will not be subject to review by the courts; but this doctrine has no application, or, at the most, a much modified application, when applied to subordinate agencies of the Legislature, charged themselves with the duty of executing the legislative will. The same exemptions from judicial interference applies to all inferior legislative bodies, so far as their legislative discretion extends, but no further. Alpers v. San Francisco (C. C.) 32 Fed. 503; Davis v. Mayor, etc., of New York, 1 Duer (N. Y.) 451. Where discretion other than legislative is vested in such a subordinate officer or tribunal, the exercise of that discretion will be subjected to correction if it be abused. Where the act is in its nature ministerial and depends upon the existence or nonexistence of facts, if the jurisdiction to determine that fact be vested, in the first instance, in such inferior tribunal, its determination made upon conflicting evidence will not be reviewed. Yet, if the case presented is one where the decision has been in such flat opposition to the plain and uncontradicted facts as to force the conclusion that the decision was in bad faith, a review by the courts will always be open to the aggrieved party, as the cases which we shall cite will abundantly show.

So here, while it is unquestionably true that jurisdiction to determine the questions presented under the petition is, in the first instance, vested in the board of supervisors, as declared in Glide v. Superior Court, 147 Cal. 21, 81 Pac. 225, it does not follow, as respondents contend, that this jurisdiction is exclusive and wholly beyond the reach of a reviewing court. As said by the Supreme Court of the United States in Fallbrook Irrigation District v. Bradley, 164 U. S. 169, 17 Sup. Ct. 67 (41 L. Ed. 369): "It may be that the action of the board upon any question of fact, as to contents or sufficiency of the petition, or upon any other fact of a jurisdictional nature, is open to review in the state courts. It would seem to be so held in Modesto Irrigation District v. Tregea, 88 Cal. 334, 26 Pac. 237. * * * Very possibly a decision by the statutory tribunal, which included tracts of land within the district that plainly could not, by any fair or proper view of the facts be benefited by irrigation, would be the subject of a review in some form and of a reversal by the courts, on the ground that the decision was based, not alone upon no evidence in its favor, but that it was actually opposed to all the evidence and to the plain and uncontradicted facts of common knowledge and was given in bad faith. In such a case the decision would not have been the result of fair or honest, although grossly mistaken, judgment, but would be one based upon bad faith and fraud, and could not be conclusive in the nature of things." By the pleading such is the case here presented. The charge, in effect, is that, notwithstanding the uncontradicted proof in petitioners' favor, the board of supervisors arbitrarily and in gross disregard of the legislative mandate refuse to accord them the right guaranteed by the Legislature—that of having their lands set apart as an independent district. Plaintiffs here do not seek even to control the exercise of discretion. Their contention is: That by the express declaration of the Legislature a given result must follow a given state of facts, with no room for the play of discretion upon the part of the board of supervisors; that they have established this state of facts; and that the board of supervisors has refused to declare the result which the Legislature itself has said they must declare. In the Glide Case, supra, it is held that "jurisdiction over these matters (the formation of reclamation districts) is primarily vested with the board of supervisors, and that, so long as the board is acting within the scope of its jurisdiction, judicial interference with its proceedings is improper and cannot be tolerated." It was not held, and has never by this court been held, that in a proper case a review of the action of the board in such matters would not be permitted, and, to prevent misunderstanding, this was particularly pointed out in the opinions of the concurring justices in that case. As was there well said by the Chief Justice: "Vested rights of property and contract rights are placed by the Constitution under the protection of the courts, where alone the questions of law and fact upon which they depend can be finally decided."

The writ of mandate may be issued "to any inferior tribunal, corporation, board or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person." Code Civ. Proc. § 1085. As pointed out by the Supreme Court of the United States, mandate is a flexible writ, whose use in modern times has been much extended. "It does not lie to control judicial discretion, except when that discretion has been abused; but it is a remedy when the case is outside of the exercise of this discretion, and outside of the jurisdiction of the court or officer to which or to whom the writ is addressed." Ex parte Virginia, 100 U. S. 339, 25 L. Ed. 667. As early as 4 Cal., this court said: "It is not now denied that mandamus may be resorted to by the superior tribunal to compel an inferior officer to do the act which is sought to be enforced, in all cases where the officer has no discretion, and when he is under obligation to do the specific act. * * * In such cases the writ is always liberally interposed for the benefit of the citizen and the advancement of justice." McDougall v. Bell, 4 Cal. 179.

In Thomas v. Armstrong, 7 Cal. 286, a writ of mandate was sought. The board of supervisors had refused a license to a ferry proprietor. He applied for mandate to compel the board to renew his license. This court said: "We think that this section confers a right upon the party which cannot be arbitrarily divested or disregarded. If it were a case in which there was any doubt, and the supervisors had exercised their discretion, and had determined, on testimony, that the ferry had not been properly kept, there would be no authority to interfere with their determination; but when they act under a mistake of law, and award the license to a stranger, under the supposition that he has succeeded to the rights of the plaintiff, their orders may be reached, and the error corrected by mandamus or any other proper proceeding."

In Stockton R. R. Co. v. City of Stockton, 51 Cal. 328, it is said: "Our view of the law then was and yet is that, if an official duty is to be performed on the happening of an event, the officer cannot arbitrarily or capriciously refuse to perform it after the event has happened, on the plea that he is not satisfied that it has happened. If the fact exists and is established by sufficient proofs, it is his legal duty to be satisfied and act accordingly."

In Temple v. Superior Court, 70 Cal. 211, 11 Pac. 699, mandate was sought to compel the superior court to hear a contempt proceeding which it had refused to do, and this court declared: "Under such circumstances the court cannot, by holding without reason that it has no jurisdiction of the proceeding, divest itself of jurisdiction, and evade the duty of hearing and determining it."

In Spring Valley Water Works v. San Francisco, 82 Cal. 286, 22 Pac. 910, 1046, 6 L. R. A. 756, 16 Am. St. Rep. 116, the contention was made that the action of the board of supervisors in fixing water rates was legislative, and therefore not subject to the control of the courts, and this court replied: "There are other cases holding the act to be legislative, but whether it is judicial, legislative, or administrative is immaterial. Let it be what it may, it is not above the control of the courts in proper cases."

In Johnston v. Superior Court, 105 Cal. 666, 39 Pac. 36, the superior court, being satisfied that due notice to creditors had not been given, ordered additional notice to be given. Upon application for mandate to compel the superior court to make its decree showing that due notice had been given, the facts were reviewed, the trial court found to be in error, and mandate issued accordingly.

In Henry v. Barton, 107 Cal. 535, 40 Pac. 798, mandamus was ordered to compel the issuance of a liquor license to an applicant who had complied with all the provisions of the ordinance touching the issuance of such license; the trustees of the town contending that the matter of the issuance was within their discretion.

In Keller v. Hewitt, 109 Cal. 146, 41 Pac. 871, the applicant for mandate showed that he had successfully passed the examination entitling him to receive a grammar grade certificate as teacher, and that the board of education arbitrarily refused to grant it to him. There, as here, the contention was made that the law vested in the board absolute power and discretion to determine the question irrespective of facts, and that such determination was final and not subject to review. It was held that no such power or discretion was vested, but that the plain duty was imposed upon the board to act in conformity with established facts, and mandate was accordingly issued.

In Hensley v. Superior Court, 111 Cal. 541, 44 Pac. 232, the superior court had refused to make or enter an order or decree of due notice to creditors, upon the ground that the order for notice to creditors was not in conformity with the law. This court in issuing mandate declared: "Where, as here, the law affixes a right to specific relief from certain facts, and there is no question made as to the existence of such facts, the court has no discretion to refuse the relief. In such a case the limit of the discretionary power of the court has been reached, and nothing but a clear duty remains; and if the relief is refused, and there is, as in this instance, no appeal or other plain, speedy, and adequate remedy, mandamus will lie to compel it."

While, of course, it is the general rule that mandamus will not lie to control the discretion of a court or officer, meaning by that that it will not lie to force the exercise of discretion in a particular manner, the above cases abundantly show that mandamus will lie to correct abuses of discretion, and will lie to force a particular action by the inferior tribunal or officer, when the law clearly establishes the petitioner's right to such action. Such is the case here presented by the pleadings. We are not to be misunderstood as holding that the facts asserted in this petition to have been proved before the board of supervisors of Yolo county by good and sufficient evidence without conflict are to be tried by the superior court de novo. The hearing will be had upon the same evidence presented to the board of supervisors. Where a question of fact is doubtful or disputed, the court will not interfere with the determination of the supervisors; but if it be established before the superior court, as alleged in the petition, that the evidence before the supervisors was uncontradicted, competent, and sufficient to prove satisfactorily all matters required by the Political Code, it will become the clear duty of the superior court to issue its mandate to the board of supervisors to accord to the petitioners the right which the statute clearly gives.

Respondents urge that there was a plain, speedy, and adequate remedy open to appellants by appeal under St. 1893, p. 174, c. 147, which provides in terms for an appeal from the decision of the board of supervisors to the superior court. This provision, however, is both unconstitutional and unnecessary. Article 6, § 5, of the Constitution limits appellate jurisdiction of the superior court to cases "arising in justices and other inferior courts in their respective counties as may be prescribed by law." Notwithstanding the quasi judicial functions which boards of supervisors are called upon at times to perform, such boards are in no sense courts within the purview of the Constitution. The statute is therefore unconstitutional and is unnecessary, since the writs of review and mandamus are sufficient for the correction of their errors. See Chinn v. Superior Court (S. F. No. 5,298, this day decided) 105 Pac. 580.

The judgment is reversed, and the cause remanded, with directions to the trial court to overrule defendants' demurrer and to permit them to plead to the merits.

We concur: SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.

(156 Cal. 492)

BRIDGES et al. v. LOS ANGELES PAC. RY.

(L. A. 2,290.)

(Supreme Court of California. Nov. 20, 1909. Rehearing Denied Dec. 20, 1909.)

1. Master and Servant (§ 107*)—Safe Appliances—Duty to Furnish.

A master is liable for a breach of duty to furnish safe appliances, resulting in injury to a servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 178, 199; Dec. Dig. § 107.*]

2. Master and Servant (§ 185*)—Safe Appliances—Duty to Furnish—Delegation of Duty.

The obligation of a master to furnish his servants with safe appliances and a safe place for work cannot be delegated, and the delegation of the duty to an employé who would for other purposes be regarded as a fellow servant of an employé injured through failure of the duty would not exonerate the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 385; Dec. Dig. § 185.*]

3. Master and Servant (§§ 101, 102*)—Safe Place and Appliances—Danger Arising in Doing of Work.

Where the place in which work is to be done and the appliances to be used by servants are as safe as can reasonably be expected, and danger arises necessarily in the doing of the work, the master has discharged his duty when he has furnished to the servants suitable means of obviating the danger.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 173; Dec. Dig. §§ 101, 102.*]

4. Master and Servant (§ 185*)—Injury to Servant—Acts of Fellow Servant.

The failure of a co-employé to use the means furnished to obviate the danger in the work is the act of a fellow servant, and, where a company operating an electric substation maintained highly charged wires, and furnished means whereby the current might be shut off, and authorized the foreman of a construction gang working on the roof to shut off the current, and decedent, one of the gang, was killed by coming into contact with a live wire, either because of the foreman's failure to turn off the current or his negligence in informing decedent that the line was clear, the company was not liable under Civ. Code, § 1970, prior to the amendment of March 6, 1907 (St. 1907, p. 119, c. 97), providing that the master is not liable for injury to a servant from the negligence of a co-employé, unless the negligence was committed in the performance of a duty the master owes by law to a servant or the master has not used ordinary care in the selection of the culpable employé.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 392; Dec. Dig. § 185.*]

Shaw and Lorigan, JJ., dissenting.

In Bank. Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by O. S. Bridges and another against the Los Angeles Pacific Railway. From an order denying a new trial, defendant appeals. Reversed.

John D. Pope, Geo. P. Adams, and Gurney E. Newlin, for appellant. Anderson & Anderson and Thos. L. Woolwine, for respondents.

SLOSS, J. A judgment for $3,000 was recovered by plaintiffs in this action for the death of their son, O. R. Bridges. The deceased was in the employ of the defendant as an electrician's helper, and was killed by coming in contact with a highly charged electrical wire in a substation of the defendant. This is an appeal by defendant from an order denying its motion for a new trial. The allegation of the complaint is that the defendant "carelessly and negligently failed and neglected to furnish the said O. R. Bridges with a safe place to work, in this: that the defendant carelessly and negligently ordered and directed the said O. R. Bridges to go among some highly charged live electrical wires from which it had carelessly and negligently failed and neglected to disconnect or cut off the electrical current, whereby the said O. R. Bridges came into contact with one or more of the said live wires and received therefrom a heavy shock of electricity, from the effects of which he died."

The following facts may fairly be said to appear without contradiction: In June, 1906, which was prior to the amendment of March 6, 1907 (St. 1907, p. 119, c. 97), section 1970, Civ. Code, relative to the liability of an employer, O. R. Bridges had been in the employ of defendant as a helper for about six months. He was a member of the construction gang, which was under the charge of one Scott as foreman. On the day of the accident this gang was engaged in the effort to install or move a piece of machinery at the Ocean Park substation. To do this, it was necessary to fasten a chain block to a timber which was to be attached to the upper part of the building. The timber itself was to be hoisted by means of a rope and pulley. Bridges started up a ladder with the rope. Before getting to the top, he asked whether the line was clear. Somebody answered that it was. Bridges went on, walked across a truss supporting the roof until he came to several highly charged wires. In attempting to climb over them, he came in contact with one or more, and received the shock which caused his death. The current at the substation was controlled by a switch, which, if properly turned, would have cut the current out from the wires. It was this condition that Bridges referred to when asking whether the line was clear. The fact was that the switch had not been turned, and, as the result showed, the current was flowing through the wires.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Before the work was undertaken, the chief operator of the defendant had instructed Scott, the foreman of the construction gang, to "open the line"; i. e., to cut off the current. The line was used for lighting purposes. It fed "only a few lights and was not important." If this order had been carried out, no injury would have resulted to any one coming in contact with the wires. The duty of shutting off power rested on the operators. No one else (except Scott and the chief operator) did that kind of work. There were other facts shown, but we have stated all that we think have any bearing upon the one point which we shall consider; i. e., whether, on these facts, the only negligence shown was not that of a fellow servant of the deceased—a default for which the defendant is not liable. Civ. Code, § 1970. It is, of course, thoroughly settled, as a general rule, that the obligation of the master to furnish to his employés safe appliances and a safe place for work is one that cannot be delegated, and that for a breach of this duty, resulting in injury to a servant, the master is liable. He will not be exonerated by the fact that he may have intrusted the furnishing of a safe place and appliances to an employé who would, for other purposes, be regarded as a fellow servant of the party injured. Donnelly v. S. F. Bridge Co., 117 Cal. 417, 49 Pac. 559. But this rule is subject to a qualification which appears to us to have plain application to the facts of this case. Where the place in which the work is to be done and the appliances to be used are in themselves as safe as can reasonably be expected, and the danger arises necessarily in the doing of the work, the master has discharged his duty when he has furnished to the employé suitable means of obviating the danger. The failure, on the part of a co-employé, to use such means, is the act of a fellow servant. It is not the breach of a duty which rests upon the master as a nondelegable duty. This rule is analogous to that applied in cases where "several persons are employed to do certain work, and by the contract of employment, either express or implied, the employés are to adjust the appliances by which the work is to be done." Burns v. Sennett, 99 Cal. 363, 33 Pac. 916. It is difficult to define with precision the limits of this doctrine. It is best set forth by a statement of some of the cases in which it has been given effect.

In Daves v. S. P. Co., 98 Cal. 19, 32 Pac. 708, 35 Am. St. Rep. 133, a section hand was killed by a train which had run into an open switch. The foreman, who should have closed the switch, had failed to perform his duty, and the accident was due to this neglect. For such neglect the master was, as was held, not liable; the court saying: "The duty violated did not relate to the place of work, but to the negligent use of an appliance or instrumentality which was proper and suitable for the purpose for which it was furnished by the master, and such use of it was simply a detail of the work or management of the business, therefore a duty of the servant, which he, and not the master, was bound to perform." The same principle was applied in Donnelly v. S. F. Bridge Co., supra, where the plaintiff, working under a pile driver, was injured by a block thrown from above by a fellow servant. Before throwing any blocks, the latter was accustomed to ask the superintendent whether all was clear below, and on this occasion the superintendent had negligently answered the question in the affirmative. So in Donovan v. Ferris, 128 Cal. 48, 60 Pac. 519, 79 Am. St. Rep. 25, where the negligence consisted in failing to warn a workman in a quarry that blasts in a neighboring tunnel were about to be exploded. In Miller v. Centralia Pulp, etc., Co., 134 Wis. 316, 113 N. W. 954, 13 L. R. A. (N. S.) 742, the plaintiff was injured by falling into an elevator shaft. His fall was due to insufficient lighting of the shaft, and the cause of the want of light was the negligence of a co-employé whose duty it was to keep the place properly lighted. "The fact," says the court, "that a working place may be rendered unsafe by reason of the negligent operation by an employé of an appliance furnished by the master does not preclude the master from committing the operation of such an appliance to a competent employé, and any injury to an employé due to such negligent operation of the appliance is not a failure of duty by the master to furnish a safe place or appliance, but is a neglect of the servant in the conduct of a common employment." Where a workman engaged in pouring molten iron into a mold was informed by the superintendent that the molds were all right, whereas in fact they were too damp, it was held that an injury resulting from a blowing out of the iron by reason of such dampness was not attributable to the employer's failure to use due care in providing safe appliances. Whittaker v. Bent, 167 Mass. 588, 46 N. E. 121. Still closer in their facts to the present case are Tilley v. Rockingham County L. & P. Co., 74 N. H. 316, 67 Atl. 946, and Guest v. Edison Illum. Co., 150 Mich. 438, 114 N. W. 226. In the former the plaintiff, while engaged in cleaning out a hydraulic main, was injured by an explosion of gas which had been allowed to enter the main. The gas could have been kept out by the use of valves attached to the main, and it was the duty of the foreman to close these valves. It was held that the employer was not responsible for the failure of the foreman to discharge this duty. In Guest v. Edison Co. the plaintiff was working upon some electric wires from which the current had been cut off by the opening of a switch. The foreman had told him that he would see that the switch was kept open. This he forgot to do. The switch was closed, and plaintiff sustained injuries. An order directing a verdict for the defendant was sustained upon appeal; the court holding that the only negligence shown was that of a fellow servant. See, also, Dixon v. Winnipeg, etc., R. R. Co., 11 Man. Rep. 528.

Upon the reasoning of these cases, it must be held that the evidence was insufficient to show any negligence for which the appellant is responsible. There is no claim that the wires, switches, and other appliances were not suitable, or that they were not reasonably safe for the purposes to which they were applied. It is not charged that the defendant failed to exercise due care in the selection of its employés. The accident was caused by the fault of Scott, either in informing Bridges that the line was clear or in failing to turn the switch. In either view this negligence was that of a fellow servant in the operation of the details of work for which proper appliances had been furnished. The employer, having provided safe means for doing the work, does not insure the employé against the negligent failure of co-employés to use such means. The duty of adjusting the appliances to the varying requirements of the work to be done may be delegated to servants.

The order denying a new trial is reversed.

We concur: ANGELLOTTI, J.; MELVIN, J.; HENSHAW, J.

SHAW, J. I dissent. Bridges, the deceased, was working under Scott, who was foreman. He was one of a party of workmen doing construction work at different places along the line of the defendant's railway. Neither Scott, nor any of the men, had any authority to shut off the electricity. It is obvious that the switches would often be far away from the men working along the line, and that the control of the current could not conveniently be a part of their work, or within their province. The evidence shows that one Peacock was chief operator of the defendant company, and that it was his duty to turn off the current when necessary to insure the safety of men at work on the lines, and that none of the men at work with Bridges were authorized to do so. I think the main opinion makes an unwarrantable assumption in saying that men engaged in the work with the deceased were furnished with "suitable means of obviating the danger." They had no authority to do the act which alone would remove it, and there is no evidence that the means were at hand, or under their control. Peacock's direction to Scott to turn off the current did not make it a part of the work in which the men were engaged, nor make Scott, as to that act, a fellow servant with them. He was, for that purpose, a principal, and his failure to turn it off was the negligence of the defendant.

I concur in the foregoing dissenting opinion: LORIGAN, J.

156 Cal. 567

SHANNON v. CHENEY et al. (S. F. 5,149.)

(Supreme Court of California. Nov. 24, 1909. Rehearing Denied Dec. 23, 1909.)

1. EXCHANGES (§ 7*)—PROPERTY IN SEAT—TRANSFER.

A seat in a stock exchange, so far as it is property, is subject to the rules of the exchange, and a sale thereof must be in subordination to such rules.

[Ed. Note.—For other cases, see Exchanges, Cent. Dig. §§ 8–10; Dec. Dig. § 7.*]

2. EXCHANGES (§ 7*)—PROPERTY IN SEAT—TRANSFER—RIGHTS OF TRANSFEREE.

An assignment of a seat in a stock exchange to secure a debt due from the owner gives the assignee only the rights of the assignor subject to the rules of the exchange.

[Ed. Note.—For other cases, see Exchanges, Cent. Dig. § 10; Dec. Dig. § 7.*]

3. EXCHANGES (§ 7*)—PROPERTY IN SEAT—TRANSFER—RIGHTS OF TRANSFEREE.

An assignee of a seat in a stock exchange under an assignment to secure a debt due from the owner, who fails to present his claim in the manner and within the time prescribed by the rules of the exchange, is barred from participating in an award of the exchange based on claims of members and others duly filed against such owner.

[Ed. Note.—For other cases, see Exchanges, Cent. Dig. § 10; Dec. Dig. § 7.*]

4. EXCHANGES (§ 14*)—ASSIGNEE OF SEAT—ACTIONS—PARTIES.

Where an assignee of a seat in a stock exchange, under an assignment to secure a debt due from the owner, sued the owner and the exchange and its president for a personal judgment against the president, who had sold the seat for an amount greater than the assignee's claim, holders of claims against the owner were necessary parties, and, where they were not made parties, a personal judgment against the president was erroneous.

[Ed. Note.—For other cases, see Exchanges, Cent. Dig. § 17; Dec. Dig. § 14.*]

5. EXCHANGES (§ 14*)—ASSIGNEE OF SEAT—ACTIONS—PARTIES.

An assignee of a seat in a stock exchange, in an assignment to secure a debt due from the owner, may not sue the exchange or its president for the debt; but he must first obtain judgment against the owner, and then take supplemental proceedings to participate in the fund derived from a sale by the exchange of the seat by bringing in all claimants of the owner.

[Ed. Note.—For other cases, see Exchanges, Cent. Dig. § 17; Dec. Dig. § 14.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Department 2. Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Action by Samuel Shannon against R. L. Cheney and others. From a judgment for plaintiff, defendant the San Francisco Stock and Exchange Board and another appeal. Reversed and remanded.

Aitken & Aitken, for appellants. Roger Johnson, for respondent.

MELVIN, J. Plaintiff brought this action to collect from defendant Cheney a debt amounting to something more than $2,000, evidenced by four promissory notes and secured by what purported to be an assignment of said Cheney's seat in the San Francisco Stock and Exchange Board. The original defendants were the stock and exchange board, Mr. Cheney, and certain others described by fictitious names. A personal judgment against defendant Cheney was prayed for, and the court was asked, in addition to the usual request for general relief, to appoint a receiver to sell the seat and to apply the proceeds of such sale toward the payment of the debt and costs. The stock and exchange board answered, alleging that under its constitution and laws the seat of defendant Cheney had reverted to the board upon the failure of Cheney to pay certain claims of members against him, found by the board's committee to be due, and that these claims amounted to more than the value of the seat in question. The defendant Cheney appeared and confessed judgment. By permission of the court, plaintiff filed a supplemental complaint, making A. B. Ruggles, as president of the stock and exchange board, a party defendant; alleging that since the commencement of the action said Ruggles, pretending to act by authority of the board and the provisions of its constitution, had sold the seat in question for an amount greater than plaintiff's claim; and praying for a personal judgment against said Ruggles, as well as one against the board. Judgment was rendered as prayed in favor of plaintiff. Appeals therefrom and from an order denying their motion for a new trial are taken by the San Francisco Stock and Exchange Board and by A. B. Ruggles.

The constitution of the stock and exchange board contains, among others, the following provisions: "Any member failing to meet his engagements in the board shall be suspended until he has settled with his creditors." "Any member who has been suspended for six months, and who has not made a satisfactory settlement of his contracts in the board during that time, shall be deprived of all privileges of membership, and his seat shall revert to the board. * * * Whenever any member shall have been deprived of all privileges of membership * * * the president of the board shall call a meeting of the creditors in the board of such person, who shall thereupon present to him their several claims against the delinquent, and the president in all such cases shall be ex officio a trustee for such person and for his creditors in the board, and the said trustee shall be vested with all the rights and privileges formerly held by such person in the board, and shall dispose of the same in the same manner that a person retiring in good standing may dispose of his seat and privileges. The proceeds of any such disposition so made shall be devoted by the said trustee to discharging the obligations due by such person to members of the board, and any surplus remaining shall, after having satisfied all other claims against him, be delivered to the delinquent or to any person authorized to receive the same." It is further provided in the constitution that the proceeds of sales of seats shall be applied to the benefit of members exclusive of outside creditors, "unless there shall be a balance after the claims of the members are paid in full," and that the seat and privileges of every member during his connection with the board shall be deemed "a continuing security to all members of the board with whom he may deal, according to its rules for the performance of his contracts and the fulfillment of his engagements." The court found: That the constitution and by-laws of the board contained the provision set forth in the answer prior to April 10, 1907, when the new constitution and rules were adopted; that defendant Cheney agreed to be bound by the constitution and by-laws while a member, but not otherwise; that the claim of Hinkle, another member of the board, against defendant Cheney, was filed September 27, 1906; that thereafter a committee of arbitration acted, reporting to the board Cheney's indebtedness to Hinkle in the sum of $2,112.50; that the report was adopted by the board, and Cheney was suspended on October 10, 1906; that within 30 days thereafter claims against Cheney, aggregating more than $3,900, were filed with the board; but that none of them arose from the failure of said Cheney to comply with his engagements in the board; that plaintiff had never filed any claim with said board; that Cheney failing for six months after October 10, 1906, to settle any claims against him, was on April 10, 1907, deprived of all privileges of membership in the board; that in May, 1907, after the commencement of this action, a committee appointed to adjust all claims filed against Cheney, reported that he owed the amounts demanded, aggregating $6,697; but that said report was never presented to nor adopted by the board; that on June 30, 1907, Ruggles sold the seat for $5,500; and that no other proceedings had ever been taken by the creditors in the board to establish or to enforce their claims against R. L. Cheney.

That there can be no sale of a "seat" or the privilege of transacting business in a stock exchange except in subordination to the rules of such exchange is too well settled to require very much discussion. This privilege, so far as it is property at all, is subject to the conditions and qualifications which "entered into and became an incident in the property when it was created, and remains part of it into whose hands soever it may come." Hyde v. Woods, 94 U. S. 523, 24 L. Ed. 264. It is "a personal privilege of being and remaining a member of a voluntary association with the assent of the association." Lowenberg v. Greenebaum, 99 Cal. 162, 33 Pac. 794, 21 L. R. A. 399, 37 Am. St. Rep. 42. Or, as expressed in the case of San Francisco v. Anderson, 103 Cal. 70, 36 Pac. 1034, 42 Am. St. Rep. 98: "It is a mere right to belong to a certain association with the latter's consent, and to enjoy certain personal privileges and advantages which flow from membership of such association. Those privileges and advantages cannot be transferred without the consent of the association, and a forced sale of them would not give to the purchaser the right to occupy said seat." Cheney's property in the seat being therefore qualified, and subject to the provisions of the constitution and by-laws, plaintiff Shannon could take by the attempted assignment no greater right nor superior ownership than that which his assignor possessed. Examining that constitution, we find a provision that "a person not a member of the board shall have the right to bring a claim against a member of the said board arising from any transaction in stocks or money loaned during his membership," in a certain manner there stated, "and not otherwise." There is no showing that plaintiff ever complied with this requirement. The by-laws provide that "all claims of members and nonmembers against said delinquent member must be filed with the secretary of the board within thirty days after the adoption of the report" (recommending suspension), and "no claims, unless filed within thirty days, * * * will ever be recognized or enforced by the board." The findings of the lower court show that Shannon failed to present his claim within the limit of time above mentioned, or at all. This would bar him from participating in the award of the board, if any, based upon claims of members and other persons, duly filed. He must therefore have recourse to his remedy as a general creditor of defendant Cheney to the surplus, if any there be, after the sale of the seat and the payment of claims duly filed and adjudicated, according to the constitution and by-laws of the board. The findings of the superior court are, in substance: That there was such surplus, because it has adjudged that the claims, except that of Hinkle, were not debts arising from the failure of Cheney to comply with his engagements in the board; and that there had never been any action of the board with reference to the report of the committee to the effect that Cheney was indebted to all of the claimants. But these adverse claimants are not parties to this action. They have had no day in court. Yet the findings exclude them from participation in the fund realized from the sale of Cheney's seat held by Ruggles as trustee under the provision of the constitution quoted herein. If Shannon could maintain any action against defendants Ruggles and the board, he could only do so by making the various claimants parties. The trustee is here confronted with a personal judgment on the one hand, and, on the other, a finding of the board's committee, which the board may perhaps adopt, that sums in excess of the trust fund are due to members. To be sure, the court in this action has found that some of these creditors have not perfected their claims; but, as they are not parties, they are not bound by that judgment, and may in another action establish their rights to the fund in question. For his protection. and in justice to him, they should be made parties. Deering v. Richardson-Kimball Co., 109 Cal. 83, 41 Pac. 801. The personal judgment against Ruggles is clearly erroneous.

But as Shannon is a general creditor of Cheney, and as there is no privity of contract between him and the stock and exchange board, this action will not lie against that association nor its president. The proper course of plaintiff would be by supplemental proceedings after judgment against Cheney, to participate in the trust fund, and even that he could not do without bringing in all the claimants. Matteson, etc., Mfg. Co. v. Conley, 144 Cal. 483, 77 Pac. 1042.

Other questions are presented by the record; but we do not think they need be discussed, in view of our conclusions with reference to plaintiff's status as a claimant of a part of the fund realized from the sale of defendant Cheney's privileges as a member of the stock and exchange board.

The judgment is reversed, and the cause remanded.

We concur: HENSHAW, J.; LORIGAN, J.

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156 Cal. 576

MITCHELL v. CALIFORNIA & O. C. S. S. CO. (S. F. 5,003.)

(Supreme Court of California. Nov. 26, 1909. Rehearing Denied Dec. 23, 1909.)

1. New Trial (§ 131*)—Statement—Preparation—Time—Extension—Delay.

Code Civ. Proc. § 1054, provides that the judge of the superior court in which an action is pending may extend the time for the preparation of the statement on a new trial, but not to exceed 30 days without the consent of the adverse party. Defendant's notice of motion for a new trial was served April 15, 1907, and the clerk of defendant's attorney thereafter secured orders from the judge extending the time to serve the proposed statement until June 23d. Before the expiration of this time, and during the absence of the judge who had signed the previous orders, one of his associates granted a further extension to July 3, 1907. On July 2d the proposed statement was served, and on the same day plaintiff moved to vacate the last order for lack of jurisdiction, whereupon defendant's attorney applied for relief on the ground of mistake and excusable neglect, as authorized by section 473, and averred that after April 15th he had been engaged in other cases, and had been ill during a large part of the month of June, that he had intrusted the matter to his clerk, who had informed him that he had obtained more time, and that the attorney believed he had obtained it by stipulation; it appearing that the clerk had failed to remember the expiration of Act June 3, 1906 (St. Ex. Sess. 1906, p. 9, c. 6), allowing courts to extend the time not exceeding 90 days by limitation on the last day of February, 1907. *Held*, that defendant was entitled to be relieved as prayed.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 268; Dec. Dig. § 131.*]

2. ACTION (§ 66*)—CONSTRUCTION OF STATUTE—RELIEF FROM EXCUSABLE NEGLECT.

Code Civ. Proc. § 473, authorizing relief from a default caused by a failure to perform an act within the time prescribed in case of mistake, inadvertence, surprise, and excusable neglect, is a remedial provision to be liberally construed in order that cases may be determined upon their substantial merits.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 737; Dec. Dig. § 66.*]

3. ACTION (§ 66*) — CONSTRUCTION — RELIEF AGAINST DEFAULT — MISTAKE OF FACT OR LAW.

Code Civ. Proc. § 473, authorizing the court to grant relief from defaults caused by mistake, inadvertence, surprise, and excusable neglect, extends to both cases of mistake of law and fact.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 737; Dec. Dig. § 66.*]

4. APPEAL AND ERROR (§ 977*)—NEW TRIAL—STATEMENT — SETTLEMENT — TIME—DISCRETION.

The Supreme Court will not disturb an order refusing to relieve a party against a default in failing to prepare a statement on a motion for a new trial within the time prescribed, unless abuse of discretion is shown.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3861; Dec. Dig. § 977.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by James Mitchell against the California & Oregon Coast Steamship Company. From an order granting plaintiff's motion to set aside an order extending the time for service of defendant's statement on motion for new trial, and from an order denying defendant's motion for relief under Code Civ. Proc. § 473, in the settlement of a statement for a new trial, the proposed draft of which had not been served in time, defendant appeals. Reversed, with directions.

See, also, 154 Cal. 731, 99 Pac. 202.

W. F. Williamson (W. W. Sanderson, Edmond Nelson, of counsel), for appellant. Costello & Costello, for respondent.

MELVIN, J. This is an appeal from an order of court which in its essence is really two orders; one granting plaintiff's motion to set aside an order extending time for service of defendant's statement on motion for new trial, and the other denying defendant's motion for relief under section 473 of the Code of Civil Procedure, in the matter of the settlement of the statement for new trial, the proposed draft of which was not served in time. It is practically conceded that the last order of court, extending time for service of the statement, was made without authority. Therefore it will be necessary to discuss only the other appeal, which really involves the whole matter.

Defendant's notice of motion for new trial was served on plaintiff on April 15, 1907. A clerk in the office of defendant's attorney thereafter secured orders from the judge before whom the case was tried extending time to serve the proposed statement on motion for new trial until June 23, 1907. Before the expiration of this time, and during the absence of the judge who had signed the previous orders, one of his associates granted a further extension to and including the 3d day of July, 1907. All of these orders were served in the usual manner; plaintiff's attorneys acknowledging receipt of copies before the documents were filed. On July 2, 1907, the proposed statement was served on plaintiff's attorneys, and on the same day they served on defendant's attorney their motion to vacate the last order of continuance upon the ground that the court had no jurisdiction to make it. Thereafter proposed amendments were prepared and served, and defendant gave notice that said amendments were not assented to or adopted by it. Finally, after a continuance by consent of the parties, the matter came on regularly on August 27, 1907, for settlement of the statement before the judge who had presided at the trial of the case, and, as plaintiff's attorneys objected to the settlement of any statement, the matter was set for hearing on August 30, 1907. Before the last-mentioned date, defendant's attorney served and filed his motion for relief under section 473 of the Code of Civil Procedure on the grounds of mistake, inadvertence, surprise, and excusable neglect, supporting said motion by an affidavit, and requesting the court to settle the proposed statement. The affidavit of Mr. Williamson shows that he was busily engaged after the 15th of April, 1907, and during most of the time involved in the period following that date either in court or in preparation of briefs; that he was ill during a large part of the month of June; that he intrusted the matter of obtaining time for preparation of his proposed statement on motion for new trial to his clerk, who from time to time informed the affiant that he had obtained more time in the "Mitchell Case"; and that the attorney believed his subordinate

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was getting extensions of time from plaintiff's attorneys by stipulation. He also made the usual affidavit of merits. Mr. Nelson, Mr. Williamson's managing clerk, by affidavit corroborated the statements in his employer's affidavit.

Respondent calls our attention to the fact that Mr. Williamson's first affidavit states that he was engaged in the superior court of Lassen county during a part of the month of May, when in reality he was in that county in April. This was doubtless an inadvertence which the attorney was permitted by the court to correct in a supplementary affidavit. It was really immaterial, because the time spent in Lassen county was during the period when, in the ordinary course of practice, the statement would have been prepared, and testimony regarding the occupation of Mr. Williamson during any part of that period was relevant as tending to show reason not only for delay, but for intrusting the matter of continuances to his clerk.

The counter affidavit of one of plaintiff's attorneys calls attention to the fact that the clerk is an attorney at law who should have known the rules of practice, but who probably overlooked section 1054 of the Code of Civil Procedure. There are no essential contradictions of Mr. Williamson's statements regarding his engrossment in the work of his clients and his dependence upon the sufficiency of the extensions obtained by his clerk. Counsel for appellant in his brief directs our attention to the circumstance that perhaps his clerk erred by failing to remember "that the amendment of the statute passed by the Legislature in extraordinary session after the great fire of April, 1906 (St. Ex. Sess. 1906, p. 9, c. 6), which allowed a court to extend time not exceeding 90 days expired by self-limitation on the last day of February, 1907, and but a short time before the unfortunate error which has made this appeal necessary." We think it legitimate also to consider the fact that the time taken by appellant after the expiration of the period lawfully allowed by the court was not very great—about 37 days—and no very serious hardship can be presumed from such delay.

Under all the circumstances disclosed, we think that the relief for which application was made should have been granted. The tendency of this court has always been to relieve parties from their defaults and mistakes, upon proper showing, to the end that matters may be heard upon the merits. Treating of this subject, and particularly of the interpretation of section 473 of the Code of Civil Procedure, the following language was used by this court in Nicoll v. Weldon, 130 Cal. 667, 63 Pac. 64: "Section 473 of the Code of Civil Procedure is a remedial provision, and is to be liberally construed so as to dispose of cases upon their substantial merits, and to give to the party claiming in good faith to have a substantial defense to the action an opportunity to present it. Buell v. Emerich, 85 Cal. 116, 24 Pac. 644; Harbaugh v. Honey Lake, etc., Water Co., 109 Cal. 70, 41 Pac. 792; Melde v. Reynolds, 129 Cal. 308, 61 Pac. 932. It is for this reason that we more readily listen to an appeal from an order refusing to set aside a default, than where the motion has been granted, since in such case the defendant may be deprived of a substantial right; whereas, it may be assumed, if nothing to the contrary is shown, that the plaintiff will be able at any time to establish his cause of action. If, for any reason, he will be unable to do so, that fact should be made to appear; but, if he is merely subjected to delay or inconvenience by having the default set aside, he can be compensated therefor by the terms which the court would impose as a condition to granting the motion."

Ever since the decision in the case of Stonesifer v. Kilburn, 94 Cal. 42, 29 Pac. 332, a very liberal policy has been pursued by this court in cases of the kind here under review. In that case the hasty reading of a stipulation whereby plaintiff gained the mistaken idea that the time to file his proposed bill of exceptions was extended 30 days beyond the period granted by law, instead of 30 days after the date of the stipulation, was considered a sufficient excuse for the failure to make timely service of the plaintiff's draft of the statement.

In Pollitz v. Wickersham, 150 Cal. 242, 88 Pac. 911, a mistake of one day was made by a clerk in the office of one of the attorneys. He entered on his diary a note that the last day to serve the proposed bill of exceptions was May 24th, instead of May 23d, the correct date. On May 24th opposing counsel refused to grant a stipulation extending time. Thereafter the bill of exceptions was prepared and served 11 days following the time allowed by law. Application for relief was not made until six months and one day later, yet this court held that the bill of exceptions was settled without abuse of discretion on the part of the court. Similar action has been upheld in: Vinson v. Los Angeles Pac. R. R. Co., 147 Cal. 483, 82 Pac. 53; Banta v. Siller, 121 Cal. 415, 53 Pac. 935; King v. Dugan, 150 Cal. 260, 88 Pac. 925.

It has been suggested that the real mistake upon which appellant's prayer for relief was based was one of law and not of fact. While the clerk's inadvertence was doubtless one of law, Mr. Williamson's was a mistake of fact; but the court will, in a proper case, grant relief against a mistake of law, exercising the power given it under section 473 of the Code of Civil Procedure. "The language of this section does not limit the relief to mistakes of fact." Douglass v. Todd, 96 Cal. 658, 31 Pac. 624 (31 Am. St. Rep. 247). See, also: Tuttle v. Scott, 119 Cal. 588, 51 Pac. 849; Kirstein v. Madden, 38 Cal. 162.

Undoubtedly courts of appeal have shown great reluctance, in cases of this kind, to disturb the order made by the lower court. "Unless the record clearly shows that the court has abused its discretion, its order, whether it be to grant or deny the application, will be affirmed." Ingrim v. Epperson, 137 Cal. 371, 70 Pac. 166. Having this excellent and salutary rule in mind, we are constrained, notwithstanding it, to believe that the order made in this case which is now under consideration was calculated to defeat, rather than to advance, the ends of justice.

The order is therefore reversed, and the superior court and the judge thereof directed to settle the proposed statement according to law.

We concur: LORIGAN, J.; HENSHAW, J.

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156 Cal. 498

LUKENS et al. v. NYE, State Controller.

(Sac. 1,677.)

(Supreme Court of California. Nov. 22, 1909.)

1. Statutes (§ 26*)—Approval by Governor—Status While Considering Bills.

While engaged in considering bills which have passed both houses of the Legislature and are before him for approval or disapproval, the Governor acts in a legislative, and not an executive, capacity.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 28; Dec. Dig. § 26.*]

2. Statutes (§ 33*)—Enactment—Approval by Governor—Approval in Part.

Under Const. art. 4, § 16, providing that on a bill being presented to the Governor, "if he approves it he shall sign it, but if not, he shall return it with his objections to the house in which it originated," the Governor has no power to agree with the beneficiary under an appropriation bill that, on the latter's agreeing to accept a certain amount less than the appropriation, he will approve and sign the bill, and such agreement is void.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 36; Dec. Dig. § 33.*]

3. Statutes (§ 215*)—Construction—Extrinsic Matters—Agreement with Governor on Approval of Bill.

Where an appropriation bill "authorized and directed" the State Controller to draw his warrant for the amount stated therein, the amount cannot be questioned by any official or citizen, and is not affected by any agreement between the Governor and the beneficiary that a warrant for a smaller sum may be drawn in satisfaction of the whole amount.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 291; Dec. Dig. § 215.*]

4. States (§ 94*)—Contracts—Authority of Governor.

Under Const. art. 4, § 32, providing that no payment shall be made on any claim against the state under any contract made without express authority of law, and that all unauthorized agreements therefor shall be void, an agreement between the Governor and the beneficiary under an appropriation bill that a less amount than that appropriated shall be accepted in full satisfaction is void for want of authority to make it.

[Ed. Note.—For other cases, see States, Cent. Dig. § 91; Dec. Dig. § 94.*]

5. Contracts (§ 126*)—Validity—Public Policy.

A contract between the Governor and the beneficiary under an appropriation bill, by which the Governor approved and signed the bill on the beneficiary agreeing to accept a less amount in full satisfaction, is void as against public policy.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 590; Dec. Dig. § 126.*]

6. Estoppel (§ 78*)—Grounds—Void Contract.

An agreement between the Governor and the beneficiary under an appropriation bill, pursuant to which the Governor approved and signed the bill on the beneficiary agreeing to accept a less amount in full satisfaction, being void for want of authority to make it and also as contrary to public policy, does not estop the beneficiary to claim the full amount, though it may have induced the Governor to approve the bill.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 204; Dec. Dig. § 78.*]

7. Constitutional Law (§ 70*)—Determination of Validity—Scope of Inquiry.

The motives of the Governor, acting in his legislative capacity in approving an appropriation bill, cannot be made the subject of judicial inquiry for the purpose of invalidating or preventing the full operation of the bill.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 131; Dec. Dig. § 70.*]

8. Statutes (§ 284*)—Parol Evidence—Motives of Governor in Approving Bill.

Parol evidence is inadmissible to show what induced the Governor to approve an appropriation bill.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 383; Dec. Dig. § 284.*]

9. Mandamus (§ 7*)—Defenses—Discretion of Court.

Where a contract between the Governor and the beneficiary under an appropriation bill, pursuant to which the Governor approved the bill on the beneficiary agreeing to accept a less amount in full satisfaction, which is set up in defense of mandamus to require the Controller to issue his warrant for the full amount of the appropriation, is void for want of authority to make it, and as against public policy, the discretion of the court does not require a denial of the writ, on the ground that the claim for the excess over the amount agreed on is unjust and inequitable.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 5; Dec. Dig. § 7.*]

Beatty, C. J., dissenting.

In Bank. Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Emma Mullan Lukens and May R. Mullan for mandamus to A. B. Nye, State Controller. Plaintiffs had judgment, and defendant appeals. Affirmed.

U. S. Webb, Atty. Gen., and Malcolm C. Glenn, Deputy Atty. Gen., for appellant. G. Russell Lukens, Hiram W. Johnson, and A. A. De Ligne, for respondents.

SHAW, J. This is an action in mandamus to compel the Controller to issue a warrant on the State Treasurer to the plaintiffs for the sum of $22,808.15, being the second installment of the amount appropriated to John Mullan by the act of the Legislature approved March 22, 1905 (St. 1905, p. 791, c. 592), in satisfaction of his claim against the state. The plaintiffs are his assignees. The act appropriates $45,616.30 in payment of said claim, and declares that "the Controller is hereby authorized and directed to draw his warrant for the said sum and the Treasurer of State is hereby authorized and directed to pay the same, and thereupon the said John Mullan shall make and deliver unto the Controller a full receipt and release of his said claim." One-half is made payable on January 1, 1906, and one-half on January 1, 1907. The installment due on January 1, 1906, has been paid. This action is to compel a warrant for the remaining one-half. The act exempts the claim from the provisions of section 672 of the Political Code, and therefore it is not required to have the sanction of the board of examiners.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The answer of the Controller alleges the following facts in defense: Prior to the passage of the act the claim had been assigned to the plaintiffs. After the bill had been passed in both houses of the Legislature, and before its approval, the Governor informed the plaintiffs that the amount allowed by the bill was excessive, and that he would not approve the same unless the plaintiffs would agree to accept the sum of $25,000 in full satisfaction of the claim. Thereupon plaintiffs and the Governor agreed that $25,000 was the full amount of the claim. An agreement was drawn up providing that, in consideration of the sum of $25,000, to be paid in two installments, the first, of $22,808.15, to be paid January 1, 1906, and the second, of $2.191.85, to be paid on January 1, 1907, the said plaintiffs acknowledged full receipt and satisfaction of the claim, and released the state from further liability, claim, and demand therefor, and that if the payments were not made on said dates, the agreement should be void. For the purpose of inducing the Governor to approve said bill and attach his signature thereto, so that it would become a law, plaintiffs signed the said agreement and delivered it to the Governor for the benefit of the state, and the Governor, relying upon the said agreement, and being thereby induced to do so, signed the said bill, whereby it became a law. The plaintiffs, in pursuance of said agreement, on January 2, 1906, demanded of the Controller a warrant for the sum of $22,808.15, due on that day by the act, and thereupon the Controller, for the purpose of carrying out said agreement, and relying thereon, and also on the representations of the plaintiffs that they would accept the sum of $25,000 in full satisfaction of said claim, issued and delivered the said warrant so demanded, and the plaintiffs collected the same from the Treasurer. The Controller is ready and willing to issue a warrant for the remainder of $2,191.85, due under the agreement, and has offered the same to the plaintiffs, who refuse to accept it.

A demurrer was sustained to the answer, and judgment passed to the plaintiffs as prayed for. The appellant contends, first, that the agreement is valid; second, that the plaintiffs, after thereby inducing the Governor to sign the appropriation bill in question, are estopped to demand any greater sum than the agreement provides; and third, that under the rules applying in mandamus the lower court, in the exercise of a sound discretion, should have refused the writ on the ground that the claim for the excess is unjust and inequitable.

The Governor was without power to take or receive the agreement in question, and he could not make it a valid contract. While engaged in considering bills which have passed both houses of the Legislature, and which are presented to him for approval or disapproval, he is acting in a legislative capacity, and not as an executive. He is for that purpose a part of the legislative department of the state. Fowler v. Peirce, 2 Cal. 172; People v. Bowen, 21 N. Y. 521. As an executive officer, he is forbidden to exercise any legislative power or function except as in the Constitution expressly provided. Article 3. His powers, as a part of the legislative department, are specifically enumerated in the Constitution. When such a bill is presented, "if he approves it he shall sign it; but if not he shall return it with his objections to the house in which it originated." If, while the Legislature is in session, he neglects to return or sign a bill for 10 days, Sundays excepted, it becomes a law without his signature. If the Legislature adjourns within the 10 days, it does not become a law unless, within the designated time after such adjournment, he shall sign and deposit the same in the office of the Secretary of State. Const. art. 4, § 16. When exercising these powers he is a special agent with limited powers, and, as in the case of other special agents, he can act only in the specified mode, and can exercise only the granted powers. If he attempts to exercise them in a different mode, or to exercise powers not given, his act will be wholly ineffectual and void for any and every purpose. When he goes beyond the limits of these powers in the attempt to exercise them, his acts, so far as they transcend the powers, are of no force.

In Ohio the Senate alone attempted to empower a committee to investigate the city officers of Cincinnati, a matter not germane to the powers or business of the Senate. Holding the committee an illegal body the court said: "Whatever inherent power the General Assembly in its entirety may possess by virtue of its being the repository of the whole legislative power of the state, we do not think it follows as a conclusion that one of its constituent parts must likewise possess the same inherent powers. It may be conceded that either branch of the Legislature has all such powers as are necessarily implied in the express grant of powers to it by the Constitution; but, under the system of distribution of powers in the American Constitutions, and especially under the Constitution of Ohio, which is explicit in excluding from the legislative department the exercise of any power which is not delegated in the Constitution (article 1, § 20), the authority of a single branch of the Legislature to act separately must be found in express terms or by necessary implication in the Constitution. It is clear that the 'legislative power' whatever may be the extent of that power which is conferred upon the General Assembly, is not expressly delegated to a part of the General Assembly. Nor is it impliedly so delegated. The Constitution explicitly grants and defines the separate powers of each branch of the General Assembly. * * * The powers of each house are not general and subject only to limitation in the Constitution, as is the legislative power of the entire General Assembly; but they are specific or enumerated powers. * * * We therefore must look to the enumerated powers alone to determine this question; and it were just as sane to claim that either branch of the Legislature might, by itself, enact a law as to claim that by 'inherent power' it could independently exercise any legislative power outside of those specifically designated in the Constitution." State v. Guilbert, 75 Ohio St. 43, 78 N. E. 934.

The same principles apply when the power of the Governor as a legislative instrumentality is involved. He may act only in the prescribed mode, and may exercise only the powers enumerated or necessarily implied. In the case of a bill containing several items of appropriation of money he may approve one or more of them, and object to the others. Article 4, § 16. In no other case is he empowered to modify or change the effect of a proposed law, or to do anything concerning it except to approve or disapprove it as a whole. He cannot participate in the discussions or proceedings of either house, except by sending them a veto message when a bill is disapproved. If he approves a proposed bill, his duty requires him to sign it as evidence of such approval. This approval, except in the single instance stated, must be of the bill as a whole, and without qualification. Any attempt on his part to attach to his approval any qualification, or to withhold his consent to a part of the law and give it to other parts, will either be entirely nugatory and ineffectual, and leave the approval absolute, or it will completely, nullify the approval and operate as a veto of the whole bill. Porter v. Hughes, 4 Ariz. 1, 32 Pac. 165; State v. Holder, 76 Miss. 158, 23 South. 643. His approval makes such a bill a part of the statute law, next to the Constitution, the highest manifestation of the will of the people. The Governor cannot qualify or change it by any contemporaneous agreement or contract on behalf of the state with persons who are to be benefited by the law, whereby they agree to release to the state a part of such benefit. That would be to permit the Governor and the persons concerned to make the law to suit themselves without the concurrence of the legislative houses. His signature, when it is shown to have been attached, is the exclusive and conclusive evidence of his unqualified approval, and, the result being law, no evidence, nor the judgment of any court, can be allowed to modify or change its terms or effect, or prevent or impair its complete operative force. The Constitution makes no distinction between a law appropriating money to satisfy the claim of a private individual and a law declaring the will of the people on any other subject. Its mandate is unalterably fixed by the words of the bill, made a law by the final act of the Governor, and it is unchangeable except by the power which enacted it. "It is a principle in the English law that an act of Parliament, delivered in clear and intelligible terms, cannot be questioned, or its authority controlled, in any court of justice." 1 Kent's Com. 447. And in the United States: "If there be no constitutional objection to a statute, it is with us as absolute and uncontrollable as laws flowing from the sovereign power in any other form of government." Id. 448.

This law is binding upon all the executive officers of the state. It expressly commands the Controller to draw warrants on the Treasurer for the sum appropriated. The Political Code, also a binding law, directs him to do the same. Section 433, subd. 17; section 672. These commands of the law are not to be questioned by any official or citizen, or controlled by the courts. Any agreement between the Governor and the beneficiaries to the effect that the Controller shall draw his warrants for a smaller sum in satisfaction of the whole amount must necessarily be futile and entirely void for any purpose. The facts alleged could not be proven as the foundation upon which to prevent the operation of the law, or to qualify its terms in any respect, and they are in law irrelevant and immaterial.

The scheme of legislation provided in the Constitution does not contemplate nor countenance such proceedings by the Governor as a mode of qualifying or affecting the operation of a law. If it were permitted, the Governor would practically have power to adjust claims against the state, a power not given to him by any law, and which the Constitution plainly vests exclusively in the Legislature. Article 4, §§ 22, 29, 30, 31, 32, 34. The appropriation bills enacted into law, instead of being as the Constitution intends, the final declaration of the people as to the disposition of the public funds, would be subject to the negotiations and bargains of the Governor with the beneficiaries, not manifested by any public record, and resting upon private agreements in writing, or in parol. We say in parol because no distinction can be made, if the power exists, between a parol contract of this character and one in writing. The fiscal officers of the state would not be justified in relying on the sanction of the law for the disbursement of state funds; they would be forced to inquire of the Governor and of the beneficiaries to learn whether or not an agreement had been made modifying such laws, or creating an estoppel against the enforcement thereof. In case of disputes, differences, or doubts concerning the terms or execution of such agreements the officers would have to decide as to the truth of the matter. It is impossible to overestimate the scandals that might arise under such a system if it were authorized. The Constitution expressly declares that no payment of public funds shall be made upon any claim against the state, under any contract made without express authority of law, and that all unauthorized agreements or contracts therefor shall be null and void. Article 4, § 32. The entire proceeding was clearly contrary to public policy.

The agreement in question being wholly void, and also against public policy, it cannot be the foundation for an estoppel. Nor can an equitable estoppel be based upon it as the inducement or consideration which may have led the Governor to approve the bill which it purports to modify. The Governor was acting in a legislative capacity, and his signature was an act in the process of making a law. It is well established that the motives which impelled the Legislature, or any component part or member of it, to enact a law cannot be made a subject of judicial inquiry for the purpose of invalidating or preventing the full operation of the law. Harpending v. Haight, 39 Cal. 202, 2 Am. Rep. 432; People v. Bigler, 5 Cal. 26; Cooley, Con. Lim. 259; 2 Suth. Stat. Constr. (2d Ed.) § 496; 26 Am. & Eng. Ency. of Law, 569; People v. Glenn, 100 Cal. 423, 35 Pac. 302, 38 Am. St. Rep. 305. As the result of this rule, and because, as heretofore shown, it is incompetent, all evidence to show what induced the Governor to sign the bill would be rejected, and the facts upon which the estoppel is supposed to rest could never be established.

But, conceding their existence as alleged, the whole plan was against public policy, and for that reason the facts are not sufficient to create an estoppel. The authorities fully support this proposition. In People v. Board, 75 N. Y. 42, the salary of the police surgeon was fixed by law at $2,250. The board of police passed a resolution appointing Satterlee to the position at a salary of $1,500. He accepted the appointment, began service under it, and received part of the salary at the reduced rate. The board had no power to change the salary. It was held that the contract, claimed to have been created by the appointment and acceptance, to serve for the salary mentioned in the resolution was not binding, and that the transaction did not constitute an estoppel against him to prevent him from enforcing payment at the legal rate. The cases of Kehn v. State, 93 N. Y. 293, Clark v. State, 142 N. Y. 105, 36 N. E. 817, and Rettinghouse v. Ashland, 106 Wis. 595, 82 N. W. 555, are similar in effect. "Contracts, as a general rule, cannot vest in parties any rights in contravention of law or public policy." Shorman v. Lakin, 47 Ark. 354, 1 S. W. 560. "The reason is too obvious to admit of question. The law might, otherwise, at times be evaded, or its policy defeated, by a few strokes of the pen." Klenk v. Knoble, 37 Ark. 304. "An unlawful agreement cannot defeat a lawful right. A contract which is void as being against public policy cannot create an estoppel." Tate v. Building Ass'n, 97 Va. 79, 33 S. E. 383 (45 L. R. A. 243, 75 Am. St. Rep. 770). "Where there is no power or authority vested by law in officers or agents, no void act of theirs can be cured by aid of the doctrine of estoppel." Raisch v. San Francisco, 80 Cal. 6, 22 Pac. 22. See, also, Oregonian Ry. Co. v. Oregon R. & N. Co. (C. C.) 10 Sawy. 479, 23 Fed. 232; Semple v. Bank, 5 Sawy. 394, Fed. Cas. No. 12,660; Dupas v. Wassell, 1 Dill, 213, Fed. Cas. No. 4,182; Webb v. Davis, 37 Ark. 555; Langan v. Sankey, 55 Iowa, 54, 7 N. W. 393; Martin v. Zellerbach, 38 Cal. 311, 99 Am. Dec. 365; 2 Pom. Eq. Jur., § 935. The consequence of holding this agreement effectual as an estoppel would be to make it valid, notwithstanding the entire lack of power in the Governor to demand or accept it, and despite its infringement of the express terms of the statute. Such contracts could always be set up as an estoppel, and the public policy which prohibits them would be defeated. As said by Mr. Justice Nutter, who wrote the opinion in this case in the District Court of Appeal, to give the agreement validity in this manner, would "establish a principle at variance with the spirit of our system of government that would enable Governors as a branch of the legislative department to exercise in their approval or disapproval of bills a power withheld by the Constitution."

The rules which govern the courts in suits in mandamus do not authorize the issuance of the writ in the present case. In Wiedwald v. Dodson, 95 Cal. 453, 30 Pac. 580, the court declared the well-established doctrine that it is a discretionary writ, and that it need not issue to compel an official act not made imperative by the proper construction of a statute, and contrary to its spirit, although in strict conformity to its literal terms. In Board v. Council, 128 Cal. 369, 60 Pac. 976, a tax had been levied and had been paid by many of the taxpayers. It was asserted that the wrong board had made the levy, and a suit in mandamus was begun to compel a levy by the legal board. The result of another levy would have been that many of the taxpayers would have been compelled to pay the same tax twice. This court refused the writ, and quoted as authority Merrill on Mandamus, §§ 71–73, to the effect that, "The writ of mandate will not issue where it will work injustice, or introduce confusion and disorder, or operate harshly, or where it will not promote substantial justice." This is doubtless a correct statement of the general rule on the subject, and in many cases it controls. But it has no real application to the case at bar. The same principles also apply to and control the doctrine of estoppel in equity. Yet, as we have seen, a contract which is illegal and against public policy will not suffice to create an estoppel. The writ of mandate is discretionary, and frequently the principles of equity are to be resorted to for the determination of the question whether or not it should issue. But these principles cannot be invoked in mandamus, any more than in equity, to enforce agreements which are void in law, and which have been made in violation of public policy, which would enable the officers of the state to avoid carrying out the positive mandates of a constitutional statute, and which would sanction and enforce the doctrine that an act of the Legislature may be modified by an unauthorized contract executed at the unauthorized demand of the Governor.

It has been suggested that the power of a Governor, who believes that a sum so proposed to be appropriated to a private individual to pay his claim against the state exceeds the amount justly due, is similar to that of a judge engaged in the trial of a case, who believes that the verdict returned by the jury is excessive. The conditions are so variant that there is no real analogy. The Governor has no legal power to reduce the amount of the claim. His only course is laid down in the Constitution. He must sign the bill as it is, or he must withhold his approval and return it with his objections to the house in which it originated. The judge, on the contrary, is, for the time being and for the purposes of that case, the repository of the whole judicial power of the state. He may render judgment for any amount he sees fit, and, if no further action is taken by the parties, that judgment will be valid, and will stand as the measure of their rights. If it does not conform to the verdict of the jury, or to the agreement of the parties made manifest by their consent to a modification and reduction of the verdict, it may, of course, be reversed on appeal. But unless thus reversed, it is conclusive. There is no lack of power, although there may be an erroneous exercise of it. The Governor, in the case supposed, is proceeding entirely beyond his official power, and his acts are of no more force, so far as the validity and effect of the agreement is concerned, than if they were those of a private citizen. The judge acts within his powers and in accordance with his duty. The purpose of his official existence is that he may do justice between the parties to the litigation. The Governor acts outside of his powers, which, in this respect, limit his duty. It is never his duty in such matters to act in excess of his power. The judge does not arbitrarily reduce the verdict and give judgment for a smaller sum. He offers the plaintiff an opportunity to agree to a reduction; if he agrees, the judge has power to render the judgment accordingly; if he refuses, the judge can regularly do nothing more than grant the new trial. In either case he acts strictly within his powers. The conduct of the judge in thus inducing an agreement between the parties and a settlement of the litigation is not only not illegal nor contrary to public policy, but it is especially encouraged by public policy. It has been sanctioned by the practice of many years in the courts of this country. See 37 Cent. Dig. c. 1363, § 324. The power to do this exists at common law, and it is therefore authorized by the law of this state. Pol. Code, § 4468. The Governor, if he has such power, could compel the person concerned to yield to his demands and execute any agreement he required, at the peril of losing his entire claim, and such person will have no alternative except to apply to a succeeding Legislature. He has no other appeal. A power so arbitrary cannot justly or reasonably be implied from anything contained in the Constitution, or in our system of government. It is not sanctioned by custom, or even by precedent It cannot be recognized by the courts until the people confer it in express terms.

A closer analogy would be the case of a judge giving judgment for a certain sum of money, and contemporaneously taking an agreement from the plaintiff to accept, in full satisfaction of the judgment, a smaller amount. The defendant, in such a case, might perhaps obtain relief by application under section 473, Code Civ. Proc., or by motion for a new trial, or by suit in equity directly attacking the judgment, provided he began the proper proceeding within the time and in the manner provided by law. But if he suffered that time to pass, he would be bound to pay the judgment in full. The agreement would form no part of the record, it would not be self-executing, nor could it operate directly upon the judgment of its own force, and it could not be used collaterally to impeach the judgment, or to satisfy it in part. The law has provided no method for the enforcement of an agreement taken by the Governor in contravention of the statute he has put in force. The veto or rejection of the entire bill is the only means he has to enforce his objections thereto; and, when the bill is signed by him, the case is parallel to that of a judgment when collaterally attacked after the time for direct attack has expired. The agreement could have no effect, and proof of it could not be permitted to impair the law, or change the judgment.

The judgment is affirmed.

We concur: HENSHAW, J.; MELVIN, J.; ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.

I dissent and will file an opinion later: BEATTY, C. J.

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156 Cal. 527

LEVY v. CALEDONIAN INS. CO. et al.

(S. F. 5,157.)

(Supreme Court of California. Nov. 23, 1909. Rehearing Denied Dec. 23, 1909.)

1. CONTRACTS (§ 303*)—DESTRUCTION OF SUBJECT-MATTER—EFFECT.

Where a contract is made in contemplation of the continued existence of a subject-matter, which is after the making of the contract destroyed without the fault of either party, nonperformance of the contract is excused.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1409–1416; Dec. Dig. § 303.*]

2. CONTRACTS (§ 303*)—PERSONAL SERVICE—DEATH OF PARTY—EFFECT.

A contract calling for the rendition of personal service by one is subject to the implied condition that, in the event of his death, further performance on both sides will be excused.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 303.*]

3. INSURANCE (§ 79*)—EMPLOYMENT OF AGENTS—CONTRACTS—TERMINATION.

A contract of employment of an insurance broker to place in certain companies or through them all fire insurance business which he might secure fixed a monthly salary to cover all compensation and expenses, and provided that the agreement should continue for two years. There was nothing to show that the parties contracted with reference to the broker's ability to secure business in a particular district. His business in San Francisco before the earthquake in 1906 amounted to 80 per cent. of his entire business and in the business district then destroyed to 80 per cent. of his city business. The broker's value to the insurance companies lay in his clientage which continued, notwithstanding the destruction of a part of the city. The business continued as profitable after the earthquake as before. *Held*, that the insurance companies could not terminate the contract on the ground of the destruction of a part of San Francisco by the earthquake.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 79.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by S. W. Levy against the Caledonian Insurance Company and others. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

T. C. Van Ness, for appellants. Goodfellow & Eells, for respondent.

SLOSS, J. On March 31, 1906, the plaintiff, an insurance broker at San Francisco, entered into a written contract with one Conroy, who was acting on behalf of four foreign insurance corporations, which he represented as manager for the Pacific Coast. By this contract Levy, in consideration of the monthly payment to him of $1,000, agreed to place in said companies, or through them, any and all fire insurance business which he might be able to secure or control. The consideration above expressed was to cover all compensation for services rendered by Levy and clerical service of his employés. The agreement provided that it was to continue for a period of two years, commencing April 1, 1906. There were other terms, none of which have any bearing upon the present controversy. No payments were ever made to Levy under the contract. This action was commenced in September, 1906, and by it the plaintiff sought to recover from said four corporations the five installments of $1,000 each, falling due up to the 1st day of September. A supplemental complaint, filed in March, 1907, asked judgment for the further sum of $6,000. Plaintiff recovered judgment for the sums demanded, and the defendants appeal from the judgment and from an order denying their motion for a new trial.

The defense relied upon is stated in the answer as follows: The defendants allege that, at the time they entered into said agreement with plaintiff, the principal portion of the business controlled and within the understanding of the parties to be controlled by plaintiff consisted of risks located in the business district of San Francisco; that said business district was, during the 18th, 19th, and 20th days of April, 1906, totally destroyed by earthquake and fire; and that by reason of such destruction, and of the destruction of the insurable property in said district, it will not be possible for plaintiff to secure for said companies the business in consideration of which he made the agreement, and that by reason thereof the consideration for which said companies entered into said agreement has failed in a material respect. The defendants allege that they entered into said agreement in consideration and because of the fact that plaintiff controlled a large insurance business in said business district. It is further alleged that, immediately after the destruction of said business district, the defendants notified plaintiff that they would no longer recognize the agreement as binding upon them and rescinded said agreement.

The court found that the consideration for the covenants and promises of the defendants is as set forth in said written agreement and not otherwise; that it is not true that, by reason of the destruction of the business district or the insurable property therein, it will not be possible for plaintiff to secure the business in consideration of which the defendants entered into said agreement. The agreement, it was found, has not failed in any material respect. The court finds that the business of insurance at all times since the said fire has been conducted in the city and county of San Francisco, although the location of the risks has changed by reason of the said fire; that the plaintiff has been able to procure, and has in fact procured, for the defendants a larger amount of insurance than before the fire. The defendants, the court finds, continued, after the earthquake and fire, to accept from the plaintiff performance of the agreement on his part, and received from him fire insurance until June 21, 1906, the date of the attempted rescission. The finding on the plea of rescission is against the defendants. This, however, is immaterial, if the court below was right in its view that there was no ground for rescission.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The findings regarding the business procured by plaintiff for defendant companies since the fire are fully sustained by the evidence. There is no dispute of the fact that after the fire, as before, the plaintiff placed with the defendants all the fire insurance business which he was able to control. The plaintiff testified that within 15 days after the fire he resumed his insurance business. The interruption was only during the time when "everything was in chaos and the insurers had no papers or books." The trial of the action commenced on March 25, 1907, not quite one year after the date fixed for the commencement of the contract. From March 31, 1906, to the time of his testimony, the plaintiff placed with the defendant companies insurance on which the premiums amounted to $45,219.84. The average for the three years preceding the fire had been from $30,000 to $35,000. On these facts we can see absolutely no foundation for the contention of the defendants that they were relieved from performing their contract by any failure of consideration. The appellants seek to bring the case within the well-established rule excusing performance where a contract is made in contemplation of the continued existence of a subject-matter which is, after the making of the contract, destroyed without the fault of either party. Taylor v. Caldwell, 3 B. & S. 826; Potts Drug Co. v. Benedict, 104 Pac. 432; Wells v. Calnan, 107 Mass. 514, 9 Am. Rep. 65; Land Co. v. Harriman, 68 N. H. 374, 44 Atl. 527; 9 Cyc. 631; 1 Beach Contr. § 217. For example, this contract, which called for the rendition of personal services by Mr. Levy, was, under the rule stated, subject to the implied condition that, in the event of his death, further performance on both sides should be excused. Robinson v. Davison, L. R. 6 Exch. 269; Spalding v. Rosa, 71 N. Y. 40, 27 Am. Rep. 7; Johnson v. Walker, 155 Mass. 253, 29 N. E. 522, 31 Am. St. Rep. 550. But neither the agreement itself nor the additional evidence discloses directly or by necessary inference that the parties contracted with reference to plaintiff's ability to secure business in a particular district. The appellants' manager testified that plaintiff's business, before the fire, had been partly within, and partly without, the city. The city business amounted to 80 per cent. of the whole, and that in the business district to 80 per cent. of the city business. This was the extent of defendants' showing. But the destruction of the buildings in the burned district did not destroy the plaintiff's capacity to obtain insurance. The most reasonable supposition is that the defendants contracted to pay him $1,000 per month, not because he was able to write insurance in a certain location, but because his relations with certain people, wherever located, enabled him to write insurance for them. His value to the appellants lay in his clientage, and this continued, notwithstanding the burning of buildings in which some of his clients had been doing business. Within a brief period after the fire, most of the merchants whose establishments in the burned district had been destroyed found quarters and resumed business in other parts of the city. There they again required insurance, and the plaintiff was again enabled to place the insurance of those of them who were his clients. It is said that there was, after the fire, a great demand for insurance, and that appellants could have obtained this business without Levy's assistance. But this conclusion is merely speculative, and can have no bearing on the rights of the parties under their contract. It may be that even before the fire the defendant companies might have been able, through their own efforts, to get a large part of the business which was brought to them by plaintiff. But they evidently considered Levy's influence valuable, and agreed to pay him for it. They should not be heard to say that they might have done as well without his aid. That his efforts were effectual is shown by the fact that he turned over a largely increased amount of premiums. Even though the excess was due, in whole or in part, to increased premium rates, there is nothing in the record to suggest that the business was not as profitable as that which the plaintiff had brought in before the earthquake and fire.

In view of what we have said, there seems to be little reason for discussing at any length appellants' further contention that they are relieved because the performance of the contract had become impossible by the occurrence of an event which could not reasonably have been anticipated. There was no impossibility. Plaintiff was able to perform his obligation to furnish insurance. He did perform it. It is equally possible for defendants to perform their part.

The judgment and order appealed from are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

156 Cal. 544

MILLER et al. v. ASH et al. (Sac. 1,612.)

(Supreme Court of California. Nov. 23, 1909. Rehearing Denied Dec. 20, 1909.)

1. Action (§ 53*)—Splitting Cause of Action—What Constitutes—Joint and Several Claims.

Where each of a guardian's wards had a several claim against the guardian's estate for an accounting, and the guardian had converted the money of the wards to his own use without accounting therefor, and had so mingled the same that it could not be traced, each ward could maintain a separate action against the guardian's administrators; and this, though they presented their claim against the guardian's estate as "joint claimants."

[Ed. Note.—For other cases, see Action, Cent. Dig. § 549; Dec. Dig. § 53.*]

2. Descent and Distribution (§ 89*)—Death of Ward—Action for Accounting—Parties.

On the death of a ward, an action against the guardian for an accounting must be brought by the ward's legal representatives, and not by his heirs.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 346, 349; Dec. Dig. § 89.*]

3. Equity (§ 71*)—Laches—Circumstances.

Whether a plea of laches should be sustained in cases of long delay in the institution of an action must necessarily depend on the circumstances peculiar to each case.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 204–211; Dec. Dig. § 71.*]

4. Equity (§ 80*)—Laches—Effect of Fraud.

In cases of fraud, greater liberality is allowed in excusing laches where actual fraud is charged than in cases of constructive fraud.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 237; Dec. Dig. § 80.*]

5. Equity (§ 70*) — Laches — "Constructive Notice."

Where a party seeking to avoid or excuse a delay, on which a plea of laches is predicated, possessed information or knowledge of extraneous facts and circumstances which, though not directly tending to show the existence of a prior conflicting right, were sufficient to put him, as a prudent person on inquiry, he was then charged with constructive notice of all that he might have learned on an inquiry prosecuted with reasonable diligence.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 203; Dec. Dig. § 70.*

For other definitions, see Words and Phrases, vol. 2, pp. 1472–1474; vol. 8, p. 7613.]

6. Evidence (§ 66*)—Presumptions—Knowledge.

On a plea of laches, it would be presumed from the existence of circumstances which would put a reasonably prudent man on inquiry that the party charged had obtained information of what he might have learned by pursuing an inquiry suggested by such circumstances.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 86; Dec. Dig. § 66.*]

7. Equity (§§ 65, 67*)—Good Faith—Laches—Equitable Relief.

Nothing can call a court of equity into activity, but conscience, good faith, and reasonable diligence; and, these being wanting, the court remains passive.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 185, 191; Dec. Dig. §§ 65, 67.*]

8. Guardian and Ward (§ 146*)—Accounting—Action—Laches.

Defendants' testator was appointed guardian for M. and her deceased brother July 22, 1862, when they were 12 and 14 years of age, respectively. Testator thereafter became their stepfather, and never filed an inventory or appraisement of the estate of either of his wards until March 21, 1906. Continuously up to the time of his death he denied to his wards that he had ever received any money or property belonging to them. In fact, on December 31, 1861, by the will of R., who was not of kin to the wards, they were bequeathed $10,000 and other property, but by a later will R. bequeathed all of his property to others. In October, 1862, testator in a contest over the validity of the will of R. was granted leave to settle the claims of his wards for $4,000, which was paid to him as guardian, and for which he filed a receipt which became a part of the files of the estate of R., and was not dscovered by the wards until January 15, 1907, when they were informed thereof by a person who was examining the files for other purposes, immediately after which M. and the heirs of her brother then deceased filed a claim against testator's estate, and, on this being disallowed, brought suit against his executors. The inventory filed by the guardian in 1906, just prior to his death, showed that no estate, property, or money of the wards had ever come into his possession, and his final account showed that, while he had received no assets, he had expended for the support and education of his wards $500 each. *Held*, that the complaint was not demurrable for laches.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 491; Dec. Dig. § 146.*]

9. Guardian and Ward (§ 137*) — Accounting—Duty to Account—Time.

It is the duty of a guardian after his wards have attained majority to present his final account to the probate court for settlement.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 461, 473; Dec. Dig. § 137.*]

10. Guardian and Ward (§ 139*)—Accounting by Executors.

After the death of a guardian without having accounted after his wards had reached majority, his executors had no authority to present his account to the probate court.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 468; Dec. Dig. § 139.*]

11. Executors and Administrators (§ 431*) — Action — Condition Precedent — Accounting — Action Against Guardian's Executors.

Where a guardian converted his wards' funds and did not account therefor during his lifetime, he having lived for a long period after his wards reached majority, the wards were not required to sue his executors for an accounting before suing them to recover the funds converted.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1664; Dec. Dig. § 431.*]

12. Executors and Administrators (§ 229*) —Claims—Presentation—Effect.

Where a guardian converted funds of his wards and died without having accounted therefor, the fact that the wards presented their claims for allowance to the guardian's executors before bringing action thereon did not affect their right of recovery, though it changed their remedy.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 827; Dec. Dig. § 229.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

In Bank. Appeal from Superior Court, Colusa County; J. O. Goodwin, Judge.

Action by Elizabeth Miller and others against W. H. Ash, as executor, and Louise Ash, as executrix of the will of William Ash, deceased. From a judgment for defendants, plaintiffs appeal. Reversed as to plaintiff Elizabeth Miller, and affirmed as to the others.

S. W. McCaslin and C. E. McLaughlin, for appellants. Thomas Rutledge and W. H. Carlin, for respondents.

MELVIN, J. This case was decided by the District Court of Appeal and afterward an order for a rehearing was duly granted by this court. The suit was against the executor and executrix of the estate of W. H. Ash; the plaintiffs being Elizabeth Miller and the three sons and sole heirs of her deceased brother, Robert Read. The complaint very fully set forth the appointment of Ash as guardian of the persons and estates of Mrs. Miller (formerly Read) and her brother Robert; the payment to Ash, by permission of the probate court, of a sum of money in compromise of claims against the estate of one Reynolds, based upon legacies left to Ash's two wards by one of Reynolds' purported wills; the concealment by Ash of the existence of the interests of his wards in Reynolds' estate and of his collection of money in satisfaction of their claims; the filing of his account after many years wherein he falsely asserted that he had received nothing as guardian for the benefit of either ward; their subsequent discovery of his fraud practiced upon them; and many other matters which will more fully appear in the opinion of the District Court of Appeal. The demurrer of defendants to the complaint was sustained, and, upon the refusal of plaintiffs to amend, judgment against them was rendered accordingly. The District Court of Appeal affirmed the judgment of the lower court as to the three heirs of Robert Read, but overruled it as to Mrs. Miller, holding on the authority of Grattan v. Wiggins, 23 Cal. 16, and Robertson v. Burrell, 110 Cal. 579, 42 Pac. 1086, that the action should have been prosecuted for the benefit of the heirs of Robert Read by the administrator of his estate.

In the petition for hearing in this court and in the briefs filed, our attention has been particularly called to the rule that all persons interested in a trust must be made parties to a suit against the trustee. It is contended that this action should have been prosecuted by Mrs. Miller, by the administrator of the estate of her deceased brother Robert Read, and by the three sons of the latter, all as joint plaintiffs, but that no claim having been presented against Ash's estate by the administrator of the estate of Robert Read, deceased, there can be no recovery on the part of any one. It is not necessary here to determine whether or not in the matter of a trust in which Mrs. Miller and the heirs of Robert Read were the joint beneficiaries it would be necessary to join said heirs of Read with their aunt Mrs. Miller and the administrator of their father's estate in bringing a suit against the trustee. When we consider the fact that each ward of William Ash had a several claim, some of the seeming difficulties of the situation disappear. Mrs. Miller, according to the allegations of the complaint, had a distinct, individual claim against the estate of her deceased guardian which existed just as independently and separately as if the other ward had been a stranger and not her brother. It is true that these plaintiffs when they presented their claim against Ash designated themselves as "joint claimants." It is also true that attached as an exhibit to this claim is a full statement of the facts regarding Ash's receipt of the $4,000 in compromise of the claims of his wards against the estate of Reynolds. This indicates that there was in reality no joint interest, but that Ash had mingled and appropriated money belonging to both estates. His combining of these funds did not make the wards joint owners, nor did his settlement in gross of their claims against Reynolds' estate without segregation of the amounts severally due his wards deprive Mrs. Miller of the right to demand her property. If Mrs. Miller had wished to make a separate claim against the estate of Ash without joining her nephews, she could have done only that which was done. She could have merely stated in her claim the circumstances which gave her an interest in that estate. She was not even required to assert the proportion of the fund to which she was entitled. That was a fact to be determined by the probate court because Ash had put it out of her power to calculate just what proportion of the fund received from Reynolds' estate belonged to her. The difficulty of making this calculation was due to a situation of Ash's own creation, and his representatives cannot therefore complain because Mrs. Miller's claim failed to specify some particular share of the $4,000 and interest due her. The failure to segregate the funds belonging, respectively, to Mrs. Miller and her brother was due to the mala fides of Ash. The difficulty, if any there be, resulted from Ash's own act. The claim as presented, therefore, contained all the necessary information respecting Mrs. Miller's interest in the Ash estate. Such claim was the proper basis, after its rejection, of a suit by Mrs. Miller against Ash's executor and executrix. While the decision of the District Court of Appeal will leave some of the complaint as surplusage so far as Mrs. Miller's cause of action is concerned, that does not alter the fact that a cause of action is stated in her behalf.

The opinion of the District Court of Appeal, which we hereby adopt, is as follows:

"The court below sustained the demurrer to the complaint, and, leave to amend having been denied, judgment was entered in favor of the respondents. This appeal is by the plaintiffs from said judgment.

"The action is founded on an alleged claim of plaintiffs against the estate of William Ash, deceased, defendants' testator, for the sum of $16,000, said amount representing the principal, amounting to $4,000, and the interest accruing thereupon, at the rate of 7 per cent. per annum from the 13th day of February, 1863, to the time of the filing of the complaint herein on April 18, 1907. Said claim was on the 15th day of February, 1907, presented to the defendants, as the executor and executrix, respectively, of said estate, for allowance, and the same rejected by said executor and executrix on the 18th day of February, 1907. The claim has its origin in a transaction occurring over 44 years prior to the institution of this suit, and is founded upon the alleged fact that as guardian of the persons and estates of the plaintiff Elizabeth Miller and her brother, Robert Read, now deceased (father of the other plaintiffs), the testator of the defendants in the month of February, 1862, received into his hands for his wards the sum of $4,000, of which, as such guardian or otherwise, it is charged, he never made or rendered any account.

"The history of this venerable transaction is minutely recounted in the complaint, from the averments of which, in order that an intelligent understanding of the legal points submitted for solution may be had, it becomes necessary to extract and present the following comprehensive statement of the facts: In the year 1855, one Joseph Read died intestate at Marysville, in the county of Yuba, Cal., leaving surviving him a wife, Catherine Read, and two minor children, Elizabeth Read (now Elizabeth Miller, one of the plaintiffs herein) and Robert Read, a son. That said minors were the issue of the intermarriage of said Joseph Read and Catherine Read. That on the 3d day of May, 1859, Catherine Read married William Ash, the testator of the defendants, and remained said Ash's wife until the time of her death, which occurred on the 7th day of February, 1861. That on the 2d day of July, 1862, after proceedings duly had, said William Ash was appointed by the probate court of said Yuba county guardian of the persons and estates of said Elizabeth Miller, then Elizabeth Read, and the said Robert Read, and on said day said Ash qualified as such guardian. That at said time Elizabeth Miller was a minor of the age of 14 years and her brother, Robert Read, was a minor of the age of 12 years. That said guardian never filed an inventory or appraisement of the estate of either of his said wards 'and no such inventory or appraisement has ever been filed in the matter of the guardianship of either of said minors, save and except that on the 21st day of March, 1906, said William Ash, as such guardian, made and caused to be filed an inventory, a copy of which is hereto annexed.' That said Ash never filed an account or a report as such guardian until the 21st day of March, 1906, when he caused to be filed in said guardianship proceedings his final account (made a part of the complaint), and further caused to be filed his report as such guardian, the same being made a part of the complaint. That there were never filed or in any way exhibited by said guardian in the guardianship proceedings any 'paper, or data or statement from which the said wards or either of them or any person interested could ascertain what property, either real or personal, ever came into the hands or possession of said guardian, and the only source from which any information touching said property could be obtained was the petition of said William Ash for letters of guardianship' a copy of which is attached to and made a part of the complaint. 'That the said minors, and each of them, both during their minority and after obtaining their majority, had no knowledge of any property which might or could possibly be a part of the estate to which they were entitled save and except that they were informed by persons other than their said guardian that both their mother, the said Catherine Read, and their father, the said Joseph Read, had left property consisting of real property and horses, wagons, mules, and other personal property exclusive of money, and they, and each of them, upon obtaining such information, repeatedly requested and importuned said William Ash, as their said guardian, to render an account and turn over to them the property which had come into his hands, particularly that which had come into his hands from the estates of their parents Catherine Read and Joseph Read aforementioned. That at all times during his lifetime the said William Ash represented to his said wards and to each of them, and to said plaintiffs and to each of them, that he had never at any time or from any source received any property of any kind or nature belonging to the estate of his said wards, and denied that as such guardian he had ever received any property of any kind or nature belonging to his said wards or either of them, or to the estate of either of them.' That Ash had always represented to his wards that all the property of the estates of their parents had passed into the hands of and been used by an uncle of said minors, Robert Read by name, and that 'he had never received any money or property whatever from any source whatever, as guardian of the persons and estates of said minors or either of them.' That neither of the plaintiffs 'knew or had any reason to believe, nor had they or either of them any knowledge, or information or reason to believe, that said guardian had received any money or property from any source other than from the estates of said Catherine Read and Joseph Read, parents of said minors, until the month of August, 1906, when said male plaintiffs

* * * received information that such was the fact,' which said information was in the year 1907, for the first time given to the plaintiff Elizabeth Miller by said other plaintiffs. The complaint proceeds to allege that on or about the 31st day of December, 1861, one Richard J. Reynolds made a will in which he gave and bequeathed to the plaintiff Miller, then Read, the sum of $10,000 and 'other property,' and to her brother, the said minor, Robert Read, the sum of $1,000 and 'other property.' That subsequently to the execution of said will said Reynolds made another will, dated the 27th day of February, 1862, by the terms of which all his property was given, devised, and bequeathed to his brothers, Charles H. Reynolds and George A. Reynolds, and his sister, Lucy A. Cole. That after making the last-mentioned will said Richard J. Reynolds died. That in the month of October, 1862, the said William Ash, as guardian of said minors caused the first-mentioned will to be filed for probate in the probate court of Yuba county, and the said G. A. and Charles A. Reynolds filed for probate in said probate court the said will executed by Richard J. on the 27th day of February, 1862, 'and thereupon a contest arose in said court involving the validity and effectiveness of said wills of Richard J. Reynolds, deceased.' That on the 9th day of February, 1862 (1863?), said Ash as guardian of said minors petitioned the said probate court of Yuba county for and was granted leave by said court to compromise and settle the claims of his said wards against the estate of said Richard J. Reynolds, deceased, for the sum of $4,000. That on the 13th day of February, 1863, said Ash compromised and settled said claims of said minors against said Reynolds' estate for the said sum of $4,000, executing an instrument acknowledging the receipt, as such guardian, for and on behalf of his wards, of said sum, the same being, in the language of said receipt, 'in full and entire payment and satisfaction of all claim, right, interest or interests, legacy and devise, which the said Elizabeth Read and Robert K. Read or either of them have in, or to or against the estate of the said R. J. Reynolds, deceased.' It is alleged that all the proceedings relating to said compromise and settlement were had in said probate court in the matter of the estate of R. J. Reynolds, deceased, and that no proceedings of any kind appertaining to or connected with said settlement and compromise of the claim of the said minors against said Reynolds' estate were had in said court in the matter of the guardianship of said minors. That 'no petition, order, receipt, return, or paper of any kind relating to said compromise or to the estate of R. J. Reynolds, deceased, was ever at any time filed by said William Ash or any person whatever, in said guardianship proceedings.' That there never was any record in said guardianship proceedings from which 'said wards or plaintiffs or any person could ascertain or know, or believe, that said wards had any interest in or claim against the estate of R. J. Reynolds, deceased.' It is further averred that Reynolds was not kin to or relative of said minors, and that there was no reason which would cause them to know or even suspect that they or either of them would be or had been named in the will of said Reynolds as legatees or devisees; that said minors did not know that they had been so named in said will; and that neither of them 'had any knowledge, belief or suspicion that the aforesaid compromise or settlement had been made or attempted or that said William Ash had received any money or property of any kind or nature either as guardian or otherwise from the said estate of Richard J. Reynolds, deceased,' until on or about the 15th day of January, 1907, when the plaintiffs, the Reads, were informed of the fact by one L. B. Ayer who, having theretofore examined the papers in the matter of the estate of said Richard J. Reynolds, deceased, discovered the receipt before mentioned as having been given by said Ash in full satisfaction of the claim of said minors against said estate of Reynolds; 'that said L. B. Ayer at the time he so discovered said receipt was not acting for or on behalf of said plaintiffs or either of them, but was acting for himself alone in looking over the papers in the matter of the estate of Richard J. Reynolds, deceased, and that the conduct of said L. B. Ayer at the time of such discovery was not prompted by or at the instance, request, or suggestion of either of said minors or of said plaintiffs.' It is charged that 'said William Ash in his lifetime concealed the fact that he had received said four thousand dollars from said minors and each of them and from said plaintiffs and each of them,' and represented to said minors that he had never received any money or property whatever as their guardian; that said minors never knew or suspected that 'he was concealing the fact that he had received the sum of $4,000 or any sum whatever as such guardian, or that his said representations were false and fraudulent and made with intent to deceive and defraud said minors,' until receiving information thereof under the circumstances before indicated.

"The complaint further states that Robert Read, one of the wards of said William Ash, deceased, died intestate at Vancouver, B. C., on or about the 10th day of October, 1905, leaving surviving him the plaintiffs, Roy R. Read, Leonard B. Read, and Egbert B. Read, 'his sons and sole heirs at law'; that said William Ash died testate in Colusa county, this state, on or about the 1st day of August, 1906, and in his last will and testament named the respondents herein the executor and executrix, respectively, thereof; that said will was proved and admitted to probate and that letters testamentary were issued to the defendants, who in due time qualified and entered upon the discharge of their duties as such executor and executrix. The petition of William Ash to be appointed the guardian of the persons and estates of said minors is dated June 30, 1862, and declares, among other matters, that, by reason of the death of their parents, they 'became and are legally entitled to real estate situated within the county of about the value of $6,000; also, personal estate of about the value of $3,000, all of which needs the care and attention of some fit and proper person'; that each of said minors was then over the age of 14 years, 'and as appears by the written nomination herewith filed has nominated your petitioner as guardian, subject to the approval of your honor.' On March 21, 1906, as has already been seen from the averments of the complaint, said Ash, as guardian, etc., filed his final account in said guardianship matter, together with an inventory and a report of his administration of the affairs of the estates of said minors. The inventory shows that no estate property, or money belonging to said minors or either of them ever came into the possession or custody or control of said guardian during the period of his said guardianship. The final account makes the same showing, but, in addition, it appears therefrom that said guardian, while so acting, expended, in the support and education of his wards, the sum of $500 each, or a total of $1,000.

"The report alleges that the only property belonging to said minors was an interest in the estate of their father, Joseph K. Read, said estate, during the lifetime of the latter, consisting of property which was owned in common and as partnership assets by said Joseph K. Read and his brother, Robert Read; that Catherine Read, widow of Joseph Read, in the year 1856 (three years prior to the intermarriage of said Catherine and said Ash), was duly appointed administratrix of the estate of said Joseph, duly qualified as such, and letters of administration regularly issued to her; that said estate was never settled or closed, and distribution thereof never made, and that said Ash, as guardian, 'did not, and never has received or had, nor did there come into his possession by distribution, or otherwise, any portion of the said estate of said Joseph K. Read'; that no administration was ever had upon the estate of said Catherine, and that 'no property, money, or estate was ever received or came into the possession of said petitioner (Ash) as such guardian belonging to the said estate of said Catherine Ash, aforesaid.' The report then states that on or about the 9th day of August, 1866, after the plaintiff, Miller, reached the age of majority, Ash executed and delivered to her a quitclaim deed of all interest in the estate of both her mother and father, and of all his interest in any property in the city of Marysville, where, the report alleges, all the property owned by said Joseph K. and Catherine Read Ash was situated during their lifetimes, and that said Miller, 'on reaching the age of majority, took possession of and received all the estate and property belonging to said Catherine Ash, and thereafter sold and disposed of all the same in her own name and right'; that, 'after the arrival of said wards at the age of majority, no account or settlement was ever had, for the reason that it was fully understood and agreed by each of said wards that no property belonging to said wards had ever come to the hands of said guardian, and that said wards were indebted to said petitioner as aforesaid.' The report states that Robert Read, after said wards had reached legal age, conveyed to them all interest of their said father in the property held in common by him and said Robert; that, although said wards resided, up to the time of said Robert's death, near and within the jurisdiction of the court in which the administration of the guardianship proceedings was pending, they never asked for or demanded or claimed any 'further settlement or accounting, but said guardianship was during all of said times since said wards reached the age of majority deemed by them and considered by all parties as fully settled and closed without further account.'

"The demurrer, among other grounds of objection to the complaint, introduces the statute of limitations (sections 339, subd. 1, 338, subds. 4, 443, Code Civ. Proc.) and laches in bar of plaintiff's cause of action.

"It is also urged through the demurrer that the plaintiffs, Roy R. Read, Leonard B. Read, and Egbert B. Read, are not proper parties to this action, for the reason that said action is for money alleged to be due the estate of Robert Read, the father of said plaintiffs, and it appearing from the complaint that said Robert Read is dead, that his legal representatives alone can sue, and not the heirs. Grattan v. Wiggins, 23 Cal. 16; Robertson v. Burrell, 110 Cal. 574, 42 Pac. 1086, and cases therein cited. This contention must be sustained. In the last-mentioned case it is said: 'Plaintiffs are not the proper parties to maintain this action, and they have no legal capacity to do so. While, in a sense, they are beneficiaries of the trust which resulted by the death of their father, the fulfillment of which was imposed upon the surviving partner, yet there were certain intermediate steps and processes necessary to be taken and followed before their beneficial interests could be reduced to possession; * * * for there was another trust intervening in time and right and duties between the close of the surviving partners' trust and their enjoyment of its fruits. It is true that as heirs of their father the title to his property, real or personal, vested in them, but their title did not carry with it the right of immediate enjoyment. The rights and duties of the administrator of their father's estate interposed and intervened. * * * The heirs' title is subject to the performance by the administrator of all his trusts, and they finally come into the possession and enjoyment of only such portion of the estate as may remain after the execution of them by the administrator.'

"We have given careful attention to all the authorities cited by the respondents in which the statute of limitations and laches constitute the principal theme of discussion and the pivotal questions, and, while those cases aptly and clearly illustrate the application of the principles governing the determination of the questions involved in such defenses, yet they are of but little aid, except in a general way, in the solution of the same propositions here, since these must be measured by circumstances materially different from those found in the cases referred to. It is obvious that the courts, in dealing with a particular set of facts and circumstances in cases in which those questions arise, can do little more than to so apply the principles governing such determination as to reach a satisfactory conclusion in the particular case under review. In other words, the solution of the questions arising by reason of the plea of the statute of limitations or of laches, in cases where a long period of time has intervened between the origin of the cause and the institution of an action thereon, must necessarily hinge and depend upon the circumstances peculiar to each particular case, and each case in which such questions are appropriately raised, and which constitute the principal subject of discussion therein, becomes, therefore, largely a law unto itself. Those general rules, however, as suggested, enable the courts to successfully test the circumstances of each case and thus arrive at a final decision in conformity either with the demands of actual justice, on the one hand, or with the policy of all rational systems of jurisprudence, on the other; for it may be and no doubt is true that in many cases real justice may be thwarted by upholding the defense of the statute or of laches, in which case the principle intervenes that the revivification of stale demands, difficult to prove, and, if proved at all, by evidence of a doubtful and dubious character and origin, should not be encouraged or entertained for the sake of the peace and repose of society. In other words, the lapse of a few years may be sufficient to defeat the action in one case, while a longer period may be held requisite in another, dependent upon the circumstances, such as the situation of the parties, the extent of their knowledge, means of information, whether the case is one of constructive or actual fraud, and the like. Hammond v. Hopkins, 143 U. S. 250, 12 Sup. Ct. 418, 36 L. Ed. 134, and cases therein cited. In that case a distinction is also made in the matter of the application of the doctrine of laches between cases of constructive fraud and those where actual fraud is charged, and it is there declared that greater liberality in respect of lapse of time in the latter class is allowed than in the former. Here it is to be remembered actual malversation is imputed and directly charged in the complaint. It is one of the settled general rules in this class of cases that if the party seeking to avoid the operation of the statute of limitations or to excuse the delay which would, in the absence of a sufficient excuse, amount to such laches as would defeat his right of action, possessed information or knowledge of extraneous facts and circumstances, or, in other words, of matters in pais, which, although not directly tending to show the existence of a prior conflicting right, are sufficient to put him, as a prudent person, upon inquiry, he is then charged with constructive notice of all that he might have learned by an inquiry prosecuted with reasonable diligence. Pom. Eq. Juris., § 610. It is said by the same author that from the existence of such circumstances 'the legal presumption arises that he has obtained information of what he might thus have learned. In every such case the first question is whether the facts of which the party has information are sufficient to put him upon an inquiry, so as to raise the prima facie presumption. The further question is then presented, whether he has made a due inquiry without discovering the truth, so as to overcome the presumption and defeat the notice, or whether he has so neglected this duty that the presumption remains unshaken and the notice effective.'

"The important question, arising in this case upon the facts as stated in the complaint, and upon the solution of which the decision must depend, is that of laches, and may thus be stated: Were there such extraneous facts and circumstances in existence during their minority or within a reasonable time thereafter connected with the guardianship transaction as would put the plaintiff Miller and her brother, as prudent persons, upon any inquiry as to the specific claim against their guardian founded upon the bequest to them contemplated by Reynolds in his first will, so that their failure to inquire must be held to be a fatal neglect? We may as well say in limine that we think the complaint presents sufficient facts to warrant an investigation upon a trial of the issues of fact, of the transaction complained of, so far as it interests the plaintiff, Mrs. Miller; for we are unable to perceive anything in the circumstances, as they are disclosed by the complaint, from which we would be justified in declaring that the wards were in possession of sufficient information as to the particular claim in dispute to put them, as prudent persons upon inquiry concerning said claim. The allegation that the wards without success repeatedly importuned their guardian to render to them or to the court an account of his administration of their estates shows that they had in mind the property which they supposed belonged to them as heirs of their parents. It does not appear when the guardian was so importuned — whether before or after the wards reached their majority. But if it may be argued from the fact that they so requested an accounting that they must have suspected an intention of wrongdoing on the part of the guardian in the matter of the management of their estates, or believed that he was fraudulently seeking to withhold or conceal any portion thereof from them, and it was, therefore, their duty to have then put on foot and prosecuted a proper inquiry looking to a determination of the proposition, by which, in all likelihood, they could have developed the full extent of his remissness or fraud, thus bringing to light the fact of the receipt by him of the money in question, the answer is, we think, in the declaration of the complaint that the guardian had always and repeatedly assured his wards that no property belonging to them ever came into his possession, and that they reposed full confidence and belief in his representations; that the wards had neither a belief nor even a suspicion, nor any reason upon which to found such a belief or a suspicion, that they were to be or were made beneficiaries under the first or any will of Reynolds.

"In the foregoing announcement of our conclusion, we are not forgetful of the rule, so often applied in cases of this character, where relief has been denied because of long delay in asking it, and where circumstances, arising by reason of such delay, have intervened or appeared to clearly warrant the refusal by the courts to aid the derelict party, that 'nothing can call a court of chancery into activity but conscience, good faith, and reasonable diligence, and that where these are wanting the court is passive, and does nothing.' Chief Justice Taney, in McKnight v. Taylor, 1 How. 161, 11 L. Ed. 86, citing Piatt v. Vattier, 9 Pet. 416, 9 L. Ed. 173. See, also, Gress' Appeal, 14 Pa. 463; Appeal of Catholic St. Vincent's Orphans' Asylum, 115 Pa. 157, 10 Atl. 37. The decision of the case here, it may frankly be admitted, has not been altogether exempt from difficulty. The courts hesitate, upon considerations of a necessary and well-founded policy, to entertain and thus undertake to settle litigation which, in the natural order of events, should have been settled so long before its resuscitation that it had faded entirely from the memory of those even directly interested in it. And, as we have seen, it is only where special circumstances are made to appear, calling for the relief demanded, that the courts are justified in excusing a long period of delay in asserting the right and so proceed to adjust the differences between the contending parties. We think the complaint here shows circumstances which would render the denial of relief a denial of justice, assuming, of course, for the purposes of this decision that the facts as pleaded can be proved by the degree of proof required in such cases. One of the significant and controlling circumstances impelling our conclusion that the judgment should be reversed, so far as the plaintiff Miller is affected, is the fact that Ash never filed a final account or asked to be discharged of his trust until a few months prior to his death—as late as March, 1906—when, for the first time he filed his final account, appraisement and a report of his stewardship as guardian, and that in said final account, appraisement, and report is not to be found a single word referring to the money which, according to the receipt executed and filed by him in the matter of the estate of Reynolds, came into his hands as guardian of the estates of his wards. While in most of the cases like the present one, where the aid of the courts is asked after the lapse of many years after the right has accrued, the fact that such aid is demanded for the first time after the death of the party charged with the default, when explanation from his own lips is impossible, furnishes the foundation for a forceful and sometimes persuasive argument under certain circumstances, yet in this case the answer to such argument may be suggested in the query: Why did not Ash avail himself of the opportunity of which he was himself the voluntary author—an opportunity which he took occasion to create at a time when life to him (for presumably he was then a man well advanced in years) had run its course, or at best its end not then far distant—to explain so important a transaction appertaining to the trust with which he had been invested? Having thus been silent when he could have spoken, had he desired to, upon a matter of such magnitude connected with his trust, the guardian, by his own unpardonable delay, occasioned, it appears from the complaint, through the want of good faith in dealing with his wards as to their rights, has answered the claim that great inconvenience and perhaps injustice may be caused by the maintenance of an action instituted after the death of the only person who could offer any explanation of the disposition of the money concerned in this dispute.

"The complaint, it has been seen, declares that the wards were in no way related to Reynolds, and that, therefore, they never expected any bounty or benefaction from him or his estate; that Ash always and persistently told them that no property belonging to them ever came into his possession as their guardian other than that which belonged to them as heirs of their parents. They had a right to and most naturally under the circumstances they would repose full confidence in him and his representations. He not only stood as to them in locos parentis by reason of his rôle as guardian, but he was, it must be kept in mind, their stepfather, having been married to their mother when they were in fact mere infants. The complaint does not disclose any extraneous circumstances concerning the Reynolds bequest which would have put the wards, as prudent persons, upon their inquiry, either before or after they attained their majority, unless it can be said that, because the transaction in the Reynolds matter constituted a public court record, the wards should have known of it. But the complaint asserts that they as a matter of fact did not know anything about the bequest, nor the compromise thereof effected by the guardian, and it is irresistibly inferable from the fact of the institution of this suit so late as the year 1907 that the complaint states the truth, for is it reasonable to suppose that the wards, knowing or even suspecting that their guardian had in his possession so large a sum of money to which they were entitled, would have neglected to assert their just claim thereto, or remain inert and supine as to so important a right so as to permit it to vanish through the erosive influence of long delay? There is in our judgment no escape from the conclusion that the plaintiff Miller knew nothing and had no reason to know anything of the money received by Ash for herself and brother from the estate of Reynolds until about the time Ash filed his final account and report in 1906.

"By whom has the memory of this ancient transaction been first revived, and why resuscitated by the guardian himself at a time so remote from that at which it should have been finally and conclusively settled? It was manifestly Ash's own inexcusable neglect and delay which brought back to life a transaction which, if properly attended to, should have been long ago, to use the language of one of the cited cases, 'confirmed and laid aside with past things, to be forever forgotten.' But for at least 35 years he permitted himself to remain undischarged of his trust, and, so far as the complaint shows, passed to the beyond without having been so discharged, and filing no final account and making no final report until, as we have seen, only a few months prior to his death, and then, as stated, giving absolutely no information and attempting no explanation of what disposition had been made of the large amount of money which he is shown to have received for his wards during his administration of their estates. Filed with and presented to the court, as they were just before his death, and when he must have been a very old man, the final account, appraisement, and report of this guardian's administration of the duties of his trust may almost be regarded in the light of a statement in extremis relating thereto, and his silence then upon the question of the disposition of the money involved in this controversy can certainly well be construed as an admission that he could not explain the transaction consistently with the principles of good conscience, good faith, and fair dealing in the discharge of his fiduciary duties. If he could, why did he not explain it? Can there be the slightest doubt, from the averments of the complaint, that he received the money? We see no reason why, in equity, good conscience, and justice, so far as the complaint discovers the facts, the plaintiff Miller should not be given the relief for which she asks, and, if the respondents find themselves unfortunately in a position in which they may be unable to make a successful defense to the merits at the trial, the misfortune is only the consequence of the default, neglect and want of good faith of their testator in the transactions leading to this litigation.

"The question involving the alleged bar of the statute of limitations calls for no extended notice. The complaint asserts that the discovery of the right declared upon was made in the year 1906, and this allegation under the demurrer must be taken as true, when supported by other sufficient statement of facts, as we have held and do hold is the case. It therefore follows that this action is not affected by the statute. The contention that the guardian repudiated his trust when he declared to the wards many years ago that he had no property in his possession as such guardian belonging to them is without merit. We have seen that, when the wards demanded a settlement or an accounting of the guardianship assets, they had reference to property which they believed had descended to or been acquired by them as heirs of their father and mother. We cannot understand how the intentional, or, as the complaint charges, the fraudulent, concealment from the wards by the guardian of money or property of which they had no knowledge and which they had no reason to know belonged to them could be treated as a repudiation of the trust in the sense that the wards would thereby be barred by the statute from maintaining an action for the same within the statutory period after the discovery that the guardian did receive money for them of which until then they had no knowledge and of the fact that he had fraudulently withheld it from them. The defense of the statute of limitations or of laches is, of course, as legitimate and as impregnable a defense as may be set up, when urged under appropriate circumstances, and should unhesitatingly be sustained where it clearly appears that a party has, through his own supineness or listlessness, and not through any act of fraud of the party against whom the right subsists, permits either the statute to run so as to foreclose his rights to assert and maintain his claim in the courts, or has neglected to prosecute his right for so long a period as to indicate an abandonment thereof and circumstances have in the meantime arisen to bring his negligence clearly within the doctrine of laches. But neither the statute limiting the time within which actions may be brought, nor the equitable doctrine of laches, has been ingrafted into our system of laws for the sole benefit and special purposes of the individual who is privileged to invoke them. The probability of doing injustice in cases long delayed, or, perhaps, to speak more accurately, of not being able under such circumstances to do exact justice, demands the application of those principles in all proper cases for the peace and repose of society. This, and not, as may by some be supposed, that the discharge of an honest debt or an honest obligation may thus be avoided, is the paramount idea underlying those rules; for the resurrection of rights of action, long deceased, or of stale demands, decomposed from age, so far as the availability of proof sustaining them is concerned, and their exploitation in the courts tends to bring about disturbances, which it is the purpose of all law to prevent. Hence, though a defendant in such a case may suffer some discomfiture or inconvenience from the existence and proof of circumstances which will arrest the operation of the statute or destroy all ground for the successful interposition of the defense of laches, yet it cannot be said to result in a rude shock to society, more vitally concerned than the individual debtor, for the courts to entertain an action on a claim, however old it may be, where, as we think is clearly shown here, the pleaded or proven facts display circumstances showing that the long delay in prosecuting the same has been due solely to the neglect and default of and concealment, ex industria, of the naked truth, by the party upon whom the law has placed and who himself voluntarily sought the responsibility of discharging the duties of a sacred trust.

"It is contended that the plaintiffs should have first brought an action for an accounting, and that the present action cannot be maintained because such a proceeding was not previously instituted and prosecuted to a final determination of the state of the account between the guardian and his wards. In certain cases involving property in the possession of a guardian or an executor as such, an action for an accounting is held to be a necessary prerequisite to the maintenance of an action at law or in equity to recover such property; but the circumstances of this case, we feel clear, bring it within certain exceptions to that rule. The death of the guardian before action was taken in this case precluded any hope of any practical advantage or benefit to be gained by either side through an accounting. It was the duty of the guardian, after the wards had attained their majority, to present his final account to the probate court for settlement. He could have been compelled to do so and required to render a full and detailed account of all his dealings with the property of his wards. He alone possessed the information concerning the estates of his wards necessary to exhibit a correct account thereof. But, the guardian having died before making a settlement, and long after the wards reached their majority, his executors have no authority to present his account to a court of probate. In re Allgier et al., 65 Cal. 228, 3 Pac. 849. Such want of authority is due to the fact that there is no law which gives the executors the right and the power to present the guardian's account to the court, but why the Legislature has not given such authority to the executors is undoubtedly for the very obvious reason that such executors are possessed of no such information relative to the administration of the guardianship affairs as would insure the presentation of a correct or proper account. Hence it follows, by the most cogent analogy, that in a case like this, where the suit to establish a claim existing against a guardian and in favor of his wards is commenced after the death of such guardian, an action for an accounting against his executors antecedently to a suit to recover upon the claim or establishing a trust in favor of the claimant in relation thereto would not only be unnecessary from a legal point of view, but would be altogether barren of satisfactory results.

"Moreover, the property claimed here is in the form of money. It is therefore impossible that the 'identical trust property or its product in a new form can be traced into the estate and so into the possession of the representatives.' Lathrop v. Bampton, 31 Cal. 29, 89 Am. Dec. 141; McGrath v. Carroll, 110 Cal. 83, 42 Pac. 466. It is further said in the case last cited that 'a beneficiary who is unable to do this must rely on the personal liability of the trustee, and so relying has only a claim against the estate which must be duly presented for allowance. But such a claim is still based upon the trust, whatever that may have been. It has its origin in the trust, and depends for its validity upon the legality and sufficiency of the trust. The fact that the beneficiary is obliged to present his claim and look, like a general creditor to the assets of the estate for payment does not change the nature of his demand, which is still one for property due under a trust accounting. It merely changed his remedy.' And so it is true in the case at bar. The claim here had its inception in the trust established by the creation of the guardianship, and must be sustained, if at all, upon the legality and sufficiency of such trust. The fact that the plaintiffs obeyed the law requiring all claims against the estates of deceased persons to be presented for allowance to the executor or administrator before action thereon can be maintained in no way affects their right, even though it changes their remedy.

"We have, as before stated, examined with minuteness all the authorities cited by both sides in this action, and, after a full consideration of the facts as presented by the complaint have, as already stated and as is obvious, concluded that, as to the plaintiff Miller, a cause of action is stated.

"Upon the questions of laches and the statute of limitation, I have consulted the following authorities in addition to those already noted: Bangs v. Loveridge (C. C.) 60 Fed. 963; Wood v. Carpenter, 101 U. S. 140, 25 L. Ed. 807; Stearns v. Page, 7 How. 819, 12 L. Ed. 928; Moore v. Greene et al., 19 How. 69–72, 15 L. Ed. 533; Martin, Assignee, etc., v. Smith, 1 Dill. 85, Fed. Cas. No. 9,164; Kennedy v. Greene, 3 Myl. & K. 722; McKown v. Whitmore, 31 Me. 448; Rouse v. Southard, 39 Me. 404; Boyd v. Boyd, 27 Ind. 429; Foster v. Mansfield, Coldwater, etc., Railroad, 146 U. S. 99, 13 Sup. Ct. 28, 36 L. Ed. 899; Bell v. Hudson, 73 Cal. 288, 14 Pac. 791, 2 Am. St. Rep. 791; Porter v. Fillebrown, 119 Cal. 236, 51 Pac. 322; Butler v. Hyland, 89 Cal. 582, 26 Pac. 1108; Irwin v. Holbrook, 26 Wash. 89, 66 Pac. 118; Hovey v. Bradbury, 112 Cal. 626, 44 Pac. 1077; Pomeroy, Eq. Juris. §§ 891, 895, 896, 886; Lataillade v. Orena, 91 Cal. 576, 27 Pac. 924, 25 Am. St. Rep. 219; Code Civ. Proc. § 338, subd. 4; Pomeroy's Eq. Juris. §§ 1080–1083; Faylor v. Faylor, 136 Cal. 96, 68 Pac. 482; Hearst v. Pujol, 44 Cal. 235; Luco v. De Toro, 91 Cal. 418, 27 Pac. 1082; Bank v. Enos, 135 Cal. 169, 67 Pac. 52; Brown v. Campbell, 100 Cal. 645, 35 Pac. 433, 38 Am. St. Rep. 314, and Barker v. Hurley, 132 Cal. 28, 63 Pac. 1071, 64 Pac. 480; Seculovich v. Morton, 101 Cal. 673, 36 Pac. 387, 40 Am. St. Rep. 106."

In accordance with the views herein expressed, the judgment as to the plaintiffs, Roy R. Read, Leonard B. Read, and Egbert B. Read, is affirmed, and as to the plaintiff Elizabeth Miller the judgment is reversed.

We concur: HENSHAW, J.; LORIGAN, J.; SHAW, J.

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11 Cal. App. 511

Ex parte SAN CHUNG. (Cr. 106.)

(Court of Appeal, Third District, California. Oct. 18, 1909.)

1. Municipal Corporations (§ 111*)—Ordinances—Validity.

When a municipal ordinance is attacked as unconstitutional, it is not sufficient that the court may entertain a doubt as to whether the legislative body had exceeded its constitutional authority, but it must clearly appear that some fundamental right has been invaded and a personal privilege unfairly impaired or destroyed before the ordinance can be declared invalid.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 245–247; Dec. Dig. § 111.*]

2. Municipal Corporations (§ 594*) — Police Power—Validity of Ordinances.

The police power of a city is of very extensive application, and, when invoked, it will be presumed that the municipal legislative body has in enacting an ordinance exercised it with a rational and conscientious regard for the rights of the individual and of the community.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1316; Dec. Dig. § 594.*]

3. Constitutional Law (§ 70*) — Police Power — Improper Extension — Judicial Supervision.

While in general it is for the Legislature to determine what laws and regulations are needed for the public health, safety, and comfort, statutes attempted to be sustained as an exercise of police power must have some relation to these ends, and, if under the guise of police regulation, an attempt is made to violate personal or property rights, they will be overthrown by the courts.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 131; Dec. Dig. § 70.*]

4. Constitutional Law (§ 240*)—Equal Protection—Laundry Regulations—Discrimination.

Sacramento City Ordinance No. 824, § 3, prohibiting public laundries within the limits of the city in any public hall, store, restaurant, lodging house, or saloon, frequented or occupied by many persons, was applicable to all laundries within the city, and did not discriminate against petitioner, a Chinese laundryman, either as an individual or as a member of the Mongolian race.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 688–699; Dec. Dig. § 240.*]

5. Municipal Corporations (§ 597*)—Laundry Locations—Regulation—Police Power.

Sacramento City Ordinance No. 824, § 3, prohibiting the maintenance or operation of a public laundry in any building used as a hall, store, restaurant, lodging house, or saloon frequented or occupied by many persons or by persons likely to spread infectious or contagious diseases, or where it is frequented or occupied for any immoral or unlawful purpose, was a valid exercise of police power in the regulation of public health.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1325; Dec. Dig. § 597.*]

Petition by San Chung for a writ of habeas corpus. Writ denied. Petitioner remanded.

Hinkson & Elliott, for appellant. R. Platnauer, for respondent.

BURNETT, J. Petitioner is held in custody by virtue of a commitment issued out of the justice court of the city of Sacramento based upon a trial and conviction for the violation of section 3 of Ordinance No. 824 of said city, providing that "it shall be unlawful for any person, firm, corporation, or association of persons to establish, maintain, operate or carry on a public laundry or washhouse within the corporate limits of the city of Sacramento in any building, or any portion thereof, or in any annex or outhouse thereto, that shall be occupied or used either directly or indirectly as a public hall, store, restaurant, lodging house, or saloon, or that is frequented or occupied by many persons, or that is occupied as a stopping place by transient guests, or that is frequented by persons likely to spread infectious, contagious or loathsome diseases, or that is occupied or used or frequented directly or indirectly for any immoral or unlawful purpose." The particular portion of said section of the ordinance violated by the petitioner is shown by the allegation of the complaint that: "The defendant did then and there willfully and unlawfully operate and carry on a public laundry in that certain building known as number 208 K street in said city of Sacramento then and there occupied and used in part as a public store," and it is therefore apparent that the validity of the ordinance only as it relates to this inhibition is involved in the proceeding here. The grounds of attack similar to those usually urged against police and sanitary regulations of kindred character are that the provision is unreasonable, discriminatory, oppressive, in restraint of trade, and generally violative of the constitutional right of petitioner to pursue a useful occupation without unlawful interference or unnecessary restraint.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The general principles involved in the determination of the controversy are well established, and, as far as necessary, may be stated as follows: In the first place, it is not sufficient that the court may entertain a doubt as to whether the legislative body has exceeded the limits of its constitutional authority, but it must clearly appear that some fundamental right of the individual has been invaded and a personal privilege unfairly impaired or destroyed before an ordinance duly enacted can be declared invalid. Again, what is known as the police power is one of very extensive application involving many variant circumstances, and it is incapable of exact definition, and depends for its just and intelligent exercise so largely upon knowledge of local conditions that a very wide discretion must be conceded to the legislative body clothed with the presumption, as it is, that it will be guided by a rational and conscientious regard for the rights of the individual as well as for the interests of the community. In determining the validity of the ordinance, the courts must give due consideration to all the circumstances of the particular city as far as disclosed, the objects sought to be accomplished, and the necessity which exists for the measure. But it is equally true that, while generally it is for the Legislature to determine what laws and regulations are needed to protect the public health and to secure public safety and comfort, yet they must have some relation to these ends, and if, under the guise of police regulation, attempt is made to violate personal or property rights, the courts will not hesitate to overthrow such a measure.

In Ex parte Jacobs, 98 N. Y. 98, 50 Am. Rep. 636, it is said the "police power is very broad and comprehensive, and is exercised to promote the health, comfort, safety, and welfare of society. * * * Under it, the conduct of an individual and the use of property may be regulated so as to interfere, to some extent with the freedom of the one and the enjoyment of the other. * * * The limit of the power cannot be accurately defined, and the courts have not been able or willing definitely to circumscribe it. But the power, however broad and extensive, is not above the Constitution. When it speaks, its voice must be heeded. It furnishes the supreme law, the guide for the conduct of legislators, judges, and private persons, and, so far as it imposes restraints, the police power must be exercised in subordination thereto." In Ex parte Sing Lee, 96 Cal. 356, 31 Pac. 246 (24 L. R. A. 195, 31 Am. St. Rep. 218), it is declared: "It is provided by section 11 of article 11 of the Constitution of this state that 'any county, city, town, or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.' The power conferred upon cities and towns by the section just quoted is undoubtedly a very broad and comprehensive one, and would sustain the enactment of any ordinance having a reasonable tendency to promote the health, the comfort, safety, and welfare of the inhabitants of the municipality and which would not be in conflict with some general law of the state." In Ex parte Whitwell, 98 Cal. 78, 32 Pac. 872 (19 L. R. A. 727, 35 Am. St. Rep. 152), it is said: "But it is not true that when this power is exerted for the purpose of regulating a business or occupation, which in itself is recognized as innocent and useful to the community, the Legislature is the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue such business or profession. * * * This principle is stated very forcibly in the case of Mugler v. Kansas, 123 U. S. 661, 8 Sup. Ct. 297 (31 L. Ed. 205) in the following language: 'The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If therefore a statute purporting to have been enacted to protect the public health, the public morals or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution. * * * This power of the courts, however, to declare invalid what they may deem an unreasonable legislative regulation of a business or occupation which the citizen has the constitutional right to follow, although undoubted, must from the nature of the power be exercised with the utmost caution, and only when it is clear that the ordinance or law so declared void passes entirely beyond the limits which bound the police power, and infringes upon rights secured by the fundamental law.'"

In Barbier v. Connolly, 113 U. S. 31, 5 Sup. Ct. 359, 28 L. Ed. 923, it is said by the Supreme Court of the United States, through Mr. Justice Field, that "the fourteenth amendment in declaring that no state 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition; and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations, to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though in many respects necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions." In the light of these general principles can it be said that the particular portion of the ordinance violated by petitioner is beyond the legitimate scope of the police power, or that it unwarrantably disturbs petitioner in the enjoyment of his constitutional privileges?

It certainly cannot be maintained that it discriminates against him as an individual or as a member of the Mongolian race. All persons, without regard to race or condition, are subject to its penalties if they violate its provisions. There is nothing in the measure to show that it was designed to impose unequal or unnecessary restrictions upon any particular class engaged in the laundry business. We must judge of the purpose of the ordinance by what appears upon its face. Therefore it must be held that it lays the same burdens upon all engaged in the same business under the same circumstances and one of the main grounds of opposition to it is therefore seen to be without merit. It does manifestly place restrictions upon the business of petitioner that are not imposed upon other occupations. And there is no question that his business is a common, ordinary, and useful occupation that should be hampered as little as possible. It is true, as said by Judge Sawyer, in Ex parte Tie Loy (C. C.) 26 Fed. 613, that "the right to labor in this or any honest, necessary, and in itself harmless calling, where it can be the most conveniently, advantageously, and profitably carried on without injury to others, is one of the highest privileges and immunities secured by the Constitution to every American citizen and to every person residing within its protection." There is no contention here that the business is prima facie a nuisance, like a slaughterhouse or a house for the storage of gunpowder or dynamite, but the ordinance is sought to be justified upon sanitary considerations. It is insisted that it is not a harmless calling, that the city council determined upon proper evidence —and, indeed, that it is a matter of common knowledge—that the conditions under which laundries are operated are favorable for the propagation of disease, that the soiled garments received and handled in such places are liable to communicate deleterious germs to the circumambient atmosphere, giving rise to danger of infection to persons coming into close proximity to these surroundings. A due regard for the health of the community and a commendable desire to destroy or minimize as far as possible the sources of contagion have led, it is urged, to this regulation of a business from which the danger suggested is inseparable. If the danger really exists and is imminent, no one would have the hardihood to deny that it is not only the privilege but the duty of the council to obviate it if possible. Within the proper exercise of the police power the operation of public laundries within the city limits could be entirely prohibited if such a measure could reasonably be said to promote the public health. But here no prohibition is sought, but only a regulation which we must assume the evidence before the council demonstrated to be in furtherance of a beneficent design to contribute to the welfare of the community. Under such circumstances, if they exist, the abstract right of the individual to pursue any lawful occupation where it can be the most conveniently and advantageously carried on must yield to the superior right of the public to be protected from the menace of disease. Such legislation, indeed, is one of the beneficent products of modern advancement in sanitation. It is sanctioned by the more enlightened public sentiment as to the duty of guarding the public health, and it reflects the principle of sound, scientific hygiene. It is on the same footing as legislation requiring streets to be kept clean, garbage properly removed, and air pollutions of all kinds prevented, whether they arise from smoke, street dust, noxious gases, or other sources. Formerly such legislation would have been regarded as an unwarranted encroachment upon the rights of the individual, but, in view of the progress of the medical profession, the better understanding of the nature of disease, and its transmission and the broader conception of the duty of the municipality in regard to the preservation and protection of the public health characteristic of the present age, it seems upon its face to embody a sensible and reasonable restriction bearing a direct and efficacious relation to the accomplishment of a legitimate purpose of police and sanitary legislation. At least, in the absence of any evidence to that effect, we cannot say that the public health is not thereby promoted, or that the method adopted is unreasonable and unnecessarily oppressive. The fact is that, as far as the convenience of the petitioner is concerned, we have no right to assume that he may not secure in the same neighborhood a building for the operation of his business free from the statutory objections, having the same advantages and at practically the same expense to himself. But be that as it may, under the showing made, it cannot be held that he has any just cause for complaint.

We find that similar questions have been considered in various decisions of the higher courts, to some of which we may with propriety refer. In Barbier v. Connolly, supra, it seems that the board of supervisors of the city and county of San Francisco passed an ordinance reciting that the indiscriminate establishment of public laundries and washhouses, where clothes and other articles were cleansed for hire, endangered the public health and the public safety, etc., and ordaining, among other things, that "no person owning or employed in a public laundry or a public washhouse within the prescribed limits shall wash or iron clothes between the hours of 10 in the evening and 6 in the morning or upon any portion of Sunday." In holding that this provision was not in contravention of the first section of the fourteenth amendment to the Constitution of the United States, it was declared that "the provision is purely a police regulation within the competency of any municipality possessed of the ordinary powers belonging to such bodies. It may be a necessary measure of precaution in a city composed largely of wooden buildings, like San Francisco, that occupations in which fires are constantly required, should cease after certain hours at night until the following morning; and of the necessity of such regulations the municipal bodies are the exclusive judges; at least, any correction of their action in such matters can come only from state legislation or state tribunals. * * * There is no invidious discrimination against any one within the prescribed limits by such regulations. There is none in the regulation under consideration. All persons engaged in the same business within the prescribed limits are treated alike, are subject to the same restrictions, and are entitled to the same privileges under similar conditions." The same ordinance was before the said court in Soon Hing v. Crowley, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145, and it is there declared that: "However broad the right of every one to follow such calling and employ his time as he may judge most conducive to his interests, it must be exercised subject to such general rules as are adopted by society for the common welfare. All sorts of restrictions are imposed upon the actions of men, notwithstanding the liberty that is guaranteed to each. It is liberty regulated by just and impartial laws. Parties, for example, are free to make any contracts they choose for a lawful purpose, but society says what contracts shall be in writing and what may be verbally made, and on what days they may be executed and how long they may be enforced if their terms are not complied with. So, too, with the hours of labor. On few subjects has there been more regulation. How many hours shall constitute a day's work in the absence of contract, at what time shops in our cities shall close at night, are constant subjects of legislation. Laws setting aside Sunday as a day of rest are upheld not from any right of the government to legislate for the promotion of religious observances, but from the right to protect all persons from the physical and moral detriment which comes from uninterrupted labor. Such laws have always been deemed beneficent and merciful laws, especially to the poor and dependent, to the laborers in our factories and workshops and in the heated rooms of our cities; and their validity has been sustained by the highest courts of the states." In the Matter of Yick Wo, 68 Cal. 299, 9 Pac. 142, 58 Am. Rep. 12, it is said: "Clothes washing is certainly not opposed to good morals, or subversive of public order or decency, but, when conducted in given localities, it may be highly dangerous to the public safety. Of this fact the supervisors are made the judges, and, having taken action in the premises, we do not find that they have prohibited the establishment of laundries but that they have as they might well do regulated the places at which they should be established and the character of the buildings in which they are to be maintained." The regulation therein considered was much more drastic than the one involved here, but it was held to be valid as within the police power of the municipality.

In Ex parte Lacey, 108 Cal. 326, 41 Pac. 411, 38 L. R. A. 640, 49 Am. St. Rep. 93, is an interesting discussion of the principles involved herein. In Dillon on Municipal Corporations, § 369, it is said: "Our municipal corporations are usually invested with express power to preserve the health and safety of the inhabitants." Here, as we have seen, our Constitution (article 11, § 11) expressly confers the power upon the municipalities, and, in addition thereto, we find in the charter of the city of Sacramento authority granted to the board of trustees (article 2, § 25, subd. 9 [St. 1893, p. 552]), "to regulate the maintenance of acid works, slaughterhouses, washhouses, laundries, tanneries, offensive trades, and all other manufactories, works and business of every description that may endanger the public safety, health or comfort and to restrict the prosecution thereof to such fixed limits as may seem proper, or exclude such works and business from the city." Dillon proceeds to say, in section 379, that: "Much must necessarily be left to the discretion of the municipal authorities, and their acts will not be judicially interfered with unless they are manifestly unreasonable and oppressive or unwarrantably invade private rights or clearly transcend the powers granted to them. * * * It is not unusual to invest the municipal council with special authority in respect of particular avocations, trades, acts, omissions, and structures, with a view to conserve the public health and safety, of which many examples have been given in the notes to this chapter. The terms in which such authority is conferred measure its scope, but, in view of the end for which it is given, it is not subjected to a hostile or even a narrow construction."

The principal cases upon which petitioner relies to support his contention are Ex parte Jacobs, supra; Ex parte Sing Lee, supra; Ex parte Whitwell, supra; The Stockton Laundry Case (C. C.) 26 Fed. 611; In re Sam Kee (C. C.) 31 Fed. 680. The ordinance condemned in the Jacobs Case made it a misdemeanor to manufacture cigars in cities of more than 500,000 inhabitants in any tenement house occupied by more than three families, except on the first floor of houses on which there is a store for the sale of cigars and tobacco. It was held to be unconstitutional because it arbitrarily interfered with personal liberty and private property without due process of law. The only attempted justification for it that it was a health law was declared to be utterly without support. The court said: "It has never been said, so far as we can learn, and it was not affirmed even in the argument before us, that its preparation and manufacture into cigars were dangerous to the public health. We are not aware, and are not able to learn, that tobacco is even injurious to the health of those who deal in it, or are engaged in its production or manufacture. We certainly know enough about it to be sure that its manipulation in one room can produce no harm to the health of the occupants of other rooms in the same house. * * * It is plain that this is not a health law and that it has no relation whatever to the public health." The decision in Ex parte Sing Lee was put upon a similar ground. The ordinance there "prohibited the carrying on of a public laundry within the corporate limits of the town except in certain specified blocks thereof, without a written permit from the board of trustees, and provided that no permit should be granted unless the applicant should first obtain the written consent of a majority of the real property owners within the block in which the business was to be carried on and also of the four blocks immediately surrounding such block." This was held to be unreasonable and an unauthorized interference with the inalienable right to engage in a lawful occupation; the court saying that the ordinance had "no tendency to promote the public health, or in any way to secure the public comfort or safety. The sections of the ordinance above quoted bear no kind of relation to such objects, and do not attempt to regulate the business mentioned with the view of accomplishing such ends, but they commit the right to carry on such business at all, in all but two blocks of the town, to the unrestricted will and caprice of a majority of the real property owners within the block upon which it is proposed to establish such laundry and of the four blocks immediately surrounding such block." In Ex parte Whitwell, 98 Cal. 73, 32 Pac. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152, the ordinance required that the building or buildings designed and used as a hospital or asylum for the care and treatment of the insane, persons of unsound mind, inebriates, or those suffering from any mental or nervous diseases should be fireproof by reason of being constructed of brick and iron or stone and iron, and not more than two stories in height, and that the same and the land used in connection therewith or such part of said land as any of the patients are to have access to should be surrounded by a brick or stone wall, not less than 18 inches in thickness and not less than 12 feet in height, and in which wall there is but one opening closed by a solid iron door so constructed and fitted into said wall as that the same may be securely fastened by a combination lock and said premises not to be within 400 yards from any dwelling house or schoolhouse.

There were other equally searching provisions, and it was rightly held that the ordinance was unreasonable and not a proper exercise of the police power, and therefore void. It was apparent from the face of the ordinance that it was an arbitrary and unwarrantable interference with a legitimate business recognized as innocent and useful to the community, and that it did not bear any relation to the lawful purpose of police or sanitary regulations. In the Tie Loy or Stockton Laundry Case the ordinance, as said by Judge Sawyer, absolutely and unconditionally forbade "the keeping of a laundry for washing clothes for hire at any point within the inhabited and even within the habitable part of the city of Stockton; the remainder of the city being in the uninhabitable marshes and sloughs. The isolated position of the laundry, the character of the structure, and the perfection or imperfection of the appliances for rendering the operation safe and free from unwholesomeness to the senses are not factors to be considered under the ordinance. All must go, safe or unsafe, healthy or unhealthy, offensive or not offensive." There probably might be conditions under which it would be a proper exercise of the police power to prohibit altogether a public laundry within the corporate limits of a municipality, but assuredly the burden of making such a showing would be cast upon the one asserting its rightful exercise. There may be more question about the decision in the Sam Kee Case, supra, but there the business within certain limits of the city of Napa was absolutely prohibited and the ordinance appearing on its face to be unreasonable and oppressive, in the absence of any showing before the court to justify such an encroachment upon individual rights, it was justly deemed to be invalid. In the foregoing cases an inspection of the ordinance revealed its fatal infirmity, but here it cannot be affirmed that the provision in controversy goes beyond the legitimate domain of the police power.

The writ is therefore denied and the petitioner remanded.

We concur: CHIPMAN, P. J; HART, J.

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11 Cal. App. 523

PRESIDENT AND BOARD OF TRUSTEES OF CALIFORNIA COLLEGE v. STEPHENS. (Civ. 638.)

(Court of Appeal, Third District, California. Oct. 19, 1909. Rehearing Denied by Supreme Court Dec. 16, 1909.)

1. LIMITATION OF ACTIONS (§ 164*)—NEW PROMISE—PROMISE OF MORTGAGOR.

Where an acknowledgment of a mortgage debt is made by the debtor before an action thereon is barred, the mortgage is not extinguished by the lapse of the period of limitation after the cause of action first accrued, the mortgage lien being extended with the original debt; but, where the acknowledgment or new promise is made after the debt is barred, it does not revive the mortgage.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 619; Dec. Dig. § 164.*]

2. LIMITATION OF ACTIONS (§ 142*) — NEW PROMISE—PROMISE TO STRANGER—ACKNOWLEDGMENT OF DEBT TO ASSESSOR.

Under Code Civ. Proc. § 360, providing that no acknowledgment or promise is sufficient evidence of a new or continuing contract so as to prevent an action from being barred unless it is in writing signed by the party to be charged, the new promise must be made to the creditor or his authorized agent, whether made before or after the statute has run, and a written instrument signed by the debtor rendered to the county assessor, as required by Pol. Code, § 3629, for assessment purposes, stating that certain realty was subject to a mortgage debt, was not a sufficient acknowledgment of the mortgage debt to remove the bar of limitations to an action to foreclose the mortgage; the mortgagee having no knowledge of the statement.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 575; Dec. Dig. § 142.*]

Appeal from Superior Court, San Joaquin County; W. B. Nutter, Judge.

Action by the President and Board of Trustees of California College against C. S. Stephens. From a judgment for defendant, plaintiff appeals. Affirmed.

Robt. B. Gaylord, for appellant. Budd & Thompson and E. J. Jones, for respondent.

CHIPMAN, P. J. This is an action to foreclose a mortgage. The promissory note to secure which the mortgage was given became due July 13, 1900, and would be barred by lapse of time July 13, 1904. The complaint was filed October 14, 1907. Defendant demurred to the complaint on the ground that the action was barred by the statute of limitations. The demurrer was sustained, and defendant had judgment accordingly. The appeal is from this judgment.

The contention of appellant is that defendant acknowledged the indebtedness in writing before the statute had run, and hence the court erred in sustaining the demurrer. The complaint alleged that no part of the principal or interest of the note had been paid except interest to October 13, 1899. Paragraph 11 of the complaint is as follows: "That subsequent to the 1st day of March, 1904, and prior to the 13th day of July, 1904, to wit, on or about the 1st day of April, 1904, said defendant C. S. Stephens voluntarily rendered and delivered to the assessor of the said county of San Joaquin the statement required by the provisions of section 3629 of the Political Code of the state of California, for the purpose of assessment of property owned by him or in his possession or under his control on the first Monday in March, 1904. That said statement was in writing and was signed and subscribed by the said C. S. Stephens and was made by him under oath, which oath was subscribed to the said statement, and that said statement purported to set forth all property subject to taxation, owned, claimed, possessed, or controlled by him at 12 o'clock noon on the first Monday in March, 1904, and which had not already been assessed that year, and that said statement, among other property listed as belonging to the said C. S. Stephens, designated and described the real property hereinbefore described, and that by and in said statement it was by said C. S. Stephens in writing stated and declared that the said real property was subject to the lien of the mortgage above alleged, and that a mortgage upon said real property was held by the mortgagee above referred to in the sum of $5,000, and that the interest of the mortgagee under said mortgage in and to the premises therein and hereinabove described was pursuant to said statement assessed to this plaintiff for the fiscal year for which said statement was rendered as aforesaid, and that this plaintiff paid the taxes under such assessment."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The acknowledgment relied upon was made before the statute had run, and if sufficient the action was in time. Section 360, Code Civ. Proc., provides as follows: "No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged." The rules in this state were very recently stated by the Supreme Court in Sanford v. Bergin, 103 Pac. 333, as to which the court said: "The effect of the application of these rules to a debt secured by a mortgage is that, where the acknowledgment is made before the action is barred, the original contract being thereby kept alive, the mortgage is not extinguished by the lapse of the period of limitation after the cause of action first accrued. The original contract not having been barred at the time of such acknowledgment, it is extended, and the mortgage lien continued with it. But where the new promise or acknowledgment occurs after the debt is barred and the mortgage lien extinguished, the new promise, express or implied, becomes the basis of the cause of action, and it does not revive or renew the lien." Here, however, the acknowledgment having been made before the statute had run, its effect, if sufficient, was to continue the original contract and the mortgage lien continued with it. Was the acknowledgment sufficient? The statute (Code Civ. Proc. § 360) does not say at what time, with reference to the due date of the obligation, or to whom the promise must be made. In fact, it may be made at any time, before or after the debt is barred, and the time merely affects the foundation or basis of the action, i. e., in the one case it is upon the original contract, and in the other upon the new promise.

Upon the question as to the character of the acknowledgment or promise, our Supreme Court has held that it must be a direct, distinct, unqualified, and unconditional admission of the debt which the party is liable and willing to pay. Pierce v. Merrill, 128 Cal. 473, 61 Pac. 67, 79 Am. St. Rep. 63. As to the person to whom the promise must be made, Mr. Wood says, in his work on Limitations (section 79 [3d Ed.]), that the promise must not only be made by one legally competent, but must be made to the creditor himself, or to some person duly authorized to act for him in that regard, and if made to an agent, in order to make it operative, it must appear that the debtor at the time knew that the person was acting as the agent of the creditor. See the authorities, note 1, p. 220. It has been held in some of the states that the acknowledgment to a stranger is sufficient; but we understand the rule in most of the states to be otherwise, as it is in this state. It was said by this court in Visher v. Wilbur, 5 Cal. App. 562, 90 Pac. 1065, 91 Pac. 412: "The test would seem to be, it seems to us, was the party to whom the acknowledgment, if any, was made, legally competent to make a contract with respect to the subject as to which the statute had run?"—citing Biddel v. Brizzolara, 64 Cal. 354, 30 Pac. 609. In that case the Supreme Court said: "It is very certain that an actual promise can be made only to the creditor, and it follows that the acknowledgment from which the promise is to be inferred must be made to the creditor. An admission to a stranger of the existence of the debt cannot be construed an acknowledgment to the creditor such as indicates an intention on the part of the person making the admission to hold himself bound to pay, nor is it expressive of his willingness to pay. 'An unqualified acknowledgment to a stranger will not take the case out of the statute or constitute a good cause of action.' Trousdale's Adm'r v. Anderson, 9 Bush, 276; Kyle v. Wells, 17 Pa. 286, 55 Am. Dec. 555; Taylor v. Hendrie, 8 Nev. 243." See, also, Rounthwaite v. Rounthwaite, 136 Cal. xx, 68 Pac. 304, where the Supreme Court said: "Section 360 (Code Civ. Proc.) refers to the acknowledgment or promise of the party charged by the original contract, to the person in whose favor the contract was made." The Nevada case was decided under a statute the same as ours. In Kyle v. Wells, 17 Pa. 286, 55 Am. Dec. 555, cited in Biddel v. Brizzolara, supra, the court said: "There is a maxim in the Roman law—'Per extraneam personam nihil nobis acquiri potest,' through a stranger we can acquire no rights — and though this maxim is not in form found in our law, yet its principle is at the foundation of all our rules as to the privity of contract and estate, and as to matters inter alios actæ. If then the defendant had expressly told the witness that he would call and pay, this would have been but the expression of a determination, revocable at pleasure, and would have created no legal duty. It is a perversion of the word 'promise' to apply it to a declaration made to one who has no interest in or connection with the subject spoken of; and we cheat the law, and morality too, of their rights, when we distort the meaning of words to reach a desired conclusion. 1 Bouv. Inst. 339." See, also, Fort Scott v. Hickman, 112 U. S. 161, 5 Sup. Ct. 56, 28 L. Ed. 636; Sheppard v. Thompson, 122 U. S. 238, 7 Sup. Ct. 1229, 30 L.

Ed. 1156; Sibert v. Wilder, 16 Kan. 176, 22 Am. Rep. 280; Kenan v. Holloway, 16 Ala. 53, 50 Am. Dec. 162. In Wakeman v. Sherman, 9 N. Y. 85, it was held that "the promise must be made to the creditor or some one acting for him, or, if made to a third person, must be calculated and intended to influence the action of the creditor"—citing Bloodgood v. Bruen, 8 N. Y. 362. In Ringo v. Brooks, 26 Ark. 540, it was held that the promise must be to the creditor. So, also, in Niblack v. Goodman, 67 Ind. 174; Wachter v. Albee, 80 Ill. 47; Cape Girardeau Co. v. Harbison, 58 Mo. 90. In Farrell v. Palmer, 36 Cal. 187, it was held that an acknowledgment of a debt to the administrator of the estate of the creditor, deceased, is sufficient, since the administrator stood as the legal representative of the creditor; but in Visher v. Wilbur, supra, such an acknowledgment was insufficient where the acknowledgment was to an heir of the deceased, who afterwards became administrator. At the time of the acknowledgment, he sustained no relation to the estate.

Appellant makes a distinction between an acknowledgment or promise given before the statute has run and one given after it has run, which latter was the case in Biddel v. Brizzolara and Visher v. Wilbur, supra. The argument is that, as the basis of the action in the latter case is the new contract, there must be a meeting of the minds of the parties; whereas, in the former, the basis of the action being the original contract, no subsequent meeting of minds is necessary. "In such case, the purpose of the statute," it is urged, "is to require the solemnity of a written acknowledgment which admits the indebtedness as an existing liability, if the presumption of payment arising from lapse of the statutory period is to be considered by the court as rebutted; but that solemnity and definiteness of evidence is equally obtained whether the acknowledgment is made to the creditor himself or to a third party, and therefore the purpose of the statute is accomplished in the latter case." We fail to recognize any just ground for this distinction so far as concerns the fact of making the promise—either as to the character or nature of the promise or the person to whom made. As said by Mr. Wood: "The distinction between the acknowledgment of a debt before and one after the statute has run consists merely in its effect upon the debt and the remedy." Wood on Lim. § 81. See, upon the point, S. P. Co. v. Prosser, 122 Cal. 413–416, 52 Pac. 836, 55 Pac. 145. If this be true, there is as much reason in requiring the acknowledgment to be made to the creditor or some one in privity with him or representing him, in the one case as in the other. It is not alone the solemnity of the acknowledgment that suspends the operation of the statute; but it is that fact, coupled with the further fact that it is made under such circumstances as would have the effect either to keep alive the original contract or create a new contract. And it seems to us that the fact should be communicated to the creditor for equally strong reasons in both of the cases suggested by appellant. Indeed, there is additional reason why the acknowledgment, when made before the statute has run, should be made to the creditor or some one representing him. Presumably the creditor knows when the statute will bar his action. If the debt is acknowledged to him, he may safely assume that the statute begins then to run, that a new period of limitation is agreed upon, and the debtor is estopped to deny it; but if not made to him or his representative, and he allows the statute to run, the creditor should be held to the consequences of his neglect to bring his action in time. Conceding that this result follows properly where the debtor acknowledges the indebtedness to a stranger after the statute has run, we feel quite satisfied that like consequences should follow where a similar acknowledgment is made before the statute has run

It is further claimed that, conceding the rule to be as contended by respondent, the acknowledgment was to the county assessor for the purpose of relieving defendant of a portion of his taxes, "is sufficiently connected with the mortgagee to allow him to rely upon it as a waiver of the statute." We do not agree with appellant in this contention. We incline to appellant's view that the statement made to the assessor was voluntary, for, as we read the statute pleaded (Pol. Code, § 3629), it would seem to be the duty of the mortgagee to return the mortgage indebtedness as part of his property, and that it cannot be regarded as the property of the mortgagor, or that there is any duty put upon him to return it. His object in doing so is to secure a reduction pro tanto of his taxable property and to avoid the possibility of its being overlooked by the assessor and the burden cast upon the land instead of the mortgagee. The mortgage is the property of the mortgagee, whose duty it is to return it for taxation; but, however this may be, the return made by the mortgagor was to the assessor for his information alone and had no necessary connection with the mortgagee, and there is no presumption that the mortgagee knew of it or acted upon it, and there is no allegation that it had any knowledge of it until the complaint was prepared, which was three years after this statement was made, or that it was with intention that it be communicated to the mortgagee. It seems to us that the assessor stood in no different relation to the mortgagee in the matter than any stranger to whom such a statement or acknowledgment has been made.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

11 Cal. App. 469

PEOPLE v. DISPERATI. (Cr. 94.)

(Court of Appeal, Third District, California. Oct. 5, 1909.)

1. Criminal Law (§ 185*)—Former Jeopardy—Discharge of Jury on Failure to Agree.

Const. art. 1, § 13, declares that no person shall be twice put in jeopardy for the same offense. Pen. Code, § 1140, provides that a jury cannot be discharged after a cause is submitted to them, unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree. *Held* that, where the court in a criminal case obtained from the jurors an expression of their judgment to the effect that they could not agree, and thereupon discharged the jury, jeopardy did not attach, though the court did not hear any evidence or try the issue, or make any findings on the question whether the jury could agree.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 344; Dec. Dig. § 185.*]

2. Criminal Law (§ 1144*)—Appeal—Presumptions.

On appeal from a conviction on a prosecution where former jeopardy was pleaded, it would be presumed, if necessary to support the judgment, nothing appearing to the contrary, that the discharge of the jury on the former trial was with the consent of the accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3019; Dec. Dig. § 1144.*]

3. Criminal Law (§ 180*)—Former Jeopardy.

Pen. Code, § 1385, provides that the court may in furtherance of justice order an indictment dismissed; the reasons to be set forth in an order entered on the minutes. Section 1387 provides that a dismissal as provided for in section 1385 is not a bar to another prosecution for the same offense in the case of a felony. *Held* that, where the jury in a prosecution for felony is discharged because an agreement cannot be reached, and the information is dismissed pursuant to section 1385, the dismissal is no bar to another prosecution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 316, 328; Dec. Dig. § 180.*]

4. Criminal Law (§ 178*)—Former Jeopardy—Dismissal of Information—Grounds.

Pen. Code, § 1385, provides that the court may in the furtherance of justice order an indictment dismissed. *Held*, that the dismissal of an information was not warranted, so as to authorize a second prosecution, on the ground that the trial would be expensive, and might burden the county general fund; that money due for other county expenses and contracts might so be consumed thereby, causing bona fide claimants to lose their rights to be paid out of the revenues of the fiscal year.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 326–329; Dec. Dig. § 178.*]

5. Criminal Law (§ 178*)—Former Jeopardy—Dismissal—Recital of Reasons.

Pen. Code, § 1385, provides that the court may in furtherance of justice order an indictment dismissed, and that the reasons of the dismissal must be set forth in an order entered on the minutes. Section 1387 provides that a dismissal, "as provided in this chapter," is not a bar to another prosecution for the same offense in the case of a felony. *Held* that, where on a prosecution for felony the information was dismissed under section 1385, but the order of the court did not recite the reasons upon which it was based, the dismissal was a bar to another prosecution, though the record showed the ground upon which the motion to dismiss was made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 326–329; Dec. Dig. § 178.*]

6. Criminal Law (§ 292*)—Jeopardy—Sufficiency of Plea.

That defendant in pleading former jeopardy substantially followed the form prescribed by Pen. Code, § 1017, subd. 4, but, instead of specifying simply the time, place, and the court, set forth all the facts in any way relating to the plea, did not vitiate the plea.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 668–671; Dec. Dig. § 292.*]

7. Larceny (§ 75*)—Instructions—Participation in Taking of Property.

On a prosecution for grand larceny, there was no evidence of actual participation of defendant in the original taking of the stolen animals from the possession of their owner, but it appeared that the animals were brought by a certain person to defendant's place, and left there to be pastured; that some days later they were taken to the S. pasture, and subsequently to the G. pasture, and the court instructed that it was not necessary for the state to prove that defendant actually participated in the act of leading or driving away the animals, but that, if he knew when the animals were put in his pasture that they had been stolen, and he thereafter aided and abetted the thief in driving the animals to the S. pasture, defendant might be convicted, and that if the jury were satisfied that when defendant took the animals to the G. pasture he did so with a felonious intent, the larceny was complete, and that it was no defense for the felonious taking of property that it had been previously stolen by some other person, if the person accused thereafter himself feloniously took or drove away the property. *Held*, that the instructions were erroneous as ignoring the distinction between larceny and receiving stolen property.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 198; Dec. Dig. § 75.*]

8. Larceny (§ 75*)—Instructions—Participation in Taking of Property.

It was error to refuse requested instruction that, if the only part defendant took in the alleged larceny was that, after the animals were stolen, he aided or assisted the thief in selling or disposing of them or participating in the profits, he could not be convicted of larceny.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 198; Dec. Dig. § 75.*]

9. Criminal Law (§ 202*)—Former Jeopardy—Identity of Offenses.

A conviction of larceny is no bar to a subsequent prosecution for receiving stolen property.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 396; Dec. Dig. § 202.*]

Appeal from Superior Court, Madera County; John G. Covert, Judge.

E. Disperati was convicted of larceny, and he appeals from the judgment and from an order denying a new trial. Reversed.

Robert L. Hargrove, Geo. W. Mordecai, Jr., and R. R. Fowler, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

BURNETT, J. In a brief of exceptional merit it is earnestly contended by appellant that he has not had a fair trial. "Prejudiced," declare his counsel, "by the misinstructions of the court and by the court's refusal to give proper instructions and by the outrageous and villianous misconduct of a juror, the defendant was deprived of a just consideration of his case. The verdict is contrary to the evidence because there is no evidence that defendant abetted or advised anyone to steal. The verdict is contrary to the facts, because receiving or disposing of stolen property is not larceny. The verdict is contrary to law because the defendant has been once in jeopardy." These various propositions are methodically presented with citation of numerous authorities. The consideration of some of the points discussed is deemed unnecessary, but the following we regard as of vital importance:

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

1. On December 18, 1907, Miller & Lux caused a complaint to be filed in the justice court against defendant, charging him with the larceny of four mules branded H.H. On January 23, 1908, defendant was held to answer, and on the 30th following an information was filed in the superior court, to which a plea of not guilty was entered. On April 6, 1908, the trial was begun. The jury disagreed, and on April 10th it was discharged; the minutes of the court showing that they "came into court and state to the court that they are unable to agree upon a verdict, and further state that it is impossible to ever reach a verdict, whereupon it is ordered by the court that they be and they are hereby discharged from further consideration in this case." On June 5, 1908, the district attorney made an application for a dismissal of the information "in furtherance of justice, as provided in section 1385 of the Penal Code." He submitted certain reasons for said application, to the effect that sufficient time had not elapsed to secure the attendance of the necessary witnesses for the plaintiff; that disclosures had been coming to light indicating that defendant had an accomplice or accomplices in the crime, and that it was important that the investigations concerning the same be completed before the trial of the defendant, and that it was impossible to complete them before the expiration of 60 days from the former mistrial; that it would be opposed to the interests of justice to disclose at that time the matters being investigated tending to connect the defendant or his accomplices with other offenses, and that "the trial of this action will be very expensive, and might burden the county general fund; that money due for other county expenses and contracts might thus be consumed, thereby causing bona fide claimants to lose their legal rights to be paid out of the revenues of the current fiscal year." The court thereupon made the following order: "It is therefore ordered that the motion of the district attorney be and the same is hereby granted and order made as requested. It is further ordered that the information be and the same is hereby dismissed, the defendant discharged, and bond exonerated." On the same day another complaint was filed in the justice court, charging the defendant with the same larceny. He was held to answer, and another information was filed, to which a plea of "once in jeopardy" and of not guilty were entered. The trial resulted in a verdict of guilty and for the people, under the direction of the court, on the plea of "once in jeopardy."

In support of his contention that he is entitled to the protection of article I, § 13, of the Constitution, providing that "no person shall be twice put in jeopardy for the same offense," it is insisted in the first place by appellant that jeopardy attached for the reason that the jury was discharged without legal consent; the rule being as stated in People v. Webb, 38 Cal. 477, "that when a party is once placed upon his trial for a public offense on a valid indictment, before a competent court with a competent jury, duly impaneled, sworn, and charged with the case, he has then reached and is placed in the jeopardy, from a repetition of which, upon the same indictment, or any other indictment for the same offense, the constitutional shield forever protects him, and after the jeopardy has once so attached, a discharge of the jury, without the consent of the defendant, for any cause within the control of the court, before they have rendered a verdict, is equivalent to a verdict of acquittal."

Appellant, however, admits that the jury may be discharged because of their inability to agree upon a verdict, and jeopardy will not attach, but it is insisted that this rule can have no application here for the reason that: "The court did not hear any legal evidence, or try the issue, or make any finding on the question whether or not the jury could agree, but dismissed the jury summarily, on the same day of the submission of the cause, without the consent of the defendant." But it does appear that the jurors stated to the court that it was impossible for them to agree, and we cannot say that their statements were unworthy of belief. We must assume that the court was entirely satisfied that any further effort to secure a verdict would be futile. The statute does not provide just what proceeding shall be taken to determine the probability of an agreement, but no better method occurs to us than to obtain from the jurors an expression of their judgment; and the court, in the exercise of the discretion committed to it, may give such weight to this opinion as the surrounding circumstances seem to demand. Again, although the jury should not be discharged until the court is satisfied that an agreement is not probable, still the law does not require an express finding by the court that the jury could not agree, and for that reason were discharged. Section 1140 of the Penal Code, the authority for the court's action, provides that: "The jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict, and rendered it in open court * * * or unless at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree." There is nothing therein requiring the court to state its reasons for discharging the jury, and, in harmony with this provision, it is stated in People v. Greene, 100 Cal. 142, 34 Pac. 630: "The reasons upon which the court deems it proper to discharge the jury are not required to be placed on record; it is sufficient that it shows the jury were unable to agree." It may be remarked that the minutes introduced in evidence in the case at bar do sufficiently show that the jurors could not agree, although in view of the presumption as to the regularity of the proceedings of a court of record, and of the rule imposing upon the appellant the burden of showing error affirmatively, since nothing appears to the contrary, it would be presumed, if necessary to support the judgment, that the defendant consented to the discharge of the jury.

A more serious question arises from the fact that the information was dismissed, and the second trial was had upon another information, based upon a new complaint in the justice court charging the same offense. The proceeding is quite unusual, and no doubt should be adopted only when substantial and exigent reasons seem to demand it. The Attorney General seeks justification for the course pursued in section 1385 of the Penal Code, which provides that: "The court may either of its own motion or upon the application of the district attorney and in furtherance of justice order an action or indictment to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes." Section 1387 is: "An order for the dismissal of the action as provided in this chapter, is a bar to any other prosecution for the same offense, if it is a misdemeanor; but it is not a bar if the offense is a felony." In the case of People v. Schmidt, 64 Cal. 263, 30 Pac. 815, it is said: "Upon due notice given the district attorney moved the court to dismiss the action and retain the defendant in custody for a re-examination upon a new charge for the same homicide. The defendant and his counsel were present at the hearing of the motion and made no objection, and the court ordered the dismissal upon the ground stated in section 1385, supra. After the entry of the order a new charge of murder was made against the defendant, upon which he was regularly examined before a magistrate and committed to answer. The dismissal of the former action did not constitute a bar to another prosecution for the same homicide. Section 1387, Pen. Code." In that case, however, it is said: "But it was also proved that the information upon which he was convicted contained no allegation that the homicide had been committed with 'malice aforethought,' nor were any words of equivalent import used in it to describe the crime. The information was therefore fatally defective." In People v. Campbell, 59 Cal. 243, 43 Am. Rep. 257, and People v. Breen, 130 Cal. 72, 62 Pac. 408, the doctrine is reiterated that "an order setting aside an indictment or information is no bar to a future prosecution for the same offense," but it does not appear upon what specific ground the orders were made in those cases. In People v. Mooney, 132 Cal. 14, 63 Pac. 1070, there had been a trial, conviction, and a reversal of the judgment by the Supreme Court on the ground that the information was fatally defective. "Upon a return of the remittitur to the trial court the district attorney made a motion in furtherance of justice that the court dismiss the information." Thereupon the information was dismissed, and the defendant discharged. Proceedings were again taken in the justice court, and a new information filed, upon which defendant was convicted, and the Supreme Court held that he had not been in jeopardy. In People v. Smith, 143 Cal. 597, 77 Pac. 449, it was held that: "The dismissal of a charge of petit larceny in a justice's court on motion of the district attorney, for the purpose of charging a felony for the same offense against the same defendant, based upon a prior conviction of burglary, does not operate as a former acquittal."

The foregoing cases are certainly authority for holding—if authority other than the provision of the statute is needed—that the dismissal of an information in the interests of justice is not a bar to another prosecution for the same offense. Nor does it signify that "the defendant," as stated by appellant, "was not the actor in any matter that laid the foundation for the plea, but, on the contrary, all the proceedings taken that created and compelled the jeopardy were done against his wishes and without his act or consent." If there had been a conviction of the defendant upon the first information, it would indeed have been a bar to another prosecution, unless it had been set aside at his instance; but the case is entirely different where the jury disagree and are discharged by the court. Then the status is the same as though there had been no trial at all, and no consent of the defendant is required to justify the court in dismissing the case under said section 1385. The Legislature has not attempted to define the expression "in furtherance of justice," and therefore it is left for judicial discretion, exercised in view of the constitutional rights of the defendant and the interests of society, to determine what particular grounds warrant the dismissal. As far as the depleted condition of the treasury is concerned, we cannot give our adherence to the view that this is a sufficient ground for the course pursued. The right of an individual charged with a crime to a speedy trial without unnecessary delay and embarrassment is surely as urgent and important as that of a creditor of the county to have his just demands promptly liquidated. The other reasons urged by the district attorney are more meritorious, but it would have been much better if they had been embodied in an affidavit, and made the basis for an application to have the cause continued a reasonable period for trial. Thereby the investigations could have been completed, the additional witnesses probably secured, and the necessity avoided of adjudicating the vexatious question now presented. But passing this, the statute provides that the order "as provided in this chapter" is not a bar, and the mandate in reference to said order is that it must contain the "reasons of the dismissal." We have no authority to disregard this requirement, or to hold that it is merely directory. The proceeding is somewhat harsh, and imposes an additional burden upon the defendant, and no substantial departure from the plain provision of the statute should be tolerated. In the case of People v. Jordan, 63 Cal. 219, it appears that, "Pending a demurrer to an information, a new information was filed, and afterwards the demurrer to the former information was sustained, but no order was made or requested permitting a new information to be filed, nor was any opinion expressed that the objection raised could be avoided by a new information," and it was held that the judgment on demurrer to the first information was a bar to another prosecution. Ex parte Williams, 116 Cal. 512, 48 Pac. 499, is to the same effect, although the court sustained the demurrer "with leave to the district attorney to file a new information." It was held, however, that the mandate of the law must be respected in a matter affecting the substantial rights of the defendant. Here there is no pretense that the order of the court recites the reasons upon which it was based. It is true the record shows the grounds upon which the motion was made by the district attorney, but nothing in the order shows that these grounds were, or any of them was, the basis for the action of the court.

There is an objection by the Attorney General that "once in jeopardy" was not sufficiently pleaded. Section 1017, subd. 4, of the Penal Code provides a simple form for such a plea. The defendant followed substantially the language of the Code, but, instead of specifying simply the "time, place and court," he set forth all the facts, including the specific times, places, and courts in any way relating to the plea, so that even laymen could understand the import of the plea. The only valid objection that could be urged against it is that it contains more than the law demands, but this does not deprive the defendant of the right to have it considered. It is to be observed that this is no "technical" objection to the proceedings, as the term "technical" is commonly understood, but it relates to an important rule of procedure which the Legislature has provided for the guidance of the courts, and the omission to observe it cannot be held to be innocuous without an invasion of the authority of a co-ordinate branch of the government. If the practice of which complaint is made is to be continued, it is manifest that great abuse is likely to follow, more dangerous to society than even the acquittal of the guilty.

2. Complaint is made of various rulings of the court in admitting evidence over the objection of appellant. Conceding some of the rulings to be erroneous, the error seems to have been without prejudice. We, therefore, forego any specific consideration of them, and devote our attention to the following instructions given by the court:

(A) "The court instructs you that in determining whether the defendant is guilty of the larceny of said animals, as charged, I instruct you that it is not necessary for the people to prove that the defendant actually participated in the act of leading or driving away the animals from the possession of their owner. If you believe to a moral certainty and beyond a reasonable doubt, from all of the evidence and circumstances of the case, that the defendant knew, at the time said animals were placed in his pasture, if they were placed there, that the same had been feloniously stolen and driven away from their owner, and that the defendant did thereafter aid and abet the thief in taking and driving said animals to the pasture on the river, known as the 'Service' pasture."

Again (B): "If you are satisfied from the evidence beyond a reasonable doubt and to a moral certainty that at the time the defendant took the animals mentioned in the information from the Hatch & Service pasture to the corral of Mr. Gordon, if he did take them, or assisted in doing so, he did so with a felonious intent, and if you further find that such taking was prior to the 31st day of October, 1906, and in the county of Madera, and that at said time said animals were the property of Miller & Lux, Incorporated, a corporation, then I instruct you that the offense of grand larceny is complete as charged. It is no excuse for the felonious taking of personal property that such property had been previously stolen by some person other than the person accused, if the person accused thereafter himself feloniously took, stole, or drove away said property, and it makes no difference whether such taking was done with or without the consent of the person who previously stole the same."

These instructions are separated by another instruction upon a different subject. The first one, which we have marked "A," is not complete, but the latter clause plainly implies that if the jury believe the facts therein stated, they must find the defendant guilty of larceny. The first sentence in the instruction is not open to objection, as it is not necessary that the defendant actually participate in the act of leading or driving away the animals; it is sufficient if he aided and abetted its commission or, not being present, advised and encouraged the commission. Section 31, Pen. Code. But the criticism of appellant is directed at the second clause, which in effect holds, so it is claimed, that one who does not participate in any manner in the original taking, but subsequently receives the property into his possession knowing it to have been stolen, is guilty of larceny the moment he moves it from one spot to another while it is so in his possession. "The pawnbroker who has never heard of the stolen watch before it is brought to him, and he is told it is stolen, is guilty of larceny the instant he takes it from the counter and puts it in the showcase to sell." It is insisted that this is not the law, and that in order to constitute larceny there must be some participation, either directly or indirectly, in the original taking. It is undoubtedly true that the instructions must be considered in the light of the facts disclosed by the evidence, and it is often properly held that an instruction, although erroneous as an abstract proposition of law, is not prejudicial because it is apparent from the record that it could not have influenced the verdict of the jury.

In the case at bar, however, there was no evidence of the actual participation of the defendant in the original taking from the possession of Miller & Lux, and it was conceded by the people that the mules were brought by a Mexican to defendant's place and left there to be pastured. Some days after that they were taken to what was known as the "Service" pasture, and about six weeks thereafter they were taken to the Gordon corral mentioned in instruction "B." The jury must have understood from instruction "A" that, though defendant had no connection whatever with the original caption, and no knowledge of it at the time, yet if he afterwards received into his possession the property with knowledge then that it had been stolen, and subsequently participated in the disposition of it, he is guilty of larceny. But the instruction is erroneous because it presupposes that the larceny had been completed before defendant had any guilty knowledge of it. In fact it assumes that the mules "had been feloniously stolen and driven away" before they were received into defendant's pasture, and, the asportation having been terminated, that the defendant aided the thief in getting rid of the property. No man can be guilty, as principal, of a crime who has no knowledge of it until the crime is fully consummated. The facts set forth in the instruction constitute the crime of receiving stolen property ,and nothing more.

In Tucker v. State, 21 Tex. App. 699, 2 S. W. 893, defendant was convicted of theft; his defense being that he bought the animal in question from two strangers. Defendant asked the court to instruct the jury as follows: "If you find that M. A. Tucker drove up the yearling in question, and that defendant, after it was brought to his lot, opened the gate, and had nothing to do with the original taking and driving, you will acquit; and this is so, no matter what connection defendant had with it thereafter." The appellate court said: "This sixth requested instruction was directly pertinent and applicable to the facts proven, and presented the law in a concise and pointed manner to the vital issue in the case, * * * and we are of the opinion it was error to refuse to give said instruction." In Boyd v. State, 24 Tex. App. 570, 6 S. W. 853, 5 Am. St. Rep. 908, it is said: "The prosecution, however, being for theft, and it being absolutely essential in support of that charge to connect the defendant with the original taking to warrant his conviction, without such proof of connection, any subsequent guilty connection with the stolen animal, such as a receiver of the same, or as to the party who had illegally altered the mark or brand, would not be sufficient to warrant the conviction for theft. To inculpate a defendant as a principal offender in the crime of theft, the state must show that he had some connection with or complicity in the taking of the property. It does not suffice to prove that subsequent to the taking, and without complicity therein, but with knowledge that the property had been stolen, he aided the taker to dispose of it." In People v. Maxwell, 24 Cal, 14, a larceny case, the following instruction was condemned: "Should you believe from the evidence that the witness Morgan stole the property described in the indictment, and that the same was found in the possession of this defendant, and that this defendant and Morgan were associated together, and that the defendant knew that the property was stolen, then and in that case he is equally quilty in the eye of the law, and your verdict should be guilty." In People v. Stakem, 40 Cal. 599, it is held that if the cattle were stolen by another than the defendant, and the defendant afterwards had guilty knowledge that they were stolen, and aided and assisted the other in selling and disposing of said cattle, and was to participate in the profits thereof, he was guilty of the specific offense under the statute of receiving stolen property. In People v. Ward, 105 Cal. 659, 39 Pac. 35, it is said that "the crime of larceny is distinct from that of receiving stolen goods, and proof of the latter crime is insufficient to convict a person who is accused of the former," and it was impliedly held that the following instruction given by the court was correct: "Before you can convict defendant, you must believe beyond a reasonable doubt that he is guilty of, or in complicity with, the original fraudulent taking, and any subsequent connection after the taking would not be larceny in him, either in good or bad faith; and, if you believe that the defendant traded for the cow from Bane, or any other party, after the felonious taking, either in good or bad faith, he is not guilty of larceny, and you must acquit him." In People v. Horton, 7 Cal. App. 34, 93 Pac. 382, the following instruction was upheld: "Before you can convict the defendant of larceny, you must believe beyond a reasonable doubt that he is guilty of, or in complicity with, the original fraudulent taking, and any subsequent connection after the taking would not be larceny."

The instruction marked "B" is equally objectionable as the one we have been considering. It assumes that the third asportation with a felonious intent would constitute larceny. The second paragraph of the instruction, abstractly considered, may be a correct exposition of the law, but it was liable to be misapplied by the jury in view of the evidence. It is true that after the original taking was completed the defendant might have stolen the property. If, for instance, he had feloniously taken it from the possession of the Mexican, it would be larceny, and the ownership could have been laid in the latter or in the real owners, Miller & Lux. But a defendant cannot "feloniously steal and take property"—necessary to constitute larceny—which is already in his possession. Applying it, however, to the facts, the jury were likely to conclude from this portion of the instruction that a felonious disposition of the property after it had been stolen by another was larceny. Respondent cites the case of People v. Del Cerro, 9 Cal. App. 764, 100 Pac. 887, as authority in support of these instructions. But in the Del Cerro Case it was expressly held that the instruction should not be construed as a direction to the jury that, "if the defendant knew the animals were stolen from Miller & Lux, and after the theft received the loot and disposed or assisted in the disposition of the same, he is guilty of grand larceny." And, while suggesting that it was somewhat obscure, it was declared that, in view of other instructions, the jury could not have been misled by it, and that, reasonably interpreted as a whole, it applied to the theory of the prosecution supported by the evidence that the defendant and one Del Carlo had entered into a conspiracy to steal the property, that Del Carlo drove the animals off the ranch, and that, while the animals were still in transit, Del Cerro, by prearrangement, joined in the asportation. The instructions of which complaint is made here are capable of no such construction. They do not contemplate any participation or complicity in the original taking or asportation. They ignore all distinction between larceny and receiving stolen property, and in view of the undisputed evidence must have been prejudicial to the substantial rights of the defendant. In State v. Grant, 76 Mo. 236, it was held that "a larceny may be regarded as still in process of accomplishment so long as the original caption is still unbroken, and the original asportation is still in progress," and in State v. Trexler, 4 N. C. 188, 6 Am. Dec. 558, that "where there is one continuing transaction, though there may be several distinct asportations, the party may be indicted for the final carrying away," but the several asportations were continuous and by the same party, while here, as we have seen, the instructions are based upon the hypothesis that the offense of larceny had been completed before any culpable participation on the part of the defendant.

Among other instructions the defendant requested that the court give the following, which was refused: "The jury is instructed that if you believe that the only part that the defendant took in the alleged larceny was that he, after the said mules were stolen, aided or assisted the person who stole them in selling or disposing of them, or participated in the profits thereof, then he cannot be convicted of grand larceny, and, in such case, you will acquit the defendant." As this states a correct principle of law, and as there was evidence to which it would apply, we think it should have been given.

In conclusion, we deem it proper to state that the evidence of larceny by defendant is slight. There is at least more evidence against him of the crime of receiving stolen property; and, if it should be deemed advisable to prosecute him for this latter offense, the former conviction, of course, would not be a bar.

The judgment and order are reversed.

We concur: CHIPMAN, P. J.; HART, J.

156 Cal. 572

METTEER v. SMITH. (S. F. 5,056.)

(Supreme Court of California. Nov. 24, 1909.)

1. DEPOSITIONS (§ 95*)—ADMISSION OF PART EVIDENCE.

Allowing plaintiff to give in evidence, as he offers, part only of his deposition, is error.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 276, 277; Dec. Dig. § 95.*]

2. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

There being other sufficient and uncontradicted evidence of what was required to be proved, error in admission of evidence is harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161–4170; Dec. Dig. § 1051.*]

3. EVIDENCE (§ 67*)—PRESUMPTION—CONTINUANCE OF FACT.

The rule that a status once established is presumed to remain till the contrary appears obtains in a suit to quiet title, so that after proof of title in plaintiff she need not show she has not parted with it.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 67.*]

4. MUNICIPAL CORPORATIONS (§ 982*)—ORDINANCES—EVIDENCE—PRESUMPTIONS.

While judicial notice will be taken that a city is one of the sixth class, and while under Pol. Code, § 3786, a tax deed "duly acknowledged or proved" is primary evidence that "the taxes were levied according to law," and Municipal Incorporation Act (St. 1905, p. 89, c. 90) § 871, relating to cities of the sixth class, provides that all deeds made on sale for taxes or special assessments under the chapter shall have the same force and effect in evidence as provided for deeds on sale for state taxes, neither the existence of an ordinance, pursuant to which a tax deed, executed by the tax collector of such a city for delinquent city taxes, purports to be executed, nor its pertinency to a subject within the taxing power of the city, can be presumed.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 982.*]

5. EVIDENCE (§ 32*)—JUDICIAL NOTICE—ORDINANCES.

As a general rule, courts of record do not take judicial notice of municipal ordinances.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 42; Dec. Dig. § 32.*]

6. TAXATION (§ 809*) — TAX DEEDS — PLEADING.

Defendant relying on a tax deed to defeat plaintiff's title must plead all the facts essential to give it validity, though the deed be prima facie evidence of such of those facts as required to be recited in it.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1600; Dec. Dig. § 809.*]

Department 2. Appeal from Superior Court, Monterey County; B. V. Sargent, Judge.

Action by Nancy J. Metteer against C. D. Smith. Judgment for plaintiff, and defendant appeals. Affirmed.

Dougherty & Lacey, for appellant. Zabala & Wyatt and A. H. Hewitt, for respondent.

MELVIN, J. Defendant appeals from a judgment quieting the title of plaintiff to certain lands in Pacific Grove, Monterey county. There is no question respecting the sufficiency of the evidence to sustain the judgment; but certain rulings of the trial court are involved in this appeal. Plaintiff offered and the court admitted over the objection of defendant a part of the deposition of plaintiff taken prior to the trial. The part admitted was as follows: "Q. Have you ever sold or conveyed this property? A. No, sir." Defendant's objection properly presented the point that it was error to offer only a selected portion of a deposition, and respondent virtually admits that the ruling was erroneous in view of the decision of this court in the case of Bank of Orland v. Finnell, 133 Cal. 475, 65 Pac. 976. Respondent contends, however, that the error was harmless because, under the pleadings and the proof of title otherwise presented and not contradicted, the evidence was not necessary to the establishment of her case—that in an action of this kind, after proof of title in the plaintiff, she need not show that she has not parted with it. We think this position of respondent must be sustained. A status once established is presumed by law to remain until the contrary appears. Eltzroth v. Ryan, 89 Cal. 140, 26 Pac. 647. While the rule announced in that case has been held not to apply to actions for the recovery of personal property (see Lettelier v. Mann [C. C.] 79 Fed. 82, and cases cited), we think it still applies in suits of this kind. Section 321, Code Civ. Proc.

Appellant also predicates alleged error upon the ruling of the trial court sustaining an objection to the introduction in evidence of a certain deed executed by the tax collector of Pacific Grove, purporting to convey to appellant the property described in the complaint, upon a sale made by said tax collector for delinquent taxes of said city of Pacific Grove for the year 1902. There was a general objection, and also the special one that "said deed on its face purported to be executed by the authority and pursuant to the provisions of an ordinance of the city of Pacific Grove, and that no such ordinance had been alleged in the answer, or offered or received in evidence." In this behalf appellant calls attention to section 871 of the municipal incorporation act relating to the government of cities of the sixth class, which provides that "all deeds made upon any sale of property for taxes or special assessments under the provisions of this chapter, shall have the same force and effect in evidence as is or may hereafter be provided by law for deeds for property sold for non-payment of state taxes." St. 1905, p. 89, c. 90. We are also cited to section 3786 of the Political Code, which provides, among other things, that a tax deed is primary evidence: First, that the property was assessed as required by law; second, that the property was equalized as required by law; and, third, that the taxes were levied in accordance with law. Appellant's counsel earnestly maintain that the presumptions thus applying to tax deeds under the cited section of the Code made it unnecessary for them to prove the passage and approval of the ordinance in question. While this court will take judicial notice of the fact that Pacific Grove is a city of the sixth class (Cole v. Segraves, 88 Cal. 104, 25 Pac. 1109; Bryan v. Abbott, 131 Cal. 225, 63 Pac. 363), and while a tax deed "duly acknowledged or proved" is primary evidence that "the taxes were levied according to law" (section 3786, Pol. Code), we do not think that the existence of the ordinance mentioned in the tax deed or its pertinence to a subject within the taxing power of the governing body of the corporation of Pacific Grove may be presumed, even under the broad provisions of the Political Code and the municipal incorporation act cited above. It is a general rule, supported by unbroken authority in this state, that courts of record do not take judicial notice of municipal ordinances. Ex parte Davis, 115 Cal. 447, 47 Pac. 258; City of Tulare v. Hevren, 126 Cal. 229, 58 Pac. 530. The court's ruling excluding the offered deed was also entirely defensible under the general objection that it was incompetent, irrelevant, and immaterial because there was no allegation in the answer of the matters essential to the validity of the tax deed. "The recitals in a tax deed are declared by the statute to be prima facie evidence of the proceedings recited; but it has never been supposed that a party who sets forth a tax title was thereby excused from alleging that those proceedings were had. The reverse has been decided by this court." Himmelman v. Danos, 35 Cal. 449. In Russell v. Mann, 22 Cal. 135, Mr. Justice Norton, writing of the requisites of a deed executed upon a tax sale, used the following language: "The Legislature has provided that the deed executed upon such a sale shall state certain of these essential facts, and shall be proof of the matters by it set forth, subject to certain exceptions; but this provision as to the effect of the deed as evidence does not dispense with the necessity of averring every essential fact in a pleading in which a tax title is specially set forth." We are of the opinion that the objection was properly sustained upon the authorities above set forth, and it will therefore be unnecessary to discuss the other matters appearing in the brief of respondent.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

156 Cal. 581

WOODARD v. GROVER et al. (S. F. 5,071.)

(Supreme Court of California. Nov. 27, 1909. Rehearing Denied Dec. 27, 1909.)

Alteration of Instruments (§ 3*)—Materiality—Change of Parties.

One party to a contract agreed to allow the wives of the other parties in interest to be substituted for their husbands in the contract, but the daughter of one of the parties was substituted instead. *Held*, that the alteration was a material one, and, in the absence of ratification, invalidated the contract.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 5-15; Dec. Dig. § 3.*]

Department 2. Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Lester Woodard against Dwight Grover and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Hugh R. Osborn, for appellants. Wm. M. Aydelotte, for respondent.

MELVIN, J. This is an appeal from an order denying the motion of defendants for a new trial. Plaintiff sued to enjoin defendants from trespassing upon certain property in San Mateo county, and particularly to restrain them from cutting and removing timber. Defendants answered, admitting plaintiff's ownership of the land in question, but claiming, under a purported contract, set forth by copy in their answer, the right to cut and remove the timber. Plaintiff by affidavit under section 448 of the Code of Civil Procedure denied the due execution and delivery of the written instrument, and challenged its genuineness, stating that although he had on April 17, 1905, signed in duplicate and acknowledged such a writing in which M. A. Grover and M. A. Littlefield were described as parties of the second part, one copy of the instrument had been mutilated by substituting the name of E. S. Grover for that of M. A. Grover. He further deposed that he had never agreed to such substitution; that through his agent he had so notified D. W. Grover and C. L. Littlefield; that the alleged contract had never been executed in duplicate and deposited in a certain bank in accordance with its provisions; and that on or about November 14, 1905, he had notified the said D. W. Grover and C. L. Littlefield that all negotiations with reference to the contract were at an end. The case was tried, and among the findings in the plaintiff's favor was one that the alleged agreement set out in the answer between plaintiff and M. A. Littlefield and E. S. Grover was never executed nor delivered. It is not necessary to review the alleged contract, which is quite lengthy, as we agree with the finding that it was not duly executed nor delivered. Suffice it to say that it was drawn with the design of permitting the parties of the second part, under certain restrictions as to time and obligations with reference to building a sawmill and constructing a dam, to enter upon Woodard's property for the purpose of cutting a large amount of timber. In the latter part of 1904, Dwight W. Grover and C. L. Littlefield met plaintiff in Santa Cruz, and, after some preliminary conversation, Woodard submitted to them a proposition in writing, setting forth the terms upon which he would contract to sell them the timber on the land in question. Several drafts of the proposed contract were drawn, and according to Woodard's testimony it was agreed that, owing to certain litigation in which Grover and Littlefield were engaged, the contract should be executed by their wives. Their testimony differed from his in one radical respect. They stated that Woodard expressed a willingness for them to insert in the contract the names of any persons whose power of attorney they might obtain. Acting upon this theory, they caused the name of Mr. Grover's daughter, E. S. Grover, to be substituted for that of her mother who had refused to sign the agreement. Defendants Hammer and Armstrong are parties to the action by reason of their purchase of an interest in this alleged contract.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appellants make but two points in their brief: (1) That the change in name is not a "material" alteration in the agreement; (2) that such modification was ratified by plaintiff.

We cannot agree with appellants on the first point, unless we determine that their version of the conversation between plaintiff and Messrs. Grover and Littlefield is the correct one. The court below resolved the conflict of evidence in favor of Woodard, who testified emphatically that he consented only to the wives of the real parties in interest signing the instrument which he executed in duplicate. It is idle to say that, because he knew them to be the real parties in interest, Woodard could not complain if Grover and Littlefield substituted any person for the wife of either of them. Our law with reference to community property alone might furnish a reason why one contracting would wish the wife of a real party in interest to sign an agreement rather than any one else. At any rate, there must be something other than the mere fact that real parties are to be represented by others to justify the sort of mutilation of a contract which was here practiced.

With reference to the other point, it may be said that, although from the voluminous correspondence introduced in evidence some expressions wrenched from their context might be taken as admissions of the existence of a contract, the sum of all of the negotiations seems to have been such as to justify the court's conclusion. Plaintiff seems to have been ready to enter into a contract with Grover and Littlefield if they could get proper financial backing and suitable offers for the timber to be taken from his land. Appellants lay great stress upon certain expressions contained in letters, particularly in one written to the Ocean Shore Railroad Company dated at Madison, Wis., August 31, 1905. In this the following language is used: "I am in receipt of a letter from Messrs. Grover and Littlefield of Pescadero, Cal., in which they say they have a prospect of closing a large contract with you for R. R. ties. In case they close the deal with you I shall furnish the timber. I am expecting to come to Cal. the first of the coming Dec. If for any reason the contract might depend on my personal presence, I would be willing to come at any time. * * * Would be pleased to learn as to the prospects of Mess. G. & L. securing this contract I have mentioned. Also if consistent would like to know the price these people are to furnish the ties for." The mere statement that Woodard would furnish the timber would as well comport with the negotiations pending as with a completed, admittedly binding contract; while the reference to the possible necessity for his personal presence would indicate that he at least did not consider the negotiations between himself and Grover and Littlefield finally settled. So with the expression in one of Woodard's letters to his agent Hovey: "If they are ready with the money to put in the plant, I am ready to furnish the timber as per the contract." This language was used in a communication with which plaintiff returned the unexecuted duplicate agreement that had been sent east, and the letter also contained the following: "When you are satisfied that the condition of things will warrant it, you can deposit the contracts with the First National Bank, as they provide, but I want to be sure that something is going to be done before making myself any more trouble. * * * P. S. If matters are satisfactory, see that the contracts are properly executed." Appellants Grover and Littlefield, on the other hand, wrote letters from which the court might well conclude that they did not consider their contract to be so settled that they could proceed under it. For example, under date of October 30, 1905, Mr. Littlefield, writing for himself and his associate, expressed the hope that plaintiff would "allow" them "to go to work" while the weather was fine. But, whatever may have been their interpretation of the instrument set forth in their pleading, certain it is that the court was justified in concluding that there was no such unqualified ratification by plaintiff of the mutilated instrument as gave it validity and made it his contract.

The order from which this appeal is taken is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

156 Cal. 585

WARDLOW v. MIDDLETON et al. (L. A. 2,437.)

(Supreme Court of California. Nov. 29, 1909.)

1. MORTGAGES (§ 452*)—FORECLOSURE—SUBSEQUENT LIENORS—COMPLAINT.

A complaint to foreclose a mortgage alleging that the defendants, other than the mortgagors, had or claimed some interest in or claim on the mortgaged premises, but that the same was subsequent and subject to plaintiff's mortgage, was sufficient on demurrer to show that defendants were proper parties to the suit in order to subject their alleged interests to plaintiff's prior lien.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1316; Dec. Dig. § 452.*]

2. PLEADING (§ 377*)—FACTS NOT DENIED—FINDINGS.

Where an allegation of a complaint to foreclose a mortgage that certain of the defendants claimed an interest in or claimed the mortgaged premises, but that it was subsequent and subject to plaintiff's mortgage, was not denied, no proof thereof was necessary in order to make such claim subject to the mortgage nor could the court's findings add to or detract from the force of such admission.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1[illegible]-1[illegible]31; Dec. Dig. § 377.*]

3. MORTGAGES (§ 588*)—FORECLOSURE—ADMISSIONS—FORECLOSURE JUDGMENT—EFFECT.

Where an allegation in a complaint to foreclose a mortgage that certain of the defendants claimed some interest in or claim to the mortgaged premises which was subsequent and subject to plaintiff's mortgage was not denied, and no prior claim was presented by such defendants by cross-complaint or otherwise, the foreclosure decree and sale would bar all liens, rights, and interest acquired from the mortgagor after, but not prior, to the execution of the mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1686; Dec. Dig. § 588.*]

4. JUDGMENT (§ 740*)—DECREE—FINDINGS—RECITALS WITHOUT THE ISSUES.

Where, in a suit to foreclose a mortgage, the complaint alleged that certain of the defendants claimed an interest in the mortgaged premises but that it was subsequent to the mortgage, and such allegation was not denied, findings that the interest of two of the defendants was acquired after the giving of the mortgage and a recital in the decree to the same effect were without the issues, and surplusage; and hence were neither conclusive against the defendants nor competent evidence against them in another action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1268; Dec. Dig. § 740.*]

Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by R. B. Wardlow against Martha T. Middleton and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Emmet H. Wilson and G. C. De Garmo, for appellants. R. Y. Williams, for respondent.

SHAW, J. This is an action to foreclose a mortgage against Martha T. Middleton, as the mortgagor, and J. W. and Carrie V. Tucker, as subsequent incumbrancers. The complaint, as against the Tuckers, made the usual allegation that they had or claimed some interest in or claim to the mortgaged premises, but that the same was subsequent and subject to the plaintiff's mortgage. The defendant Middleton made default. The other defendants, appellants here, filed a general demurrer to the complaint; which demurrer being overruled they filed an answer denying, for want of information and belief, the allegation of nonpayment of the mortgage debt, but not denying the aforesaid allegation in regard to their own claims and interests. There was a trial by the court, findings in favor of the plaintiff and judgment of foreclosure. The appeal is from the judgment; the evidence being presented by bill of exceptions.

The demurrer to the complaint was properly overruled. The allegation above mentioned has been held sufficient in an action to foreclose liens in numerous decisions. Poett v. Stearns, 28 Cal. 228; Himmelmann v. Spanagel, 39 Cal. 391; Anthony v. Nye, 30 Cal. 401; Harmon v. Ashmead, 68 Cal. 323, 9 Pac. 183; Sichler v. Look, 93 Cal. 608, 29 Pac. 220. It was sufficient to show that the said defendants were proper parties to the suit. No other objection is made to the sufficiency of the complaint.

The findings state that the interest of the two Tuckers in the property was acquired after the giving of the mortgage to the plaintiff. The decree also contains recitals which are the equivalent of findings, but which have no proper place in the decree, which repeat the statement that their interests in the premises were acquired after the giving of the plaintiff's mortgage. It is objected that this finding and recital is not sustained by any evidence. There is no evidence on the subject. None was necessary; the allegation of the complaint thereon being admitted by the pleadings. The finding could neither add to nor detract from its force. The effect of such an admission, where the party by cross-complaint or otherwise does not present any prior claim, is that the foreclosure judgment and sale will bar all liens, rights, and interests acquired from the mortgagor after the execution of the mortgage, but will not bar rights or claims prior and superior to the mortgage. McComb v. Spangler, 71 Cal. 424, 12 Pac. 347; Ord v. Bartlett, 83 Cal. 431, 23 Pac. 705; Sichler v. Look, 93 Cal. 608, 29 Pac. 220. The finding and recital, being outside the issues, are surplusage, and are not only not conclusive upon the appellants, but are not competent evidence against them in any other action. Collins v. Gray, 154 Cal. 135, 97 Pac. 142; Bank of Visalia v. Smith, 146 Cal. 402, 81 Pac. 542. There is no merit in the appeal.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J

156 Cal. 587

CASTINO v. RITZMAN. (L. A. 2,424.)

(Supreme Court of California. Nov. 30, 1909.)

1. Damages (§ 159*)—Personal Injury—Financial Loss.

Under Civ. Code, § 3333, providing that plaintiff may recover all the damages proximately caused by the injury, a person injured as the result of defendant's negligence was entitled to recover, not only the damage directly sustained as a result of the pain and suffering, but also for the financial loss to his business from his inability to attend thereto, without separately alleging the amount of the loss caused by each element.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 429-453; Dec. Dig. § 159.*]

2. Damages (§ 143*)—Personal Injuries—Allegation.

In an action for personal injuries, a general statement of the whole amount of the damage sustained will suffice where all of the damage claimed is the natural and ordinary effect of the injuries.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 410; Dec. Dig. § 143.*]

Department 1. Appeal from Superior Court, Los Angeles County; Frank F. Oster, Judge.

Action by G. Castino against J. W. Ritzman. Judgment for plaintiff, and defendant appeals. Affirmed.

Ingall W. Bull, for appellant. F. McD. Spencer, for respondent.

SHAW, J. Appeal from the judgment on the judgment roll alone.

Plaintiff recovered damages for injuries to his person caused by the negligence of the defendant. He was thrown against a pile of lumber so violently that his arm was broken and sprained, and his body bruised. The complaint alleged that, by reason of these injuries, his arm was for a long time useless, he was made to suffer, he could not sleep, was not able to work, and could not attend to his business; that because of this inability to attend to his business "great waste and damage has resulted and will result to plaintiff's said business and the plaintiff financially"; and that by said injuries he had been damaged in the sum of $3,000. The defendant demurred on the ground that the complaint improperly joined an action for injuries to the person with an action for an injury to property, and that it was uncertain because it did not state how much of the damage was caused by loss of business and how much by the injury to the plaintiff's person.

The sole objection here urged is that this demurrer was improperly overruled. The objection is without merit. The whole of the damage was caused by the bodily injury, and it is so alleged. A bodily injury may cause financial loss by reason of the party being thereby made unable to work, or to attend to business, as well as by the pain and distress he suffers therefrom. The injury to the person causes all the damage. It may all be recovered in one action, and there is but one cause of action. All the elements of damage must be measured by the financial loss and stated in terms of money. This is the only reparation the law can make. The plaintiff may recover all the damages proximately caused by the injury (Civ. Code, § 3333). It is not necessary in such a case to state separately the amount of the loss that is caused by each element of damage. A general statement of the whole amount of damage will suffice when all the damage claimed is the natural and ordinary effect of the injuries alleged. Sloane v. Southern C. R. Co., 111 Cal. 685, 44 Pac. 320, 32 L. R. A. 193; Treadwell v. Whittier, 80 Cal. 580, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175. There was no claim made for special damage to the plaintiff's property, by reason of his inability to attend to his business. Conceding, but not deciding, that such damage might constitute an injury to property, although caused by an injury to the person, it was not here alleged and there was no misjoinder.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

156 Cal. 632

Ex parte BROWN. (Cr. 1,574.)

(Supreme Court of California. Dec. 2, 1909.)

Gaming (§ 72½*)—Stakeholders—Criminal Responsibility.

Under Pen. Code, § 337a, which makes it a crime to receive any money bet or wagered, or offered for the purpose of being bet or wagered, by or for any other person, upon the result of any trial or contest of speed between men or beasts, it is a crime to receive money from another person to hold the same as a bet or wager on a proposed horse race.

[Ed. Note.—For other cases, see Gaming, Dec. Dig. § 72½.*]

In bank. Application by Charles Brown for a writ of habeas corpus against Frank Barnet as sheriff of Alameda county. Writ denied.

Carroll Cook, Henry Ach, and M. C. Chapman, for petitioner.

PER CURIAM. There was evidence sufficiently showing, for the purpose of commitment for trial, that petitioner received money from another person to hold the same as a bet or wager on a proposed horse race. This was substantially the charge made by the complaint. Section 337a of the Penal Code in terms makes it a crime for one to receive any money bet or wagered, or offered for the purpose of being bet or wagered, by or for any other person, upon the result of any trial or contest of speed between men or beasts. We do not see why this case does not fall within this inhibition, nor do we see any reason to doubt the validity of the law.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The application for a writ is denied.

(156 Cal. 589)

FINNELL v. FINNELL et al. (Sac. 1,652.)

(Supreme Court of California. Nov. 30, 1909.)

1. VENDOR AND PURCHASER (§ 209*)—CONTRACTS—SALES—RECONVEYANCE.

A father conveyed land to a son, who subsequently reconveyed it to the father for a specified consideration. The son, prior to the reconveyance, concluded to sell the land, and communicated his intention to third persons, who suggested that he sell to his father. The third persons arranged the trade, acting as the son's agents, and received a commission therefor. *Held* to justify a finding that the reconveyance was a sale, and not a family settlement.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 425; Dec. Dig. § 209.*]

2. VENDOR AND PURCHASER (§ 255*)—CONTRACTS — SALES—VENDOR'S LIEN—CREATION BY STATUTE.

Civ. Code, §§ 3046, 3048, giving a vendor a lien for the unpaid and unsecured price otherwise than by the personal obligation of the purchaser, valid against every one except a purchaser in good faith and for value, give to every vendor security for the unpaid price unsecured otherwise than by the personal obligation of the purchaser, and the lien may be enforced so far, and it can be done without injury to the rights of bona fide purchasers or incumbrancers for value.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 255.*]

3. VENDOR AND PURCHASER (§ 266*)—VENDOR'S LIEN—WAIVER.

The right of a vendor to enforce a lien is personal, and it may be waived without consideration and without writing, and, when once waived, the right is forever gone.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 713; Dec. Dig. § 266.*]

4. VENDOR AND PURCHASER (§ 266*)—VENDOR'S LIEN—WAIVER.

Where a vendor does any act manifesting an intention not to rely on his lien, such as taking security therefor without an express agreement that he may still have his vendor's lien, the lien does not exist.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 713, 733, 734; Dec. Dig. § 266.*]

5. VENDOR AND PURCHASER (§ 281*)—VENDOR'S LIEN—EXISTENCE—BURDEN OF PROOF.

A vendor's lien is presumed to exist, and is an incident to the transaction and sale, unless the intention of the vendor that it shall not exist is clearly manifested by his acts or declarations, and the burden of proof is on the purchaser or his successor to show such intention.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 792; Dec. Dig. § 281.*]

6. VENDOR AND PURCHASER (§ 251*)—VENDOR'S LIEN—CREATION—INTENT OF PARTIES.

The act of a vendor manifesting an intention that his lien shall not exist must be one substantially inconsistent with the continued existence of the lien, and is not inferred from the mere fact that the parties may not have contemplated the assertion of the lien in the first instance, and the secret intention of the vendor is immaterial.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 624; Dec. Dig. § 251.*]

7. VENDOR AND PURCHASER (§ 251*)—VENDOR'S LIEN—CREATION—BY IMPLICATION.

Where, at the time of the conveyance, it was not agreed that a vendor's lien should not exist, and the vendor did not waive the lien, the lien existed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 624; Dec. Dig. § 251.*]

8. VENDOR AND PURCHASER (§ 266*)—VENDOR'S LIEN—WAIVER.

A son conveyed land to his father for a consideration, a part of which was unsecured, except by the father's note, which was not taken as a substitute for the purchase money. The son had no actual knowledge of the father's intent to mortgage the premises to third persons, but the son's agents for the purpose of inducing the father to purchase knew of such intent. The son asked the father to give a mortgage as security for the unpaid price, and the father declined to do so. *Held*, not to show a waiver by the son of a vendor's lien.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 713; Dec. Dig. § 266.*]

9. VENDOR AND PURCHASER (§ 265*)—VENDOR'S LIEN—BONA FIDE PURCHASER—NOTICE.

A purchaser of land subject to a vendor's lien, with the aid of dummy directors and stockholders, formed a corporation, and conveyed the land to the corporation and issued stock to the stockholders, who had knowledge of the facts. *Held*, that the corporation was not a bona fide purchaser without notice, but took the land subject to the lien.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 704; Dec. Dig. § 265.*]

10. LIMITATION OF ACTIONS (§ 167*) — VENDOR'S LIEN—ENFORCEMENT—LIMITATIONS.

The right of a vendor to enforce his lien continues so long as an action may be commenced for the purchase money, and, where a note for the price is given, an action to enforce the lien may be commenced at any time before an action is barred on the note.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 653; Dec. Dig. § 167.*]

11. EQUITY (§ 87*)—LACHES—STATUTE OF LIMITATIONS.

Where an express statute of limitations applies to a suit in equity, mere delay to commence the suit for a period less than that of the statute does not justify a dismissal of the action, but there must appear, in addition to mere lapse of time, some circumstance from which defendant or some other person may be prejudiced, or there must be such lapse of time that it may be reasonably supposed that such prejudice will accrue if the remedy is allowed.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 242–244; Dec. Dig. § 87.*]

12. EQUITY (§ 87*)—LACHES—STATUTE OF LIMITATIONS.

Where a purchaser conveyed land, subject to a vendor's lien, to a corporation, whose stockholders knew that the purchase money had not been paid, mere delay in commencing suit to enforce the lien until the period prescribed by limitations was about to expire did not defeat the suit on the ground of laches.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 242–244; Dec. Dig. § 87.*]

13. Vendor and Purchaser (§ 251*)—Vendor's Lien — Creation — Knowledge by Vendor of Lien Law.

That a vendor, at the time of conveyance, did not know that a vendor's lien existed under the law did not affect his right to rely on the lien.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 624; Dec. Dig. § 251.*]

14. Vendor and Purchaser (§ 278*)—Vendor's Lien—Enforcement—Laches.

Knowledge of a subsequent purchaser of the facts which gave the original vendor a right to enforce a lien removed any prejudice that resulted from mere delay in commencing a suit to enforce the lien.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 777; Dec. Dig. § 278.*]

In Bank. Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by William Finnell against John Finnell, Jr., as Administrator of John Finnell, Sr., deceased, and another. From a part of the judgment for plaintiff, and from an order denying a new trial, defendant the Finnell Land Company appeals. Affirmed.

Charles W. Slack, W. P. Johnson, and Garret W. McEnerney, for appellant. Theodore A. Bell and Bell, York & Bell, for respondent.

ANGELLOTTI, J. This action was brought by plaintiff on October 14, 1904, to enforce an alleged vendor's lien upon 4,250 acres of land in Tehama county, sold by plaintiff to John Finnell, Sr., his father, on October 15, 1890, the amount due on account of the purchase price being $92,000, with interest at 6 per cent. per annum from October 15, 1902, evidenced by a promissory note given by John Finnell, Sr., to plaintiff October 15, 1890, which by its terms was payable October 15, 1900. John Finnell, Sr., having died prior to judgment, the defendant John Finnell, Jr., administrator of his estate, was substituted in his place as defendant. Defendant Finnell Land Company, a corporation, the present owner of the land, was alleged to have acquired it from John Finnell, Sr., with full knowledge that he had not paid to plaintiff the amount due on account of the purchase price. Judgment went for plaintiff, directing the sale of the land and the application of the proceeds to the payment of plaintiff's claim, aggregating with interest $121,180.95 and costs, and also in favor of the Finnell Land Company to the extent of providing that, if it pay the amount due plaintiff, or if the land be sold under the judgment, it be subrogated as a judgment creditor of the administrator of the said John Finnell, Sr., its judgment being payable in due course of administration, for the amount so paid, or for which said land may be sold. This is an appeal by the Finnell Land Company from those portions of the judgment which make the amount found due plaintiff a lien on said premises, and require the sale thereof to satisfy the same, and also from an order denying its motion for a new trial.

On October 15, 1900, plaintiff was the absolute owner in fee of the land involved, being tracts I, J, K, and L of the Rancho de los Saucos, according to a survey and map thereof made by L. V. Healey and E. N. Eager. This land constituted a part of 15,839.37 acres which had previously been acquired by John Finnell, Sr. The 4,250 acres had been conveyed to plaintiff by John Finnell, Sr., by deed dated September 17, 1882, and acknowledged January 17, 1883. On October 15, 1890, plaintiff, by a good and sufficient grant, bargain, and sale deed, sold and conveyed this land to John Finnell, Sr., for a consideration of $127,500, and also the stock thereon for $4,000. John Finnell, Sr., gave to plaintiff his check on the James H. Goodman & Co. Bank of Napa for the $4,000 for the stock, and also a check on account of the purchase price of the land for $3,412.80, both of which checks were indorsed over to the bank by plaintiff to satisfy an indebtedness due from him. He further gave plaintiff personal property of sufficient value to make the amount actually paid by him on account of said purchase price $3,500. Plaintiff then owed John Finnell, Sr., $32,000, evidenced by his notes, and these notes had been transferred by John Finnell, Sr., to the bank, and this indebtedness was assumed solely by John Finnell, Sr. This left $92,000 due on account of the agreed purchase price; and, as the findings sufficiently supported by testimony establish, not in payment for the land, but purely to evidence the amount still owing, John Finnell, Sr., gave to plaintiff his note of October 15, 1890, payable October 15, 1900, said note providing for interest at 6 per cent. per annum, payable annually. The interest was paid annually up to October 15, 1902. No part of the principal sum of $92,000 has ever been paid, and no part of the interest accruing since October 15, 1902. At the time of the transaction plaintiff asked John Finnell, Sr., if he would not give him a mortgage to secure the payment of the note; but John Finnell, Sr., after consultation with Mr. George E. Goodman, president of the bank, and following his advice, refused to do so, and plaintiff never received any security of any kind for the payment of the note. The evidence amply supports the conclusion of the trial court to the effect that the conveyance by plaintiff to John Finnell, Sr., was not made as a part of a family settlement and compromise, but that it was an out and out sale, as fully so as one made to a stranger would have been. The evidence shows that plaintiff had concluded to sell this land, and communicated his intention to Mr. Goodman and Mr. Noyes, another officer of the bank. The bank and Mr. Goodman were creditors of Finnell, Sr., in large amounts, and Mr.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Goodman suggested that plaintiff had better sell to his father, and not "to any one else in their way," so he told Goodman and Noyes he would do so if they arranged it but he would not go to his father himself about the matter. "They went ahead and made the trade," acting as his agents, it may be conceded, for the purpose of effecting a sale. Plaintiff actually paid Noyes a commission of over $2,000 for arranging the sale. There was nothing to compel the conclusion that in thus dealing with his father he was simply surrendering to him something that had been previously given to him by way of a family settlement or advance, in return for the promise of his father that he should receive certain money in lieu thereof.

Unless plaintiff waived his rights in that behalf, he acquired at the time of this sale to his father a vendor's lien on the property so conveyed by him, for so much of the price as remained unpaid and unsecured otherwise than by the personal obligation of the buyer, which lien was valid against every one claiming under the buyer except a purchaser or incumbrancer in good faith and for value. Civ. Code, §§ 3046, 3048. Whatever may be said against the policy of allowing such a secret lien, not evidenced by any writing or public record, our Legislature has seen fit to look with favor upon it, and to continue in force the old equity rules in regard thereto. As was said in Fisher v. Shropshire, 147 U. S. 133, 143, 13 Sup. Ct. 201, 37 L. Ed. 109, the principle on which such a lien rests has been held to be that one who gets the estate of another ought not in conscience to be allowed to keep it without paying the consideration. Our law, recognizing this as a just principle, gives to every vendor, in the vendor's lien declared by section 3046, security for, and a means of enforcing, payment of the consideration, so far as it can do so without injury to the rights of bona fide purchasers or incumbrancers for value. The right thus afforded of enforcing payment of the consideration against the property conveyed is a personal one, and it may be waived and relinquished without consideration, and without a writing (see Claiborne v. Castle, 98 Cal. 30, 33, 32 Pac. 807), and, when once waived, is gone forever. It is thoroughly settled that, if the vendor do any act manifesting an intention on his part not to rely on the lien thus given by law for the payment of the purchase money, such as taking security therefor, without an express agreement that he may still have his vendor's lien, the lien will not exist. Fisher v. Shropshire, supra; Avery v. Clark, 87 Cal. 619, 625, 25 Pac. 919, 22 Am. St. Rep. 272; Lee v. Murphy, 119 Cal. 364, 51 Pac. 549, 955. But the lien is presumed to exist, and is an incident of the transaction of sale, in all cases unless the intention of the vendor that it shall not exist be clearly manifested by his acts or declarations, and the burden of proof is on the vendee or his successors to show such intention. See 2 Jones on Liens, § 1064; Selna v. Selna, 125 Cal. 357, 360, 58 Pac. 16, 73 Am. St. Rep. 47. The act manifesting such an intention must be one substantially inconsistent with the continued existence of the lien, and cannot be inferred from the mere fact that the parties may not have contemplated the assertion of the lien in the first instance. Fisher v. Shropshire, supra.

The trial court found that it is not true that at the time of the conveyance, and up to shortly before the commencement of the action, plaintiff relied wholly for the payment of the consideration on the personal responsibility of his father, John Finnell, Sr. This finding is attacked as not being supported by the evidence; but, in view of what we have said, we do not regard it as a material finding. The question in this connection is not what were the secret thoughts or expectations of plaintiff as to where he was to get this purchase money, but whether he had done any act or made any statement that manifested his intention to abandon any right given him by law to enforce his claim against the land, and to look solely to his father personally for payment; in other words, had done or said anything that was inconsistent with the retention of a lien, and amounted to a waiver thereof. As was said in Moshier v. Meek, 80 Ill. 79, speaking of such a lien, "this lien, in equity, is created without the express agreement of the parties, and even when they do not know that such a lien exists or is created by operation of law." In Houston v. Dickson, 66 Tex. 79, 1 S. W. 375, the court, after saying that the lien may be waived by such facts as show that the vendor relies on other security, or relinquishes his right to the security which the law gives him, said: "But the absence of knowledge that the law gives him such a security, or a mere secret intention not to claim it, does not affect the right." See, also, 2 Jones on Liens, § 1064.

It was further found, substantially, that it is not true that at the time of the conveyance it was understood and agreed that no lien existed or was reserved, and it is not true that plaintiff ever waived all liens against said land or any part thereof. If this finding, which is attacked by appellant, is sufficiently supported by evidence, it effectually disposes of all claims to the effect, either that a vendor's lien never existed in favor of plaintiff, or that there had been a waiver of any right to a lien. We are satisfied that it cannot be held here that the finding is not sufficiently sustained by the evidence. Admittedly there was nothing to indicate any express agreement of the parties, written or parol, relative to the matter, and appellant is compelled to rely upon the circumstances of the transaction as showing an agreement or understanding that no vendor's lien should exist, and that all right to such a lien should be waived. As we have already said, the trial court was fully justified in finding that the transaction of October 15, 1890, between plaintiff and his father was not one in the nature of a family settlement and compromise, and also that the note was not taken as a substitute for the purchase money, so that whatever force might properly be given to such a circumstance, if found, is a matter of no concern here.

It is claimed that the evidence shows that plaintiff knew that his father intended to mortgage the land to the James H. Goodman & Co. Bank in order to take up plaintiff's notes to him, which he had transferred to such bank, which mortgage was in fact executed by the father about six months afterward, and that this knowledge put him on notice that the intended use of the property by the father was such as was absolutely inconsistent with the creation of a vendor's lien on the property. Plaintiff had no actual knowledge of his father's intention to mortgage this land, but it is claimed that the knowledge of Mr. Goodman and Mr. Noyes in this behalf must be imputed to him by reason of the fact that they were his agents. We do not consider this claim well based under the circumstances. They were his agents for a very limited purpose, simply that of inducing Mr. Finnell to purchase the land from his son, and they appear to have been interested in accomplishing this, not alone on account of plaintiff, but principally on account of the bank, whose agents they also were, so that this property should not go into the hands of a stranger, but should be, with the other portions of the rancho, a part of the property of Finnell, Sr., with whom the dealings of the bank were very extensive, and involved very large sums of money. The understanding between them and Finnell, Sr., "that the land should be holden for the amount of money that he [plaintiff] owed," evidence by the mortgage subsequently given, was one urged and assented to by them solely as agents of the bank, and had no connection whatever with the subject-matter of their agency for plaintiff. The matter of obtaining the necessary funds wherewith to make the purchase from plaintiff was a transaction wholly between the purchaser and the bank, with which plaintiff had nothing whatever to do. We are satisfied that the knowledge of Goodman and Noyes as to the means by which the indebtedness due the bank from the purchaser was to be secured cannot be held to indicate any assent, on the part of plaintiff, to a waiver of any of his rights in the matter of the enforcement of his claim for the balance of the purchase money. The fact that plaintiff asked his father to give a mortgage as security for the balance of the purchase money, and that his father declined to do so, certainly does not show any disposition on plaintiff's part to waive any security given him by the law. It shows, to the contrary, that he did desire to obtain, if possible, a written contract of security, and the utmost shown by his subsequent willingness to convey without obtaining this is that he withdrew his demand for such a contract, not that he waived anything given him by the law. The appellant, Finnell Land Company, acquired the property from John Finnell, Sr., by a deed dated May 29, 1900, and has ever since been the owner thereof. The trial court found that it purchased the land and took the deed therefor "with the full knowledge that the said John Finnell, deceased, had not paid plaintiff the residue of said purchase money."

The Finnell Land Company was organized as a corporation under the laws of this state on May 24, 1900, with a capital stock of $650,000, divided into 6,500 shares of the par value of $100 each. The evidence quite clearly establishes that it was formed at the instance of Mr. Goodman and the other officers of the J. H. Goodman & Co. Bank, to which Finnell, Sr., owed very large amounts of money, aggregating several hundred thousand dollars, to enable him and them to more readily control the real property of Mr. Finnell, of which the land involved here constituted a part, with a view to its sale and the settlement of the claims of the bank and Goodman. The original directors were John Finnell, who was president of the corporation, and four of his sons, not including the plaintiff. On May 29, 1900, Finnell, Sr., proposed in writing to the directors to convey to the company, free of incumbrance, all of his land, being about 15,841 acres, in consideration of the issuance of all of the stock, 6,500 shares, as follows: To John Finnell, Jr., 10 shares; to James Finnell, 10 shares; to Simpson Finnell, 10 shares; to Bush Finnell, 10 shares; to George E. Goodman, 2,000 shares; and to John Finnell, Sr., 4,460 shares. This offer was accepted by the directors, and the deed was thereupon delivered and the stock issued. It is found, in accord with an allegation of appellant's answer, that "all of said persons to whom the said shares were issued other than John Finnell, were nominal owners thereof, but the beneficial and equitable owner, and the only person having any interest in said shares, was the said John Finnell, who owned the entire capital stock of said corporation, to wit, 6,500 shares, from May 29, 1900, until October 26, 1900, when he transferred said 6,500 shares as hereinafter found." The transfers of October 26, 1900, here referred to, were specifically described in subsequent findings, being one of 4,500 shares, together with certain personal property, to the James H. Goodman & Co. Bank in satisfaction of an indebtedness of $447,742.80 due said bank from him, and one of 2,000 shares and certain personal property to said George E. Goodman, in satisfaction of an indebtedness of over $350,000. On September 8, 1902, said

George E. Goodman transferred his 2,000 shares to Simpson Finnell, a brother of plaintiff, who has ever since been the owner thereof, and the Goodman Bank still owns the other 4,500 shares. The evidence shows that each of the directors of appellant other than John Finnell, Sr., including said Simpson Finnell, knew, at the time of the transaction by which it acquired the land, that plaintiff had not been paid the balance of the purchase price, and that he held the note of John Finnell, Sr., therefor. The evidence further shows that both George E. Goodman, individually, and the James H. Goodman & Co. Bank, through its president and other officers, had the same knowledge through all the proceedings in relation to the formation of the corporation and the transaction by which this property was conveyed to appellant, and ever since. Under these circumstances we do not see how it can be doubted that the Finnell Land Company took the land from Finnell, Sr., with full knowledge that John Finnell, Sr., had not paid the plaintiff the residue of the purchase money. It is obvious that, if at the time of the conveyance the corporation was practically simply John Finnell, Sr., as the finding in regard to the ownership of the stock establishes, and that no other person had any interest in the property of the corporation, it necessarily had all the knowledge in regard to the right of plaintiff that Finnell had. This was recognized in Bang v. Brett, 62 Minn. 4, 63 N. W. 1067, cited by appellant, the court saying: "Or, if the members of the corporation consisted wholly of the Merritts and others having notice of the existence of plaintiff's lien, it might be that their notice would be notice to the corporation." But it is unnecessary to cite authorities to sustain this proposition. John Finnell, Sr., with the aid of dummy directors and stockholders, incorporated himself, and conveyed the land to himself so incorporated. If, by reason of the fact that it was then understood by him, Goodman, and the Goodman Bank that the stock was subsequently to be transferred to Goodman and the Goodman Bank in satisfaction of his indebtedness, Goodman and the Goodman Bank could be held to have then had any interest in the corporation, the latter, as has been said, had the same knowledge in regard to plaintiff's claim as had Finnell. Although under these circumstances it was not essential to notice to the corporation that the dummy directors of appellant should have had knowledge, they nevertheless did have it. We know of no theory upon which it may be held that the Finnell Land Company, constituted as it was, did not take with notice of plaintiff's right.

The trial court found against appellant's claim that plaintiff had been guilty of laches in failing to assert his lien and bring an action to enforce the same prior to October 14, 1904, the date of the commencement of this action. We cannot hold that this finding is not sufficiently sustained by the evidence. The right of a vendor to enforce his lien continues, unless waived, so long as an action can be commenced for the purchase money (2 Jones on Liens, § 1064); and, where a note for the purchase money is given, payable at a future day, an action to enforce the lien may be commenced at any time before the lapse of the period within which an action can be brought on the note (California Savings Bank v. Parrish, 116 Cal. 254, 259, 48 Pac. 73). This action was commenced within that period. "Where an express statute of limitations applies to a suit in equity, mere delay to commence the suit for a period less than that of the statute of limitations is never a reason for dismissing the proceeding." Lux v. Haggin, 69 Cal. 267, 10 Pac. 676. "There must appear, in addition to mere lapse of time, some circumstances from which the defendant or some other person may be prejudiced, or there must be such lapse of time that it may be reasonably supposed that such prejudice will occur if the remedy is allowed." Cahill v. Superior Court, 145 Cal. 42, 47, 78 Pac. 467, 469. In this case it was affirmatively made to appear that there could have been no prejudice resulting to any person by reason of the failure of plaintiff to commence his proceeding to enforce the lien until the period prescribed by the statute of limitations was about to expire. It may be assumed, purely for the purposes of this decision, that, as against a corporation whose stock is transferable in the open market and likely to pass into the hands of innocent purchasers, a person having a mere vendor's lien against property held by the corporation must assert his claim promptly, and that any unreasonable delay in asserting it will foreclose his right if stock of the corporation has been transferred to purchasers in good faith and without notice. But no such condition confronts us here. All those who have acquired the stock of Finnell, Sr., had full knowledge of the facts under which plaintiff's right to a lien exists.

It is claimed that the trial court erred in several rulings on the admissibility of evidence. The alleged error principally relied on was the exclusion by the court of certain evidence attempted to be elicited from plaintiff relative to a conversation between him and his brother Bush Finnell in July or August, 1904, which was two or three months before the commencement of this action. The proposed evidence was contained in the deposition of plaintiff, which had been taken for the purposes of the trial, and, so far as necessary to be stated here, is as follows: "Q. Now, what was it precisely that your brother Bush told you at that time? A. Well, Bush and I were talking, and I told Bush it looked to me like everything was getting muddled up, and if we did not get it settled up pretty soon, there would be nothing left, and I told Bush about this note.

In fact, I guess he knew it; I think all the Finnell family knew it, notwithstanding I never said anything to them about it. I asked Bush if there was any way for me to make myself whole or part whole. He said he knew no other way except I might bring a vendor's lien against the land, and that was about all there was said. Q. Up to that time did you know there was such a thing as a vendor's lien? A. No, sir; knew nothing about it. Q. That was new to you? A. That was a new trick to me; I did not know it." The sum and substance of this was that plaintiff did not know that there was such a thing as a vendor's lien at the time of the conveyance to his father, or until shortly before the commencement of this proceeding. We have already seen that the mere fact that a vendor does not know that the law gives him such security cannot affect his right. But it is urged that the proposed evidence was "very material additional evidence upon the question of the intent of William Finnell in taking the $92,000 note from his father, to the effect that he relied entirely upon the financial responsibility of his father as security for it, and that the reconveyance was in fact a family settlement and compromise," and that it went to show that no vendor's lien was ever created. To our minds this evidence was in no way material on the question of family settlement and compromise. We have already stated our views to the effect that it was not material what were the secret thoughts or expectations of plaintiff as to how he could or would collect this purchase money, or whether he believed that he could collect it only from his father personally, and so, in his own mind, relied entirely on his father's financial responsibility. The law, not any contract of the parties, gave him the lien if the transfer of the land to his father was an ordinary sale, and we do not think that the proposed evidence as to his ignorance of the law relative to a vendor's lien was such as to throw any light upon the question whether it was a sale, or upon the question whether he did or said anything which might tend to show an understanding between the parties for a waiver of any right given him by the law. We cannot see that this evidence could have affected in any degree the conclusion of the trial court upon any material issue.

It is urged that it was error for the court to exclude the testimony showing how plaintiff became indebted to his father for the $32,000 which he claimed to owe him at the time of his conveyance on October 15, 1890. As to this claim, it is sufficient to say that we are unable to find that the trial court excluded any evidence that would have had any material bearing upon this question.

Mr. F. E. Johnston, an attorney, was allowed, over the objection of appellant "that it is a privileged communication," under subdivision 2, § 1881, of the Code of Civil Procedure, to testify that at a conversation that occurred between himself and Finnell, Sr., and Mr. Goodman at the Palace Hotel in San Francisco, shortly prior to the formation of the Finnell Land Company, in which the matter of forming a corporation was "simply mentioned by one or the other," he was asked whether it could be done, and he said it could be done. He further said that he was not anybody's attorney in the matter. It is clear that the objection made to this evidence was properly overruled.

The evidence showing knowledge on the part of the officers of the James H. Goodman & Co. Bank of the facts giving plaintiff a right to enforce against the land his claim for the residue of the purchase money was admissible, if for no other reason, for the purpose of showing that no prejudice could have resulted from the delay of plaintiff in commencing his proceeding to enforce his lien, and thus meeting the defense of laches.

In view of our conclusion upon the matters already discussed, there is no other point suggested in the briefs that requires attention.

Those portions of the judgment that are appealed from, and the order denying a new trial, are affirmed.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

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156 Cal. 611

GROGAN v. CHAFFEE. (L. A. 2,054.)

(Supreme Court of California. Dec. 1, 1909.)

1. MONOPOLIES (§ 8*)—NATURE OF "MONOPOLY."

A "monopoly" exists where all, or so nearly all, of an article of trade or commerce within a district, is brought within the hands of one man, or set of men, as to practically bring the handling or production of the commodity or thing within such control to the exclusion of the competition of free traffic therein.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 8.*

For other definitions, see Words and Phrases, vol. 5, pp. 4570–4573.]

2. EVIDENCE (§ 5*)—JUDICIAL NOTICE—MATTERS OF COMMON KNOWLEDGE.

The court must assume as a matter of common knowledge that persons may and do manufacture pure olive oil in considerable quantities.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 4; Dec. Dig. § 5.*]

3. MONOPOLIES (§ 17*)—CONTRACTS CREATING MONOPOLY.

A manufacturer of olive oil may require a retailer buying the same to maintain a standard selling price as a means of securing the legitimate benefits of the reputation which the product of the manufacturer may have attained, and such a contract is not invalid as tending to create a monopoly, in the absence of anything to show that the oil comprises the whole or any large proportion of the oil in the market supplied by the manufacturer.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. § 17.*]

4. MONOPOLIES (§ 17*)—RESTRAINT OF TRADE —SALE OF GOODS.

A contract between a manufacturer of olive oil, having a secret process, and a retail dealer therein, stipulating that the latter will not sell the oil for less than the price fixed by the manufacturer, is not invalid as in restraint of trade, notwithstanding Civ. Code, §§ 1673–1675, providing that every contract by which any one is restrained from exercising a lawful business shall be void, etc., since the Code must be construed in the light of the rule that not every limitation on absolute freedom of dealing is prohibited, and that the question is whether, under the particular circumstances and the particular contract, it is or is not unreasonable.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. § 17.*]

5. MONOPOLIES (§ 10*)—STATUTES—APPLICABILITY.

Where a contract is not obnoxious to St. 1907, p. 984, c. 530, as amended by St. 1909, p. 593, c. 362, defining "trusts," the court will not determine the question whether the contract made prior to the amendment is obnoxious to the act as originally enacted.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 9; Dec. Dig. § 10.*]

Beatty, C. J., dissenting.

In Bank. Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Charles A. Grogan against H. G. Chaffee. From a judgment for defendant on sustaining a demurrer to the complaint, plaintiff appeals. Reversed, with directions.

See, also, 6 Cal. App. 566, 92 Pac. 653.

Powers & Holland, for appellant. Porter, Sutton & Cruickshank and Thomas, Gerstle, Frick & Beedy, for respondent.

PER CURIAM. A judgment of reversal having been heretofore rendered herein, a rehearing was ordered. The opinion originally filed was prepared by Sloss, J., and read, in part, as follows:

"The plaintiff appeals from a judgment against him, following an order sustaining a demurrer to his amended complaint. The demurrer is based upon both general and special grounds. On this appeal, however, the respondent limits his argument in support of the ruling on the demurrer to the ground that the complaint fails to state facts sufficient to constitute a cause of action. We are satisfied that there is no merit in any of the other specifications, and shall address ourselves to the single proposition discussed by counsel.

"The case stated by the complaint is this: The plaintiff has for 10 years been engaged in the manufacture and production of pure olive oil by a process of his own discovery. The oil so produced is sold and used for food, medical and commercial purposes, and plaintiff has extensively advertised to the public the fact that he manufactures a pure olive oil, and that such oil is guaranteed to be pure and wholesome. In his advertising the plaintiff has used certain designs copyrighted by him, and these designs are placed on every bottle or package of oil manufactured and sold by him, as a trade-mark. By reason of these methods of advertising and dealing, the plaintiff's oil has become well known, and a large quantity thereof is sold throughout the United States, and more particularly in the city of Pasadena, and elsewhere in the county of Los Angeles. The plaintiff has affixed to every bottle or package of his oil a notice stating that the article 'is sold upon the condition that the purchaser, if he retails these goods, will maintain my fixed retail selling price on them; and that, if he wholesales them, he will sell them subject to this same condition.' This notice specifies the fixed retail selling price as $1.35 per half gallon can and $2.50 per gallon can. All persons buying said olive oil agree not to sell or deliver any of it at a price less than that provided for in the notice.

"The defendant is a retail grocer, engaged in business in the city of Pasadena. He has bought of plaintiff olive oil under the express contract and condition that the same should not be sold at a price or prices less than those fixed by plaintiff. He has, however, refused to comply with his contract, and sells and offers for sale said oil at the price of $1.20 per half gallon, and has advertised such offer by publication in a newspaper and by posters and notices posted in the windows of his store. This conduct has been continued by defendant notwithstanding plaintiff's demand that he comply with his contract. The complaint alleges that plaintiff has sustained irreparable damage, that it is impossible to ascertain the damage sustained and to be sustained, and that there is no adequate remedy at law. The prayer is for an injunction restraining defendant from advertising, selling, or offering for sale the oil at prices less than those fixed by the contract, and for damages. In support of the ruling sustaining the demurrer it is urged that the contract relied on by plaintiff is unenforceable as being in restraint of trade.

"We have here no question of an attempted monopoly. 'A monopoly exists where all, or so nearly all, of an article of trade or commerce within a community or district, is brought within the hands of one man or set of men, as to practically bring the handling or production of the commodity or thing within such control to the exclusion of competition of free traffic therein. Herriman v. Menzies, 115 Cal. 16, 44 Pac. 660, 46 Pac. 730, 35 L. R. A. 318, 56 Am. St. Rep. 81. It was the tendency to create a monopoly, thus defined, that was the objectionable feature of the agreements declared invalid in such cases as Pacific Factor Co. v. Adler, 90 Cal. 117, 27 Pac. 36, 25 Am. St. Rep. 102; Mill, etc., Co. v. Hayes, 76 Cal. 387, 18 Pac. 391, 9 Am. St. Rep. 211; Vulcan Powder Co. v. Hercules Powder Co., 96 Cal. 510, 31 Pac. 581, 31 Am. St. Rep. 242. See, also, Cummings v. Union Blue Stone Co., 164 N. Y. 1, 58 N. E. 1, 79 Am. St. Rep. 620; Cohen v. Envelope Co., 166 N. Y. 292, 59 N. E. 906. The contract here relied on does not relate to any olive oil except that manufactured by plaintiff. There is no suggestion that this comprises all, or any large proportion, of the olive oil manufactured or sold in the market supplied by plaintiff. While plaintiff alleges that he manufactures oil by a process of his own discovery, there is nothing exclusive in the product resulting from this process. All that he claims for his oil is that it is pure and wholesome. The court must assume, as a matter of common knowledge, that others may and do manufacture pure olive oil in considerable quantities.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"Under these circumstances we see no reason why the contract alleged by plaintiff should not, as between the parties to it, be held to be valid. It violates no canon of public policy. By its terms the buyer is not precluded from engaging in any lawful trade. He may sell other olive oil at any price and on any conditions satisfactory to him. The producer was, in the first instance, under no obligation to sell his oil, and when he did sell it had the right to exact, as part of the consideration for the sale, a promise by the purchaser that he would not sell it at less than a stipulated price. There is nothing either unreasonable or unlawful in the effort by a manufacturer to maintain a standard price for his goods. It is simply a means of securing the legitimate benefits of the reputation which his product may have attained. Contracts similar to the one under discussion have been considered in a number of cases, and have generally been upheld where, as here, they had no tendency to create a monopoly. Fowle v. Park, 131 U. S. 88, 9 Sup. Ct. 658, 33 L. Ed. 67; Bement v. National Harrow Co., 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058; Park & Sons Co. v. National Druggists' Association, 175 N. Y. 1, 67 N. E. 136, 62 L. R. A. 632, 96 Am. St. Rep. 578; Garst v. Harris, 177 Mass. 72, 58 N. E. 174; Dr. Miles Med. Co. v. Goldthwaite (C. C.) 133 Fed. 794; Dr. Miles Med. Co. v. Platt (C. C.) 142 Fed. 606; Dr. Miles Med. Co. v. Jaynes Drug Co. (C. C.) 149 Fed. 838; Walsh v. Dwight, 40 App. Div. 513, 58 N. Y. Supp. 91. Many of these decisions, it is true, deal with contracts concerning the sale of patented or proprietary articles, and are based, to some extent, upon the principle that a monopoly right is inherent in a patent or in an article produced according to a formula known only to its manufacturer. It has been questioned whether the fact that an article is produced under a secret formula is of any importance in determining the validity of contracts regulating its sale. Hartman v. John D. Park & Sons Co. (C. C.) 145 Fed. 358; s. c., on appeal, John D. Park & Sons Co. v. Hartman, 153 Fed. 24, 82 C. C. A. 158, 12 L. R. A. (N. S.) 135. However this may be, we are cited to no case which holds that a contract like the one at bar is invalid as between the parties to it, whether it deals with an article produced under patent or secret formula or one that may be produced by any one. The tendency of the modern decisions has been to view with greater liberality contracts claimed to be in restraint of trade. It is not every limitation on absolute freedom of dealing that is prohibited. As is said by the Supreme Court of the United States in Gibbs v. Consolidated Gas Co., 130 U. S. 396, 409, 9 Sup. Ct. 553, 557, 32 L. Ed. 979: 'Public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other requires, the contract may be sustained. The question is whether, under the particular circumstances of the case, and the nature of the particular contract involved in it, the contract is, or is not, unreasonable.' So in People's Gaslight Co. v. Chicago Gaslight Co., 20 Ill. App. 492, the court says: 'The tendency of the courts is to regard contracts in partial restraint of competition with less disfavor than formerly, and the strictness of the ancient rule has been greatly modified by the modern decisions.' Many decisions announcing views similar to those declared in these quotations are cited with approval by this court in Herriman v. Menzies, supra, and it must be taken to be settled that the sections of Civ. Code, §§ 1673, 1674, 1675, relating to contracts in restraint of trade, are to be construed in the light of these principles. Herriman v. Menzies, 115 Cal. 16, 44 Pac. 660, 46 Pac. 730, 35 L. R. A. 318, 56 Am. St. Rep. 81. In Smith v. S. F. & N. P. Ry. Co., 115 Cal. 584, 604, 47 Pac. 582, 589, 35 L. R. A. 309, 56 Am. St. Rep. 119, this court said: 'The rule invalidating contracts in restraint of trade does not include every contract of an individual by which his right to dispose of his property is limited or restrained. Section 1673 of the Civil Code makes void every contract by which one is restrained from "exercising a lawful profession, trade or business," except in certain instances. But this is far different from a contract limiting his right to dispose of a particular piece of property, except upon certain conditions. As the owner of property has the right to withhold it from sale, he can also, at the time of its sale, impose conditions upon its use without violating any rule of public policy. * * *'

"The necessary result of what we have said is that the complaint must be held sufficient. It is alleged that the defendant bought oil under an express agreement that he would not sell it at less than given prices, and that he had sold and threatened to sell it at less than such prices. This is a violation of plaintiff's rights under his contract. Whether this contract could be enforced against persons who might come into possession of plaintiff's oil, with notice of the restriction imposed by him on its sale, but without having made any direct agreement to respect such restriction, is a question not here presented. See Garst v. Hall & Lyon Co., 179 Mass. 589, 61 N. E. 219, 55 L. R. A. 631."

The rehearing was ordered to enable the court to give further consideration to the views of the United States Circuit Court of Appeals for the Sixth Circuit, as declared in Park & Sons Co. v. Hartman, 153 Fed. 24, 82 C. C. A. 158, 12 L. R. A. (N. S.) 135, and restated in Miles Med. Co. v. Park & Sons Co., 164 Fed. 803, 90 C. C. A. 579. Judge Lurton was the author of each of these opinions. The first contains a very elaborate and learned discussion of the law governing some of the questions involved. It may be said that neither of these cases involved the question here presented; i e., the enforceability, as between the parties, of a contract of the kind here shown. The corporation complainant in each instance sought to obtain relief against persons who had entered into no contractual relation with it. It must, however, be confessed that the views there expressed upon the general question of the validity of a system of contracts like that here involved is opposed to what was declared by us in our opinion. Most of the cases cited by us in our opinion heretofore filed are reviewed by Judge Lurton in Park v. Hartman and are either disapproved or sought to be distinguished. It does not appear to us, however, that the attempt to distinguish has in all instances been entirely successful, and, notwithstanding the great respect entertained by us for so able and learned a court as that which decided the cases of Park v. Hartman and Miles v. Park, we must remain of the opinion that the conclusion there reached, so far as it is applicable to the case before us, is contrary to the weight of authority.

In our former opinion something was said about the effect upon this litigation of the so-called Cartwright act (St. 1907, p. 984, c. 530), which had been enacted after the date of this appeal. That statute has recently been amended. St. 1909, p. 593, c. 362. The constitutionality of the amending act is not here questioned, nor is it suggested that the contract relied on appears, on the face of the complaint, to be obnoxious to the terms of the law as it now stands. Whether or not a defense to the action could be based on the Cartwright act is a question not now before us. At the present time, and on the record and argument here presented, there is no occasion to discuss the construction or applicability of the statute.

The judgment is reversed, with directions to the superior court to overrule the demurrer, granting leave to the defendant to answer.

BEATTY, C. J. I dissent.

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156 Cal. 617

HUDSON et al. v. DAILEY et al. (L. A. 2,234.)

(Supreme Court of California. Dec. 1, 1909.)

1. WATERS AND WATER COURSES (§ 155*) — PARTITION OF LAND — WATER RIGHTS — RIGHTS OF PURCHASERS.

The owners of a ranch executed a partition deed containing a covenant that, notwithstanding the partition, the rights to use of the water of a creek flowing into the ranch or rising thereon should remain as theretofore held, in equal shares. *Held*, that such covenant was ineffective between purchasers of different tracts from the same original owner, but was only available as between purchasers claiming title from the different original holders.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 166; Dec. Dig. § 155.*]

2. WATERS AND WATER COURSES (§ 155*)—WATER RIGHTS—COVENANTS—NONCONTIGUOUS LANDS.

A covenant in a partition deed that the owners of the entire property should continue to use the waters of a stream in equal shares, as theretofore, did not necessarily secure any riparian rights to subsequent grantees of the land not contiguous to the stream.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 166; Dec. Dig. § 155.*]

3. WATERS AND WATER COURSES (§ 155*)—RIPARIAN RIGHTS—DIVISION OF LAND.

A subsequent conveyance by one of the original owners of riparian land of a part thereof not abutting on the creek would not convey any riparian rights, unless so provided in the conveyance, or unless the circumstances were such as to show that the parties so intended, or such as to raise an estoppel.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 166; Dec. Dig. § 155.*]

4. WATERS AND WATER COURSES (§ 155*)—NONRIPARIAN LAND.

Where a tract of land conveyed was not contiguous to a stream and had never received water therefrom, and there were no ditches leading to it from the stream at the time of the conveyance, nor other conditions indicating an intention that it should continue to have riparian rights, notwithstanding its want of access to the stream, the fact that it was part of a ranch to which riparian rights had extended while the ownership was continuous from it to the banks of the stream would not preserve such right to the severed tract.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 166; Dec. Dig. § 155.*]

5. WATERS AND WATER COURSES (§ 101*)—PERCOLATING WATERS — RIGHTS OF LANDOWNERS—REASONABLE USE.

Where two or more persons own different tracts underlaid by porous material extending to and communicating with them all, which is saturated with water moving with more or less freedom therein, each has a common and correlative right to the water on his land to the full extent of his needs, if the common supply is sufficient, and to the extent of a reasonable share, if the supply is insufficient for all.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 110; Dec. Dig. § 101.*]

6. Waters and Water Courses (§ 107*)—Percolating Waters—Unreasonable Use—Burden of Proof.

Where defendants drew percolating waters for use on their own land from underlying porous material, to plaintiff's alleged injury, the burden was on plaintiff to show that the amount taken by defendants exceeds their reasonable share of the waters available.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 116, 117; Dec. Dig. § 107.*]

7. Waters and Water Courses (§ 101*)—Subterranean Waters—Waters Feeding a Stream—Riparian Rights.

Where waters in an underground stratum are in such immediate connection with the surface stream as to make them part of the stream, defendants' land overlying the water is riparian to the stream and entitled to riparian rights with reference to such water.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 110; Dec. Dig. § 101.*]

8. Waters and Water Courses (§ 151*)—Subterranean Waters—Adverse Use.

Where subterranean waters constituted part of a stream, the owners of land overlying such waters would not lose their right to a reasonable share thereof by mere nonuser.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 155; Dec. Dig. § 151.*]

9. Waters and Water Courses (§ 146*)—Subterranean Waters — Waters of Stream—Adverse Use.

Where subterranean waters constituted part of a stream, plaintiff's use of the water, after it had passed through defendant's lands overlying the water and had become part of the surface stream, would not constitute a trespass on defendant's property, and hence would not be adverse to them so as to constitute the foundation of a title by prescription.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 153; Dec. Dig. § 146.*]

10. Waters and Water Courses (§ 105*)—Percolating Waters—Rights of Landowners.

A landowner is entitled to a reasonable use of percolating waters therein, though it may be moving through his land into that of his neighbor, and though his use may prevent it from entering his neighbor's land, or draw it therefrom; and this whether the percolating waters feed a stream or otherwise.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 113; Dec. Dig. § 105.*]

11. Waters and Water Courses (§ 137*)—Right to Use—Adverse Use.

Defendant, having diverted the waters of a creek adversely to plaintiff under claim of right, and used the same on his land for many years, more than five years before action, sunk several wells in the bed of the stream, from three of which water, to the quantity to which he had previously obtained the right of adverse use, was obtained. Plaintiff had knowledge of such use, and knew that the flow in the creek immediately decreased, and by reasonable inquiry could have ascertained that the decrease was caused by the wells. *Held*, that plaintiff's right to object to defendant's use of the wells was barred by limitations.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 149; Dec. Dig. § 137.*]

12. Waters and Water Courses (§ 107*)—Subterranean Waters—Injunction—Nature of Injury.

Where complainant introduced no evidence as to the quantity of water discharged from a single well claimed to have been sunk in a stream by defendant without right, she was not entitled to an injunction, under the rule that to obtain such relief complainant must show a substantial injury.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 117; Dec. Dig. § 107.*]

13. Waters and Water Courses (§ 146*)—Diversion—Wells—Laches.

Where defendants had been in the use of wells alleged to constitute a diversion of the waters of a stream, to a part of which complainant was entitled, for more than five years, complainant's suit to restrain the maintenance of the wells was barred by laches.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 153; Dec. Dig. § 146.*]

14. Nuisance (§ 73*)—Uncapped Artesian Wells — Private Injury — Public Nuisance—Limitations.

Where plaintiff's right to restrain the maintenance of certain artesian wells in a water course alleged to constitute a diversion of the flow, to which plaintiff was entitled, was barred by limitations, the fact that defendant left the wells uncapped, in violation of St. 1877–78, p. 195, c. 153, and thereby created a common nuisance, did not relieve plaintiff of the bar of the statute; plaintiff's right of action for special injury caused by a public nuisance being barred in the same manner as similar actions, though the public's right to abate the nuisance was not barred.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 172; Dec. Dig. § 73.*]

15. Nuisance (§ 72*)—Special Injury—Artesian Wells—Uncapped Wells—Waste.

That certain artesian wells in a water course were left uncapped, in violation of St. 1877–78, p. 195, c. 153, did not constitute a special injury to plaintiff entitled to water from the stream, where the water from the wells did not go to waste during the irrigation season.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 164–169; Dec. Dig. § 72.*]

16. Waters and Water Courses (§ 146*)—Diversion—Limitations.

Where the effect of certain artesian wells in a water course was perceptible at a dam near plaintiff's point of diversion immediately after the wells were constructed, and plaintiff had knowledge of the flow and use of the wells by the owner from the beginning, limitations started to run against her from that time.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 153; Dec. Dig. § 146.*]

In Bank. Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Victoria Hudson and others against Ella M. Dailey and others. From a judgment in favor of defendants and from an order denying plaintiff's motion for a new trial, they appeal. Affirmed.

Hass, Garrett & Dunnigan, for appellants. Hunsaker & Britt, John D. Pope, and Ward Chapman, for respondents.

SHAW, J. The plaintiff Victoria Hudson alleges: That she is the owner of 760 acres of land in the Rancho de la Puente, that said land is riparian to a stream of water known as "San Jose creek" and is entitled to riparian rights therein, and to receive of its waters for use thereon a flow of 250 miner's inches of water; that the water of said stream is directly supplied to it from the saturated soils and gravels of the valley through which it runs; that the defendants have bored a number of wells in said valley from which, some by artesian pressure and some by pumps, but all without right, they obtain large quantities of the waters which feed said creek and appropriate the same to their own use, thereby depleting the stream flowing in the creek to the extent of 300 miner's inches, and depriving the plaintiff of the waters thereof; and that they claim the right to continue this use of the waters lying beneath their lands. She prays for a decree quieting her title to 250 miner's inches of water of the creek, and enjoining the defendants from pumping and using the water of said wells to an extent that will prevent a sufficient flow of water in said creek to supply her with said quantity therefrom. The plaintiff J. W. Hudson is the husband of Victoria, and has no interest in the suit. In this opinion, when we mention the plaintiff, we refer to Victoria. The answer denies many of the material allegations of the complaint. Defendant Currier answers separately, making the additional defense that the plaintiffs' action is barred by the statute of limitations. The action was begun on November 30, 1904. The findings are very full and elaborate. The conclusion of law and judgment was that the plaintiffs take nothing by the suit. A motion for a new trial was denied. The plaintiffs appeal from the judgment and order.

The appellant urges that the findings of the court are, in many particulars, contrary to the evidence. We do not find it necessary to consider all of these specifications in detail. We are of the opinion that, upon a proper view of the case as presented in the court below, all the findings that are necessary to support the judgment are sustained by the evidence.

San Jose creek, in its original natural state, had its origin in the Sierra Madre mountains, from whence it then flowed on the surface of the ground through the plain upon which the city of Pomona is now situated and to and through the San Jose valley. For many years, however, owing to the diversion and use of the water in Pomona and vicinity, there has been no surface stream in the channel from its embouchure from the mountains down to the upper part of the San Jose valley, at which point the stream again appeared on the surface and flowed down to the lands of the parties here concerned. It is the theory of the plaintiff that the greater part of the water of the stream, thus rising in the valley, is composed of water which comes from the mountain streams and sinks into the underlying porous strata extending from the foot of the mountains to and into the San Jose valley and under the lands of the defendants, and which, owing to the narrowing of said valley at its upper end and the consequent elevation of the water plane at that point, rises to the surface and flows in the depression constituting the channel of the creek. Accepting this as correct, the defendants claim that the plaintiff has shown no legal injury, no invasion of her rights, and no ground for relief. The evidence shows that her theory is correct in the main. Some of the water, thus percolating through the underlying strata, comes from rainfall upon the adjacent hills and upon the valley itself and the plain above in the vicinity of Pomona; but this fact does not affect the relative rights of the parties to the water.

There is a finding to the effect that the soils and material of the earth intervening between the respective pumping plants and the creek, "or a considerable portion thereof, are impervious and do not permit the water to pass through them to the creek," that there are different and distinct water-bearing strata underneath the valley surface, between which lie other strata containing no water, and that a part of the water obtained by the defendant's wells is drawn from lower strata which do not feed the creek at the point where the plaintiff obtains her water from it. The plaintiff contends that these findings are not sustained by the evidence. The finding that the waters of the lower strata do not feed the creek, flowing at the plaintiff's dam, is based on the qualified and conditional opinion of certain witnesses that these lower strata were overlaid by a blanket of impervious material, throughout the entire portion of the valley above the dam, through which no water could rise into the creek, and into which no water could sink from the strata which do feed the creek. It assumes that there were no breaks or interruptions in this impervious stratum or blanket, through which the waters could pass from it to the strata above or below, or from the upper strata through it. There was no evidence of these facts. If there was in the valley a single acre where this supposed blanket did not exist, the opening would be equivalent to an immense well through which the water would pass from the upper strata into the lower one, if the water in the latter was extracted, or would rise into the upper strata if the water in the upper strata was diminished and there was pressure below, thus depleting or replenishing, as the case might be, the upper strata from which the creek water was directly obtained, and to that extent affecting the flow in the creek. But as the findings also, in substance, declare that the pumping of the defendants does, to a material extent, decrease the amount of water which the plaintiff is able to divert from the creek and which she needs for the irrigation of her land, the findings as to the lower strata is immaterial. If the pumping by the defendants constituted an unlawful diversion of water to which plaintiff was entitled, it would be no defense that they also took other water from another source. Each defendant owns a separate tract of land in severalty. All of these lands, except those of Currier, lie within the valley and over the underground porous strata from which the creek issues. Each of these defendants, by means of wells and pumps, takes water from the strata and uses it upon his tract of overlying land. These are the diversions complained of and shown by the evidence. These, coupled with other similar diversions and uses in Pomona and vicinity and a series of 10 unusually dry years immediately preceding the action, have caused the stream flowing upon the surface in the creek to diminish to such an extent that, at the plaintiff's place of diversion from the creek, the flow is much less than it was formerly, and she is thereby deprived of the use of the quantity of water which, for 30 years previously, she had been accustomed to use.

The court found that none of these defendants takes or uses more water in this way than is necessary for irrigation and domestic use on his particular tract of land. In her briefs the plaintiff practically concedes that this finding is correct. There is no direct evidence to show whether or not the underground supply is insufficient for all demands upon it. If we concede that the circumstances show that it is not sufficient for all, we are then met by the proposition that there was no evidence to prove that said defendants, or any of them, have ever taken more than a reasonable share of such water. The plaintiff tendered no issue of that character. The complaint asserts a paramount right in the plaintiff, superior to that of the defendants. There is no attempt to present a case of excessive use by a defendant entitled to share in a common supply, or to obtain a decree apportioning the waters of the valley among the parties. The evidence does not supply the data necessary to apportion the water to which each party is entitled. If these defendants are entitled to a reasonable share of this underground water, the plaintiff has shown no case against them.

The lands of the plaintiff and of all of the defendants, except Currier and Ybarra, were originally a part of the Rancho de la Puente. This ranch consisted of about 49,000 acres of land, included practically the whole of the San Jose valley, and was granted by the Mexican government to John Rowland and William Workman. In 1868 these two owners made a mutual deed of partition thereof containing the following covenant: "And it is mutually agreed and covenanted that, notwithstanding this partition hereby made, the rights to use and benefits of the waters of the San Jose creek flowing into said Rancho de la Puente or rising thereon, whether for water power, irrigation or other purposes, shall continue and remain as heretofore to be had, held, possessed and enjoyed by the parties in equal shares and to their heirs and assigns." The plaintiff's land and all the lands in said rancho belonging to the respective parties are held by title derived from the parties to this deed and covenant. At the time the Rowland-Workman deed was executed, the ditch and dam which the plaintiff now uses was in use, and by means thereof the water of the creek was carried to the plaintiff's land. It is contended that the effect of the covenant aforesaid was to bind each of the parties and their successors in interest to maintain his land in such condition and make only such use thereof as would enable her to continue to obtain from the stream by said dam and ditch the same amount of water that was then taken therefrom and used on her land, and that the extraction of the underground water and consequent diminution of the flow in the creek is a violation of the covenant. We do not think it was intended to have that effect, but that it merely divided the rights to the water into equal shares between them, regardless of frontage on the stream or other circumstances affecting the amount to which each would have been entitled; but, conceding that it would have the effect as contended, between the successors of Rowland as against the successors of Workman, it would have no effect whatever between purchasers of different tracts from the same original owner. Purchasers from Rowland of different parts of the land allotted to him could not claim the benefit of this covenant, as against each other. The plaintiff claims under Rowland. She does not show that the defendants owning parts of the Puente ranch do not also claim under him.

We cannot determine from the findings or evidence whether the tracts of land in this rancho, now owned by the several defendants and not contiguous to the surface flow of the creek, are entitled to riparian rights in the surface stream or not. The covenant above mentioned does not necessarily secure it to them. A subsequent conveyance by one of the original owners, of a part of the tract not abutting upon the creek, would not carry any riparian or other right in the creek, unless it was so provided in the conveyance, or unless the circumstances were such as to show that parties so intended, or such as to raise an estoppel. If the tract conveyed was not contiguous, had never received water from the creek, and there were no ditches leading from the creek to it at the time of the conveyance, nor other conditions indicating an intention that it should continue to have the riparian right, notwithstanding its want of access to the stream, the mere fact that it was a part of the rancho to which riparian right had extended while the ownership was continuous from it to the banks of the stream would not preserve that right to the severed tract. The severance, under such circumstances, would cut off such tract from the riparian right. Anaheim U. W. Co. v. Fuller, 150 Cal. 331, 88 Pac. 978, 11 L. R. A. (N. S.) 1062. The record does not show where these lands lie with respect to the stream, nor what were the covenants in the deeds by which they were segregated from the entire tract, nor the conditions then existing with respect to the use of the water. The court finds that each of said defendants, before he resorted to the use of wells and pumps, had been accustomed to receive and use on his land some of the water from the creek, and that they each resorted to pumps and wells because of the diminution of the surface flow; but the conditions of such use, and the nature of the right under which it was had, are not shown except by the statement that it was water "which they had appropriated and used for many years." How long the use had continued does not appear. The court finds that the wells of Currier, Persons, Dailey, and Howell were bored and had been in operation more than five years before the action was begun. This defense will be considered hereafter. The other defendants cannot justify their taking of the underground water as a continuation of the riparian use recognized by the covenant in the Rowland-Workman deed, nor as an indirect exercise of a prescriptive right previously acquired by them in the flow of the creek, for they do not appear to have acquired a right of either character.

It appears, however, that the lands of all defendants except Currier are situated over the strata from which they obtain water and from which the creek is also supplied. The irrigated lands of the plaintiff are over the same strata. Defendants' lands are far above the plaintiff's place of diversion from the surface stream, and they use the water only upon their overlying lands. The general rule, as now established by the decisions of this court, undoubtedly is that, where two or more persons own different tracts of land, underlaid by porous material extending to and communicating with them all, which is saturated with water moving with more or less freedom therein, each has a common and correlative right to the use of this water upon his land, to the full extent of his needs if the common supply is sufficient, and to the extent of a reasonable share thereof if the supply is so scant that the use by one will affect the supply of the others. Katz v. Walkinshaw, 141 Cal. 134, 144, 150, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35; McClintock v. Hudson, 141 Cal. 281, 74 Pac. 849; Cohen v. La Canada, etc., Co., 142 Cal. 439, 76 Pac. 47; Montecito, etc., Co. v. Santa Barbara, 144 Cal. 585, 77 Pac. 1113; Burr v. Maclay, 154 Cal. 434, 98 Pac. 260; Barton v. Riverside Water Co., 155 Cal. —, 101 Pac. 790. Applying this rule, and assuming for the present that the right of the plaintiff is not paramount to that of the others, there can be no doubt that the taking of a part of the underground waters by the defendants is not unlawful, unless they take an unreasonable share thereof. As there is no presumption that the part so taken by any defendant exceeds his reasonable share, it would be incumbent upon the plaintiff to prove it, and, as she had made no attempt to do so, she cannot prevail against them. She insists, however, that her right is paramount to that of the defendants to the use of these underground waters. Her land, or the part of it upon which she uses the water, is riparian to the creek. She, and her predecessors in interest, by means of a dam and open ditch, have diverted the water from the creek at a point below any of the lands of the defendants, and have used it upon her land ever since the year 1868, under claim of right, to the extent of about 250 miner's inches, whenever the stream was large enough to furnish that amount. The diversions of the defendants by their wells have materially contributed to the dimunition of the surface stream, and have, to that extent, deprived her of the water to which she is entitled, if her right is superior to theirs. The question is thus presented whether or not the rights of a riparian proprietor, to the waters of a stream, extend to the subterranean waters above from which the stream proceeds, and are paramount to that of the owners of the lands which overlie those subterranean waters.

If the water in the underground strata is in such immediate connection with the surface stream as to make it a part of the stream, as the plaintiff seems to contend, then the defendants' lands overlying such water must be considered as also riparian to the stream, and, under the law of riparian rights, they have a common right with the plaintiff to the use of the water. In that case her use would not be adverse to them. They would not lose their right by disuse, and their taking of a reasonable share would be lawful. Coleman v. Le Franc, 137 Cal. 217, 69 Pac. 1011. In Verdugo, etc., Co. v. Verdugo, 152 Cal. 664, 93 Pac. 1021, a different rule was applied because in that case the right of the party taking the surface stream was paramount to the right of the other riparian owners along its course. It was made paramount by the force of a decree in partition setting apart the surface stream to the use of a particular tract of the land, exclusively, and consequently divesting the other lands of all right to the stream and giving the person owning the land to which it was assigned the right to have its flow preserved undiminished. The rule which in that case was declared to apply to such of the underground waters as might prove to be unnecessary to the preservation of the surface stream—that is, that all the parties having access to it would have the right to share reasonably in its use—is the rule applicable to the case at bar, if plaintiff has no paramount right. But the plaintiff insists that, by continuous use since 1868, she had gained a prescriptive right to the water of the stream, which, she claims, is paramount to said rights of the defendants, at least to the extent that they may not extract the underground water in such quantities as to deplete the surface stream to her injury. If this water is a part of the stream, this claim is also untenable. The defendants, as riparian owners, would not lose their rights by disuse. Her use of the water, after it had passed through their lands and become part of the surface stream, would not injure them, nor constitute a trespass upon their property, and hence it would not be adverse to them and could not be the foundation of a title by prescription as against them. Hargrave v. Cook, 108 Cal. 78, 41 Pac. 18, 30 L. R. A. 390; Bathgate v. Irvine, 126 Cal. 140, 58 Pac. 442, 77 Am. St. Rep. 158; Cave v. Tyler, 133 Cal. 568, 65 Pac. 1089.

There is also a claim that this underground water, as to a great part of the lands, has not the characteristics of a stream, but must be classed as percolating water. There will always be great difficulty in fixing a line, beyond which the water in the sands and gravels over which a stream flows, and which supply or uphold the stream, ceases to be a part thereof and becomes what is called "percolating water." Undoubtedly, the water in the lands of many of the defendants would be of the class ordinarily designated as percolating water. It is therefore important to determine the relative rights of the owner of the nonriparian land containing percolating water, which feeds a surface stream, and those who have acquired riparian or prescriptive rights in said stream, where the pumping of such percolating water and its use on the land in which it is found will diminish the surface stream, to the injury of those having such riparian or prescriptive rights therein. The owner of land has a natural right to the reasonable use of the waters percolating therein, although it may be moving through his land into the land of his neighbor, and although his use may prevent it from entering his neighbor's land or draw it therefrom. This right arises from the fact that the water is then in his land so that he may take it without trespassing upon his neighbor. His ownership of the land carries with it all the natural advantages of its situation, and the right to a reasonable use of the land and everything it contains, limited only by the operation of the maxim, "Sic utere tuo ut alienum non lædas." It is upon this principle that the law of riparian rights is founded, giving to each owner the right to use the waters of the stream upon his riparian land, but limiting him to a reasonable share thereof, as against other riparian owners thereon. We think the same application of the principle should be made to the case of percolating waters feeding the stream and necessary to its continued flow. There is no rational ground for any distinction between such percolating waters and the waters in the gravels immediately beneath and directly supporting the surface flow, and no reason for applying a different rule to the two classes, with respect to such rights, if, indeed, the two classes can be distinguished at all. Such waters, together with the surface stream supplied by them, should be considered a common supply, in which all who by their natural situation have access to it have a common right, and of which they may each make a reasonable use upon the land so situated, taking it either from the surface flow, or directly from the percolations beneath their lands. The natural rights of these defendants and the plaintiff in this common supply of water would therefore be coequal, except as to quantity, and correlative.

There is nothing in the facts alleged or proven giving to the plaintiff any paramount or superior rights in these waters. There is no evidence that she had ever used or diverted the water in such a manner as to interfere in any way with the use of the percolating water by the defendants or so as to make her use adverse to them and give her a prescriptive right against them for the amount she was accustomed to use. She and they alike must depend solely on their natural rights for the determination of the quantity they may take from this common supply. As she has failed to allege that they have taken or threaten to take more than a reasonable proportion of the water, and as she had no right superior to theirs, she has not established a cause of action against them with respect thereto.

The brief of the plaintiff presents numerous details wherein it is claimed that the findings are to some extent unsupported by the evidence. None of them, however, go to the merits of the case, except those we have discussed, and those as to which we have assumed that the facts are as the plaintiff contends they should have been found. It is unnecessary to consider them further. None of them in any wise affect the conclusions we have stated.

The lands of the defendants Ybarra and McClintock are not within the Rancho de la Puente, but are within the San Jose valley, and are situated over the same underground strata as the other lands hereinbefore mentioned. All that has been said with regard to the natural rights belonging to the lands of the other defendants applies with equal force to these lands. The facts are the same, and the plaintiff has failed to establish a cause of action as to them.

The case against the defendant Currier stands upon different grounds. He pleaded the statute of limitations, and the finding of the court is that the action was barred as against him. This finding is sustained by the evidence. He had diverted the water of the creek continuously and adversely to the plaintiff, under claim of right, and used it on his land for many years before the suit was begun, by means of a dam and ditch. The flow of the creek decreased, and, being unable to obtain therefrom the waters he needed, he put down seven wells in the bed of the creek, from three of which he obtained water equal to the quantity to which he had previously obtained the right by such adverse use. These wells were sunk more than five years before the action was begun. The evidence shows that the plaintiff knew of such use and knew that the flow in the creek immediately decreased. By reasonable inquiry she could have ascertained that the decrease was caused by the wells. Under these circumstances the action is clearly barred. Another well was bored by him within the five-year period. The court finds that the water flowing from it was very small. In order to make a case for an injunction, it was necessary for the plaintiff to show substantial injury. She introduced no evidence of the quantity discharged from this well, resting it upon the testimony of the defendant that it was very small, as the court found. In support of the finding and judgment, we will presume that the quantity was negligible, and the injury to the plaintiff therefrom too slight to justify an injunction.

The wells of Dailey, Persons, and Howell having been also in use for more than five years, the action as against them would be barred by laches. The facts as to them were alleged in defense; but there was no plea of the statute of limitations on their behalf.

The evidence shows that Currier left his artesian wells uncapped and permitted the water therefrom to flow down the creek channel unused, so far as he was concerned, during the winters, when it was not needed. Plaintiff claims that this was a violation of the statute of 1878 (St. 1877-78, p. 195, c. 153), declaring any uncapped artesian well from which water was permitted to flow and run to waste to be a public nuisance, and making it a misdemeanor in the owner of such well to permit such waste, and that, as the right to maintain a public nuisance cannot be gained by adverse use, the finding that the plaintiff's action, as against Currier, is barred by limitation, is erroneous. We cannot say that a private prescriptive right to private property may not be obtained by means of acts which may also constitute or cause a public nuisance. The private owner who is injured has a right of action in case of special injury, and such right is barred in the same manner as other actions of like nature. A private owner, so injured, cannot invoke the protection of the public right to abate the nuisance, which is not barred, and thus avoid the effect of the statute of limitations upon his private right of action. A further sufficient answer to this point is that the water from these wells did not go to waste during the irrigating season. The fact that it was allowed to flow without use during the winter, when it was not needed for use by any one, might make the uncapped wells a public nuisance during that season; but it would not have that effect during the time when the water was used, nor would it prevent Currier from acquiring, by adverse use during the regularly recurring irrigating seasons, the right to divert the water by the wells during that season.

It may be that the effect of allowing the water to flow from said wells during the winter is to unnecessarily lower the water and decrease the pressure in the underground strata, and thereby reduce the creek flow during the ensuing irrigating season, or part of it, and possibly the plaintiff may have a cause of action to prevent such diminution from that cause; but the complaint does not allege such waste, and without such allegation it does not state a cause of action of that character.

There is no foundation for the proposition that the statute of limitations would not begin to run in favor of Currier, with respect to his right to maintain wells, until the extraction of water by his wells had begun to diminish the flow at the plaintiff's dam. The evidence shows that the effect was perceptible at the dam immediately, and that the plaintiff had knowledge of the flow from the wells and the use thereof by Currier from the beginning. This was sufficient to charge her with notice that the tendency of the diversion of the flow at those wells would be to reduce the amount in the stream below and to start the statute of limitations running.

There are no other points deserving of consideration.

The judgment and order are affirmed.

We concur: HENSHAW, J.; SLOSS, J.; LORIGAN, J.; ANGELLOTTI, J.; MELVIN, J.

156 Cal. 603

CITY OF LOS ANGELES v. HUNTER et al.

SAME v. BUFFINGTON et al.

(L. A. 2,140.)

(Supreme Court of California. Dec. 1, 1909.)

1. Waters and Water Courses (§ 99*)—"Percolating Water."

"Percolating waters," in the common-law sense of the term, are those that are vagrant, wandering drops moving by gravity in any and every direction along the line of least resistance. The term does not include waters percolating only in the sense that they form a vast mass of water confined in a basin filled with detritus, always slowly moving downward to the outlet in conformity with the physical law to attain a uniform level.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 108; Dec. Dig. § 99.*

For other definitions, see Words and Phrases, vol. 6, p. 5287; vol. 8, p. 7750.]

2. Waters and Water Courses (§ 106*)—Percolating Water—Riparian Land—Interception of Water.

It is unlawful for one owning land bordering on a stream to intercept percolating waters therein and apply it to any use other than its reasonable use on the land from which it is taken, if he thereby diminishes the stream to the damage of those having rights therein.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 115; Dec. Dig. § 106.*]

3. Waters and Water Courses (§ 209*)—Waters of Stream—Use—Subterranean Waters Feeding Stream.

The city of Los Angeles having a prior right to the use of all of the supply of the Los Angeles river for domestic and municipal purposes, and all of such supply being required for legitimate use within the limits of the old pueblo, the city was entitled to restrain the abstraction of the waters underlying the San Fernando valley, which are confined in a basin filled with detritus, always moving downward to the outlet, which is the Los Angeles river.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 302; Dec. Dig. § 209.*]

4. Waters and Water Courses (§ 209*)—Waters of Stream—Paramount Rights—Enforcement—Complaint.

Where a city claimed a paramount right to all the waters of a stream, it was not necessary that the complaint should allege that any particular quantity of the water was necessary for the city's use, nor was it necessary that the city's complaint should give the boundaries and location of the irrigable land, nor the number and location of homes, hotels, and factories, etc., for the use of which water was required.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 302; Dec. Dig. § 209.*]

5. Waters and Water Courses (§ 209*)—Municipal Supply—Diversion—Decree.

Where a city was entitled to the entire surface flow of a stream for municipal and domestic purposes, it was not necessary for the court, in a decree restraining defendants from diverting water from the stream at any time, to define the amount of water which would be required by the city from October 1st of each year to May 1st of the following year.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 302; Dec. Dig. § 209.*]

6. Waters and Water Courses (§ 105*)—Rivers—Subterranean Flow—Artesian Wells.

Where a surface stream under normal conditions was proportionate to the contributions of water from rainfall and underground storage, and defendant's artesian wells drew from the underground supply, with the effect of appreciably diminishing the surface flow, the court properly found that the waters developed in the wells were part of the subterranean flow of the water.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 113; Dec. Dig. § 105.*]

7. Evidence (§ 553*)—Experts—Hypothetical Question—Assumption of Recollection.

An hypothetical question asking witness to assume what another witness had testified with reference to the character of the geological formation of a valley, and to base thereon an opinion as to where the water plane of a valley extended, was objectionable, in that it permitted the witness to assume a recollection of all of the matters testified to by the witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2371; Dec. Dig. § 553.*]

8. Appeal and Error (§ 1048*)—Prejudice—Evidence.

An objection that an hypothetical question permitted the witness to assume a recollection of all of the matters testified to by another witness was not such an irregularity as to call for a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1048.*]

9. Evidence (§ 508*)—Experts—Formation of River.

In a suit to restrain the alleged unlawful diversion of the waters of a river to which plaintiff city claimed the entire paramount right, the court did not err in permitting experts to testify as to the manner in which the river was created.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2311; Dec. Dig. § 508.*]

10. Waters and Water Courses (§ 209*)—Paramount Rights—Quieting Title—Parties.

In a suit by a city claiming a paramount right to the entire waters of a stream to quiet title thereto, as against the defendants, the court being able to fully determine the controversy as between the parties litigant, others similarly situated to those who were defendants in the action were not necessary parties.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 302; Dec. Dig. § 209.*]

In Bank. Appeal from Superior Court, Los Angeles County; G. A. Gibbs, Judge.

Suit by the City of Los Angeles against Jesse D. Hunter and others to quiet title in the plaintiff to an asserted paramount right in the waters of the Los Angeles River, and by the City against Thomas D. Buffington and others to quiet the same title and to obtain an injunction restraining defendants from making any diversion of the water when required by the city for municipal and domestic purposes. Judgments for plaintiff, and defendants appeal. Affirmed.

McNutt & Hannon, Stephens & Stephens, Warren E. Lloyd, T. R. Archer, and Munson & Barclay, for appellants. W. B. Mathews, Leslie R. Hewitt, City Atty., H. T. Lee, and J. R. Scott, for respondent.

HENSHAW, J. The suit of the City of Los Angeles v. Hunter et al. is an action against 47 owners of land in the San Fernando valley, to quiet title in the plaintiff to its asserted paramount right to the use of the waters of the Los Angeles river. The case of the City of Los Angeles v. Buffington et al. is an action against 160 owners or tenants of land in the same valley, brought for the same purpose, and also to obtain an injunction restraining the defendants from making any diversion of water from the river when it is required by the city for supplying its municipal and domestic needs. The actions were tried together, and, from the judgments which followed in favor of the city, the defendants appeal. The legal propositions presented upon all appeals are substantially identical.

Saving certain minor objections going to the introduction or rejection of evidence, the principal contentions of appellants are: First, that the waters which they were taking by means of wells were not waters of the Los Angeles river; and, second, if they were waters of the Los Angeles river, the city of Los Angeles had no superior right to the use of them. The lands of these defendants, embracing in all about 5,000 acres, are situated in the southeastern portion of the San Fernando valley, where the surrounding mountains draw together and form what is called the "Narrows." A description of the San Fernando valley, adequate for all the purposes of this consideration, will be found in City of Los Angeles v. Pomeroy et al., 124 Cal. 597, 57 Pac. 585. The cases of Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35, and McClintock v. Hudson, 141 Cal. 275, 74 Pac. 849, together with the Pomeroy Case, above cited, give so full and satisfactory an account of the water conditions existing, not alone generally in the arid portions of this state, but particularly of the conditions existing and controlling the considerations of the questions here presented, that a reference to them renders unnecessary any detailed description.

The defendants were using water pumped from wells of various depth, which wells were situated at an average distance of about 1,000 feet from the surface border of the Los Angeles river, though in instances the distances of certain wells were two or three miles. The contention of the city is that these wells abstracted water belonging to the Los Angeles river, to the use of all of which water it has a paramount right. The court so found. The defendants' contention is twofold: First, that the waters are strictly percolating waters, not belonging to the subterranean flow of the stream, but if concededly on the way to join and swell such flow, still percolating waters, to the use of which, as owners of the land, they have an absolute indefeasible right; second that over all the San Fernando valley extends a clay blanket, impervious to water, underlying which blanket are water-bearing gravels, that the waters above this blanket feed the Los Angeles river, while the waters below this blanket do not; that they draw their well waters from the gravels below the blanket, and therefore, conceding that the city of Los Angeles has a paramount right to the use of the waters of the river, they are not trespassing upon this right. The court rejected both of these contentions in the following findings: "That the waters of said river, in its course through said valley, penetrate into and completely fill the voids of said permeable material, down to bed rock, under the surface channel of said river, and on both sides of said channel, throughout the whole width of said valley, from a point at or above the level of the surface stream of said river down to bed rock. It is not true, as alleged in the answers herein, that none of the underground waters in any of the lands of the defendants, described in the amended complaint herein, are part of the Los Angeles river, mentioned in the said amended complaint, or of the waters thereof, but are waters percolating in said lands, and form a part of the soil thereof, so as not to constitute a stream or water course; but, on the contrary, the court finds that all of the underground waters in all of said lands, from the surface of the ground down to bed rock, are flowing waters, and are part of the subterranean stream of said Los Angeles river." By these findings the court adopts the theory which is supported by the evidence of certain of the experts, that the waters of the Los Angeles river proper entering the valley sink to bed rock and spread out laterally, filling all the voids of the soil, and so moved slowly down to the Narrows, where the Los Angeles river, owing to the declension in that direction of the land surface, appears as a visible stream. It is earnestly contended against this finding: That it takes no account of proved conditions; that it treats this great valley as being all a part of the Los Angeles river; that in so doing it stultifies physical and geological facts; that it eliminates from consideration the rainfall upon the surface of the valley; the water from all the surrounding mountains which not following well-defined channels, still by gravity is carried down and sinks into the valley lands; and the fact that the water flowing into the valley by numerous channels itself sinks into the lands of the valley miles distant from the thread of the river, yet this water also is treated as part of the stream long before, in the course of nature, it can have reached the true subterranean flow thereof. So it is insisted by appellants that these waters are strictly percolating waters, and that of them they have the common-law right of absolute ownership, as modified in this state only by the doctrine of Katz v. Walkinshaw, supra, namely, that the quantum of water which they use shall be in reasonable proportion to the whole thereof, and that the water so taken shall be used upon the surface soil of the basin, or, at least, not carried away for exterior use, to the injury of any owners of the land within the basin.

But in the view which we take, it is immaterial whether the San Fernando valley be considered a great basin, saturated by water from the inflow of the Los Angeles river and its tributaries, or saturated as a result of all the causes which appellants assign. In passing, it will suffice to say that the court was justified, upon a conflict in the evidence, in rejecting the theory of the clay blanket covering the valley at a varying depth. Unquestionably the San Fernando valley is the great natural reservoir and supply of the Los Angeles river. Unquestionably the cutting off of this supply would as completely destroy the Los Angeles river as would the cutting off of the Great Lakes destroy the St. Lawrence. San Fernando valley may indeed be regarded as a great lake filled with loose detritus, into which the drainage from the neighboring mountains flows, and the outlet of which is the Los Angeles river. Impeded by the soils, these waters, of course, move more slowly than they would in an open lake; but unquestionably the general movement of practically all is southeasterly to the Narrows, through and out of which flows the Los Angeles river proper. Unquestionably, also, a serious interruption of or interference with this supply would as certainly impair the volume of water carried by the Los Angeles river as though the interruption and interference were with a surface flowing tributary thereof. The waters of the San Fernando valley therefore are not "percolating waters" in the common-law sense of the term—vagrant, wandering drops moving by gravity in any and every direction along the line of least resistance. These waters percolate, it is true, but only in the sense that they form a vast mass of water confined in a basin filled with detritus, always slowly moving downward to the outlet, in the effort, in conformity with physical law, to attain a uniform level. If it be here conceded that the city of Los Angeles has the paramount right to the use of the waters of the Los Angeles river, then the abstraction of waters from this valley is as clearly an interference with that right as it would be if the valley, instead of being filled with débris, were an open lake from which the river drew its whole supply. The doctrine of percolating waters as applied by the common law has of necessity been modified to meet the conditions existing in this state, conditions which never confronted the authors of that body of laws, and of the existence of which it is safe to say they never conceived the possibility. Not only has that doctrine been modified in Katz v. Walkinshaw, supra, but it has further received necessary and just modification in McClintock v. Hudson, supra, where, quoting from the syllabus, which correctly epitomizes the view of this court, it is said: "Under the rule established in Katz v. Walkinshaw with respect to percolating waters, it is not lawful for one owning land bordering on a stream to excavate in his land, intercept percolating waters therein, and apply it to any use other than its reasonable use upon the land from which it is taken, if he thereby diminishes the stream to the damage of others having rights therein." If, as here contended and found, the city of Los Angeles has paramount right to the use of all the waters of the river, then, under the doctrine thus enunciated, none of these so-called percolating waters may be withdrawn to the invasion and injury of such right. See Hudson v. Dailey (L. A. 2,234, filed Dec. 1, 1909) 105 Pac. 748.

To this proposition we now come. The decisions of this court in Lux v. Haggin, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674; Vernon Irrigation Co. v. City of Los Angeles, 106 Cal. 237, 39 Pac. 762; City of Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585; City of Los Angeles v. Los Angeles Farming & Milling Co., 152 Cal. 645, 93 Pac. 869, 1135; taken with the cases of Hooker v. City of Los Angeles, 188 U. S. 314, 23 Sup. Ct. 395, 47 L. Ed. 487, 63 L. R. A. 471, and Devine v. City of Los Angeles, 202 U. S. 313, 26 Sup. Ct. 652, 50 L. Ed. 1046—must be regarded as a definitive determination of the city's right. Collectively, these cases present the same arguments as are here advanced by appellants, and the decisions denying validity to these arguments must be considered as closing the contention. The right to use the water upon annexed territory not within the limits of the original pueblo is distinctly declared in City of Los Angeles v. Pomeroy, supra. Moreover, with the extraordinary growth of the city of Los Angeles within the original pueblo limits of four square leagues, this question becomes of no practical importance, since it is fairly well established that all of the supply of the Los Angeles river is required for legitimate uses within the limits of the old pueblo. We have thus considered the principal contentions advanced by appellants. Certain minor propositions may be disposed of with brief review.

The demurrer to the complaint for uncertainty was properly overruled. The city was contending that it had a paramount right to all of the waters of the river, and it was not required to aver that any particular quantity of the water was necessary for its use. Nor was it necessary that the city's complaint should give the boundaries and locations of the irrigible land any more than it would have been required to give the number and location of homes, hotels, factories, or the like for the use of which the water was required.

It was both impracticable and unnecessary for the trial court to attempt to define the amount of water which would be required by the city from October 1st of each year to May 1st of the following year. The court having properly decreed that the paramount right to the use of the water was in the city, by its injunction restraining the defendants from diverting water from the river at any time when the city was taking the entire surface flow for the purposes for which the city and its inhabitants were required to use the water, said all that was necessary upon this matter. Vernon Irrigation Co. v. Los Angeles, 106 Cal. 237, 39 Pac. 762; City of Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585. The finding that the waters developed in the wells of the appellants are part of the subterranean flow of the Los Angeles river was, as above discussed, abundantly sustained by the evidence. It was shown that the surface stream under normal conditions is proportionate to the contributions of water from rainfall and underground storage. The wells indisputably drew from this underground supply, with the effect of appreciably diminishing the surface flow.

Appellants objected to the following question asked of the expert Koebig: "Then, assuming what Mr. Mulholland testified to with regard to the character of the material and the manner of the upbuilding of the valley is true, where, in your opinion, does the water plane of the San Fernando valley extend?" It is urged that this was permitting the expert Koebig to construe the testimony of the expert Mulholland and to draw inferences therefrom; but the trial court, before overruling the objection, called attention to the fact that the witness had heard the testimony of Mulholland, and that his opinion was to be based, not upon the opinion of Mulholland, but upon the facts testified to by him. The only objection to the question that remains is that it permitted the witness to assume a recollection of all of the matters testified to by Mulholland. For the reasons given in People v. Le Doux, 102 Pac. 517, this method of framing what is in effect a hypothetical question is not favored; but for the reasons also there given the irregularity was not such as to call for a reversal of the case. The court did not err in permitting the expert witnesses to give their views as to the manner in which the Los Angeles river was created. While it is true, as said in Los Angeles v. Pomeroy, supra, that "what a subterranean stream must be in order to bring it within the law of riparian rights is a question of law," for experts learned in geology to give their theories as to the manner in which nature has created or developed a given physical condition is not an invasion of the domain of the law.

The trial court did not err in denying the motion of appellants to bring in other parties or their motions that their suits abate until these parties were brought in. The suit being one to quiet title, based upon the plaintiff's asserted paramount right to the waters of the stream, the presence or absence of such defendants, even if situated similarly to those in the action, could not have benefited or injured the latter. It is not pretended that the court in the action actually brought could not and did not fully determine the controversy between the parties litigant.

No other matters call for special attention, and for the foregoing reasons the judgments and orders appealed from are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; MELVIN, J.; SLOSS, J.; LORIGAN, J.

11 Cal. App. 497

VICTOR POWER & MINING CO. v. COLE.

(Civ. 651.)

(Court of Appeal, Third District, California. Oct. 18, 1909.)

1. EJECTMENT (§ 63*)—PLEADING—SUFFICIENCY OF COMPLAINT.

A complaint in ejectment, alleging that on or about a stated date defendants, without title or right, and without consent of plaintiff and its grantors, unlawfully entered into possession of, and ousted plaintiff and its grantors of the possession of, a part of certain described property, and have withheld, and are now wrongfully withholding, from plaintiff the possession of such premises, is sufficient, since it avers the estate of plaintiff, possession by defendant at the time of the commencement of the action, and his wrongful withholding of the same.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 154–157; Dec. Dig. § 63.*]

2. EJECTMENT (§ 66*)—PLEADING—SUFFICIENCY OF COMPLAINT.

The averment that defendant's entry was without the consent of "plaintiff and its grantors" would not render the complaint subject to general demurrer; it being merely superfluous.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 66.*]

3. JUDGMENT (§ 143*)—DEFAULT—VACATION—GROUNDS.

That one of a firm of attorneys representing defendant obtained an extension of time in which to answer, and by inadvertence neglected to make a record of the extension upon the office calendar of the firm, and left town without notifying his partner thereof, returning when it was too late to file an answer, would not warrant vacation of the default judgment for excusable neglect; it appearing that his partner knew when the time originally granted would expire.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 143.*]

4. JUDGMENT (§ 161*)—DEFAULT—VACATION—PLEADING FILED AFTER DEFAULT TAKEN.

An answer, served on plaintiff's attorneys after judgment by default for failure to answer, and after the denial of a first motion to set aside the judgment and default, but prior to the hearing of the second motion for the same purpose, was no ground for granting the motion, especially in view of Code Civ. Proc. § 182, providing that unless motions are refused for informality, or with liberty to renew them, after an application for an order made to a judge of a court in which the action or proceeding is pending is refused, or granted conditionally, no subsequent application for the same order shall be made, except to a judge of a higher court.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 161.*]

Appeal from Superior Court, Shasta County; W. M. Finch, Judge.

Action by the Victor Power & Mining Company against C. L. Cole. From a judgment for plaintiff, and an order denying a motion to set aside the default upon which the judgment was entered, defendant appeals. Affirmed.

Braynard & Kimball, for appellant. W. F. Aram and P. H. Coffman, for respondent.

HART, J. The defendant prosecutes this appeal from the judgment and an order denying his motion to vacate and set aside the default upon which said judgment was entered.

The action is in ejectment; the complaint averring, among other facts, that "on or about the 5th day of October, 1907, the said defendants, without title, without right, and without the consent of the plaintiff and its grantors, wrongfully and unlawfully entered upon and into possession of, and ousted the plaintiff and its grantors of the possession of, a part of the said Bonanza mining claim, lands, and premises (all of which are in a preceding paragraph of the complaint specifically described), and ever since on or about the said 5th day of October, 1907, they have withheld, and are now wrongfully and unlawfully withholding, from the plaintiff, the possession of the same, to wit, that lot and part of the said Bonanza mining claim, lands, and premises known as the 'Cole house, barn, and buildings,' on the east side of the wagon road and creek running through the said Bonanza mining claim and premises, being the most southerly building on said Bonanza mining claim, to the damage of plaintiff in the sum of $60." The prayer is for judgment for the recovery of the possession of the demanded premises and for damages for withholding the same, etc. It will be convenient to here narrate the facts essential to an understanding of the point made by appellant that the court below erred in making the order denying his motion to set aside and vacate the judgment and the default.

The complaint was filed on the 6th day of January, 1908. Summons was served on the defendant in the county of Shasta on the 17th day of January, 1908, and the same, with proof of service thereof, was returned and filed on the 30th day of January, 1908. On the 24th day of February, 1908, default of defendant and judgment thereupon were entered, and a writ of possession issued. On the 28th of February, 1908, the defendant filed a motion to set aside the judgment and vacate the default on the grounds of excusable neglect. This motion was supported by the affidavits of one G. Zerr and C. H. Braynard, one of the attorneys of the defendant, and upon the showing thus made the court, on the 25th day of March, 1908, made an order setting aside the judgment and the default, and allowed the defendant to answer or demur to the complaint. On the 9th day of April, 1908, the defendant filed a demurrer to the complaint, and on the 31st day of July, 1908, the court made an order overruling said demurrer, and allowing the defendant 30 days within which to file an answer. It is stated by counsel for respondent in their brief that on the 31st day of August, 1908, an order of the court was filed extending the time to answer to 10 days from August 29, 1908. This last-mentioned order does not appear in the judgment roll; but it does therein appear that on September 11, 1908, the default of the defendant for failure to answer was again entered by the clerk of the court. On the 21st day of September, 1908, the court rendered judgment against the defendant upon his default. On the 28th day of September, 1908, the attorneys for the defendant served and filed a notice of motion to set aside the said second default. Said motion was heard by the court on the 16th day of October, 1908, and on the 6th day of November, 1908, the court, by Hon. G. W. Bush, presiding judge thereof, denied the same. The judgment on the second default was entered on the 4th day of November, 1908. On the 7th day of December, 1908, the attorneys for the defendant served and filed a notice of a second motion to set aside and vacate the second default and judgment; the time for hearing said motion being fixed in said notice for the 15th day of January, 1909. On March 5, 1909, the court, Hon. Wm. M. Finch, judge of the superior court of Glenn county, presiding, made an order denying said second or last-mentioned motion. The appeal here, other than that from the judgment, is from the order made and entered by Judge Finch on the 5th day of March, 1909.

1. The claim for a reversal of the judgment is founded on the contention that the complaint does not state a cause of action. But the demurrer was properly overruled. The complaint contains all the averments essential to a statement of a cause of action in ejectment, to wit: The estate of plaintiff, possession by the defendant at the time of the commencement of the action, and his wrongful withholding the same. Haggin v. Kelly, 136 Cal. 483, 69 Pac. 140; Hihn Co. v. Fleckner, 106 Cal. 97, 39 Pac. 214; Hihn v. Mangenberg, 89 Cal. 268, 26 Pac. 968; Rego v. Van Pelt, 65 Cal. 254, 3 Pac. 867; Payne v. Treadwell, 16 Cal. 246; McFar-

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

land v. Matthai et al., 7 Cal. App. 599, 95 Pac. 179. The averment that defendant's entry was without the consent of "plaintiff and its grantors" was superfluous; but it has never been, nor will it ever be, held that, because a complaint sets out more facts than are necessary to a statement of a cause of action, the pleading is for that reason alone obnoxious to the objections of a general demurrer.

2. We perceive no reason which would justify a disturbance of the court's order refusing to set aside and vacate the default and judgment of which complaint is here urged. The most important of the several affidavits upon which the motion was pressed was that of C. F. Kimball, member of the law firm of Braynard & Kimball, attorneys for the appellant. In that affidavit it is alleged that the affiant "obtained an extension of time, by order of court, for said defendants to answer the complaint herein, which said extension of time expired on September 8, 1908, as shown by said order on file herein. By inadvertence I neglected to make a record of such extension of time upon the office calendar of the law firm of Braynard & Kimball, attorneys for said defendants. Said extension of time was obtained on August 29, 1908, and was for 10 days from such date." The affiant proceeds to aver that, on the 2d day of September, 1908, he departed from Redding, Shasta county, for the city of Stockton, to attend the Democratic state convention as a delegate to that body; that after the adjournment of said convention he visited Sacramento and San Francisco, and did not return to Redding until the 11th day of September, 1908, arriving there in the nighttime, and from the time of his departure from Redding he had no consultation with Mr. Braynard, his partner concerning business, until the morning of the 12th of September. The affidavit of Charles H. Braynard, of the law firm of Braynard & Kimball, corroborates Mr. Kimball, and, among other things, declares that affiant was unaware of the order made by the court on the 29th day of August, 1908, granting to the appellant further time within which to answer the complaint, until the morning of September 12, 1908, at which time he was informed of said order by his law partner. There can be no doubt that counsel for appellant signally failed to make such showing as would have warranted the court, in the exercise of its discretion, in vacating the judgment and setting aside the default entered against their client.

In order to justify the vacating of a judgment and the setting aside of a default, the party claiming to be thus aggrieved must show excusable neglect, or present a reasonable excuse for his default. Shearman v. Jorgensen, 106 Cal. 483, 39 Pac. 863; Edwards v. Hellings, 103 Cal. 204, 37 Pac. 218; Heine v. Treadwell, 72 Cal. 217, 13 Pac. 503; Reilly v. Ruddock, 41 Cal. 312. As is said in Shearman v. Jorgensen, supra, "it is only in exceptional cases that orders of this kind will be reversed by this court." But the facts here do not bring this case within the exception. One of the attorneys of the defendant was certainly aware of the extension of 10 days granted by the court to the defendant to answer the complaint, and the fact that said attorney failed to make a note of that order of the court on the office calendar of the law firm of which he was a member, and that by reason thereof his partner failed to become apprised of such order, is no reason at all for excusing their default. In other words, we fail to see the force of the argument that the plaintiff should be compelled to suffer the consequences of the neglect of Mr. Kimball to give his partner timely information of the order made by the court granting them additional time in which to file an answer. It is not denied that Mr. Braynard knew that the 30 days' time allowed the defendant for answering the complaint granted by the court upon overruling the demurrer would expire on the 31st day of August, 1908, and that he must have believed that, so far as he was advised, the plaintiff would be entitled to a default judgment after the expiration of that time. Personally he made no effort to secure further time beyond the 30 days originally granted to his client, and knew nothing of the order allowing additional time until the return of his partner to Redding, and after the additional time secured by the latter had expired. We do not think that proper, or any, diligence was shown by the defendant in the matter. To the contrary, it would rather appear that, having suffered two defaults to be entered against him, he was inexcusably negligent. The entry of the default and judgment in the first instance ought to have been sufficient to put the defendant on his guard, so that he would have avoided a repetition of the same difficulty. As stated, the facts do not justify interference with the ruling of the court below on the order appealed from.

The fact that the appellant, after the second default and judgment were entered, served upon the attorneys for the plaintiff an answer, of which "due service" was admitted by said last-mentioned attorneys, furnished no reason for allowing the motion. The alleged answer was served on the plaintiff's attorneys on February 18, 1909, after the denial of the first motion to set aside the judgment and default, but prior to the hearing of the second motion for the same purpose. The case had gone to judgment, and certainly, after that event, an answer or other pleading could avail nothing to the party offering it. Particularly is this true here, since it is manifest that, under the terms of section 182 of the Code of Civil Procedure, the defendant was, so far as the facts disclosed here show, without authority or right to institute the second motion. That section provides that, save in cases where motions are refused for informality in the papers or proceedings necessary to obtain the order, or to motions refused with liberty to renew the same, an application for an order made to a judge of a court in which the action or proceeding is pending is refused in whole or in part, or is granted conditionally, no subsequent application for the same order shall be made to any court commissioner, or any other judge, except of a higher court. There is no showing here that the first motion was refused because of "informality in the papers or proceedings necessary to obtain the order," nor does it appear that liberty to renew the motion was granted.

For the foregoing reasons, the judgment and order appealed from are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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11 Cal. App. 503

VICTOR POWER & MINING CO. v. ZERR. (Civ. 652.)

(Court of Appeal, Third District, California. Oct. 18, 1909.)

Appeal from Superior Court, Shasta County; W. M. Finch, Judge.

Action by the Victor Power & Mining Company against G. Zerr. From a judgment for plaintiff, and an order denying a motion to vacate the judgment and set aside the default upon which it was entered, defendant appeals. Affirmed.

Braynard & Kimball, for appellant. W. F. Aram and P. H. Coffman, for respondent.

HART, J. This is an action, ejectment in form, and the appeal is from the judgment and an order refusing to grant the motion of the defendant to set aside the default entered against him for failure to answer the complaint within the time allowed by the court upon overruling the demurrer to said complaint, and to vacate the judgment entered upon said default. The facts and the law pertinent thereto are, confessedly, similar to those in the case of the plaintiff herein against C. L. Cole (No. 651, an opinion in which has this day been filed) 105 Pac. 758.

It therefore follows that, upon the authority of said case (No. 651), the judgment and the order appealed from herein must be affirmed; and such is the order.

We concur: CHIPMAN, P. J.; BURNETT, J.

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11 Cal. App. 505

VICTOR POWER & MINING CO. v. ALVARES. (Civ. 653.)

(Court of Appeal, Third District, California. Oct. 18, 1909.)

Appeal from Superior Court, Shasta County; W. M. Finch, Judge.

Action by the Victor Power & Mining Company against Manuel Alvares. From a judgment for plaintiff, and an order denying a motion to set aside the default upon which it was entered and vacate the judgment, defendant appeals. Affirmed.

Braynard & Kimball, for appellant. W. F. Aram and P. H. Coffman, for respondent.

HART, J. This is an appeal from the judgment, and an order denying defendant's motion to set aside the default for failure to answer the complaint and to vacate the judgment thereupon entered against the appellant. The facts and the law applicable thereto are admittedly the same as those in the case of Victor Power & Mining Co. v. C. L. Cole (No. 651, this day decided) 105 Pac. 758.

Therefore, upon the authority of said case, the judgment and the order herein appealed from are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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11 Cal. App. 506

GREEN et al. v. GAVIN et al. (Civ. 648.)

(Court of Appeal, Third District, California. Oct. 18, 1909. Rehearing Denied by Supreme Court Dec. 16, 1909.)

1. MINES AND MINERALS (§ 19*)—LOCATING CLAIMS—POSTING NOTICES—TIME.

Where defendants did all acts required for the valid location of a mining claim by recording notice of location in the county recorder's office, staking and developing the claim and posting notice of location on the claim, it was immaterial as against subsequent locators that the only valid notice of location was posted after the notice was recorded.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 37; Dec. Dig. § 19.*]

2. MINES AND MINERALS (§ 22*)—LOCATION OF CLAIMS—RECORDING NOTICE OF LOCATION.

The recorded notice of a mining claim need only be similar to that posted upon the ground and show that claimant claims the land described and identified therein, so that, where the notice recorded was a copy of a posted notice which was insufficient because not posted within the claim, that the valid notice subsequently posted, which differed from the first notice only in omitting the name of a witness, was not again recorded, was immaterial as against subsequent claimants.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 45–50; Dec. Dig. § 22.*]

3. APPEAL AND ERROR (§ 1041*)—HARMLESS ERROR—PREJUDICIAL EFFECT—AMENDMENT.

In an action to quiet title to a mining location, the case was tried on defendants' allegation that their location notice was posted on February 29, 1905, and a copy thereof recorded on the 13th of that month. After trial, but before judgment, an amendment was allowed alleging that a notice was posted near and upon the claim on February 13th, and that on February 29th defendants again posted on the claim a copy of the notice of location, except that it omitted the name of a witness, containing the date of the location as of the 13th, locator's name, etc. The facts alleged in the amendment were admitted in evidence without objection. *Held*, that the amendment could not have injured plaintiffs, though it was probably unnecessary, since the ineffectual posting of February 13th need not have been alleged.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4106–4109; Dec. Dig. § 1041.*]

4. PLEADING (§ 236*)—AMENDMENTS—DISCRETION OF COURT.

The court should liberally exercise its discretion in allowing amendments, so that the cause may be decided on the merits.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 601; Dec. Dig. § 236.*]

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5. Mines and Minerals (§ 38*)—Claims—Actions—Proof—Immaterial Facts.

In an action to quiet title to a mining claim, the fact that the first notice of claim posted by defendants was near the land, and not upon it as alleged in the answer, was immaterial where sufficient facts were alleged and proved to show a valid location, and sustain the judgment for defendants.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 38.*]

Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by F. H. Green and others against James Gavin and others. From a judgment for defendants and an order denying a motion for new trial, plaintiffs appeal. Affirmed.

Tuttle & Tuttle, for appellants. W. H. Slade and J. M. Fulweiler, for respondents.

BURNETT, J. The action is to quiet title, and the vital question in the case involves the validity of a mining location made by respondents. The facts are substantially without controversy, and may be stated as follows: On February 12, 1905, the respondents discovered mineral in paying quantities on the claim in dispute, and on the following day posted a notice of location on a tree plainly visible thought to be on or near the west line of the claim, but which a subsequent survey showed to be some 288 feet west of said line. An identical copy of this notice was recorded in the county recorder's office on the 23d day of February, 1905. These two instruments were in proper form, were signed by the locators, witnessed by one George Adams, and dated February 13, 1905. On this latter date respondents went around the claim, placed stakes at what they believed to be the four corners, marked trees, and brushed out the lines so that the boundaries could be readily traced, and immediately began the work of development of the mine which had not ceased at the time of the trial of the action. On the 29th day of February, 1905, one of the respondents posted near a trail on the easterly side and actually on the claim an additional notice sufficient in all respects and exactly like the first notice, with the single exception that it did not contain the name of Adams as a witness. On the 19th day of December, 1905, while respondents were in possession of the claim and engaged in developing it, appellants with knowledge of the foregoing facts, posted on the same claim their notice of location, and, as respondents would not yield possession, this action was begun.

The claim is located in what is known as the "Brushy Mining District" in the county of Placer, and it was stipulated that the custom of miners in said district at all the times mentioned required the posting of a location notice upon the mining ground claimed or attempted to be located, and the recording of a copy thereof with the county recorder of the county. It does not appear from the stipulation in what order these acts were required to be performed but there was evidence to the effect—and it would seem natural and reasonable to conclude—that the practice was first to post and afterwards to record the notice. But in the case at bar we consider this circumstance entirely immaterial as all the acts required for a valid location of a mining claim had been performed by respondents long before appellants entered upon the ground and the aforesaid departure from the usual order of procedure was absolutely without prejudice to any one, and could not inure to the benefit of the subsequent locators.

A statement of the foregoing facts would seem to be sufficiently confirmatory of the lower court's decision, but there is abundant authority for its support. In Thompson v. Spray, 72 Cal. 333, 14 Pac. 185, it is said: "Does the fact that the notice was recorded before it was posted render it invalid? We think not. No record is necessary in the absence of a custom requiring it. * * * But, if such a custom were shown, we do not think the mere order in which the acts are done of sufficient importance to render them of no effect." The following statement in Kern Oil Co. v. Crawford, 143 Cal. 302, 76 Pac. 1112 (3 L. R. A. [N. S.] 993), in reference to the marking of the boundaries, is applicable also to the acts required by custom: "Technical accuracy, either in the location of the stakes or in the wording of the notice, is not required. If a third party, intending to locate, can readily ascertain from what has been done by the prior locator the extent and boundaries of the claim so located, then the object of the statute has been accomplished." The matter could hardly be stated more clearly than in Dwinnell v. Dyer, 145 Cal. 21, 78 Pac. 253 (71 L. R. A. [N. S.] 763), wherein, through Chief Justice Beatty, the court declares: "Under the law of Congress, under the laws of this state, and under every code of district laws adopted by miners that has come to my notice, the prescribed order of the acts necessary to a valid location is, first, the discovery of mineral bearing rock in place; second, the posting of notice at or near the point where the ledge is exposed; next, the recording of notice; and, finally, the work of development. But, although this is the natural and proper order of procedure, it is not obligatory in the absence of intervening rights. It is indeed universally held that, when every act necessary to complete a location has been done before an adverse claim has accrued, the order in which such acts have been performed is immaterial. If, for instance, a locator before the discovery of any lode begins by first marking out a surface claim, his location is perfected if he develops a lode within his boundaries, before a good location is made by an adverse claimant." No one would deny that respondents, having made a mistake in posting the first notice without the boundaries of their claim, could supply the omission by posting the notice properly. But appellants insist that thereafter the notice should have been recorded. But what purpose could have been accomplished by repeating an act already performed? As far as the constructive notice required by the custom is concerned, it had been fully given and its object accomplished. Neither the law nor custom requires an idle act. Appellants state that "the first notice was invalid because posted without the claim and the second or additional notice was invalid because the same was never recorded, prior to the time of our location." But the argument is based upon a misconception of the notice required to be recorded. All that is contemplated is that the claimant shall post upon the ground a written statement signed by him and properly dated containing the information that he claims the land as a mining claim with a description of it sufficient for identification and that he shall record a similar notice in the recorder's office. The posted and the recorded notices are not required to be identical. They should, of course, be substantially alike. The only difference here relating to the name of a witness is entirely immaterial. As under the admitted facts the trial court could have reached no different conclusion, it is necessary to consider only one ruling, which relates to an amendment to the answer. It seems that the cause went to trial upon the averment by defendants that the location notice was posted on the 29th of February, 1905, and that a copy of said notice was recorded on the 13th day of said month.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

After trial, but before judgment, upon due notice given, the court allowed an amendment to the effect that on February 13th a notice was posted near and upon said land, and that thereafter "on or about the 29th day of February, 1905, the said James Gavin, acting for himself and for his said co-locators of said mining claim, again posted on said mining claim, a full, true and correct copy of said notice of location of said claim, containing the names of said locators, the date of said location, to wit, the 13th day of February, 1905, and a correct description thereof, except, that the name of the witness, George Adams, to said location was omitted therefrom." The amendment was probably unnecessary, as the ineffectual posting of February 13th need not have been alleged, but the facts were received in evidence without objection, and it is impossible to conceive how appellants could be injured by the allowance of the amendment. The rule is well established that the court should liberally exercise its discretion in allowing amendments so that the cause may be determined upon its merits. Bean v. Stoneman, 104 Cal. 49, 37 Pac. 777, 38 Pac. 39; Carter v. Lothian, 133 Cal. 451, 65 Pac. 962.

It may be remarked that the court found in accordance with the evidence that the first notice was posted "near to said mining claim" and not "near and upon said land," as alleged in the amendment. But this circumstance is of no moment, as all the material facts are alleged in the answer and found by the court that are required to support the judgment.

The decision of the trial court is clearly right and the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

11 Cal. App. 483

LEWIS v. SUPERIOR COURT OF BUTTE COUNTY et al. (Civ. 674.)

(Court of Appeal, Third District, California. Oct. 6, 1909.)

1. PROHIBITION (§ 17*)—DEMAND—JUDGES.

The applicant for a writ of prohibition must make a demand on defendant that he accede to the course sought to be enforced, and therefore prohibition against the superior court and the judge thereof cannot, after the death of the judge, be maintained against his successor without such demand first being made upon him.

[Ed. Note.—For other cases, see Prohibition, Dec. Dig. § 17.*]

2. PROHIBITION (§ 29*)—JUDGES—THREAT TO DO ACT—DENIAL OF INTENT.

Before a judge should be prohibited from doing an act, it should appear that he is about to proceed or threatens to do the act, and, where he denies in his return that he will do the act complained of unless prohibited, the peremptory writ should not issue.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 77; Dec. Dig. § 29.*]

3. JUDGMENT (§ 570*)—BAR—NONSUIT FOR INSUFFICIENT FACTS—EFFECT.

Where a nonsuit is granted for insufficient facts, there has been no trial on the merits.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1028–1045; Dec. Dig. § 570.*]

4. APPEAL AND ERROR (§ 842*) — REVIEW — MOTION FOR NONSUIT—QUESTION OF LAW.

The ruling of the trial court on motion for a nonsuit presents a question of law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1582–1595; Dec. Dig. § 842.*]

5. JUSTICES OF THE PEACE (§ 171*)—APPEAL—TRIAL ANEW.

An action commenced in the justice's court cannot be tried anew in the superior court, unless the issues of fact have been tried in the justice's court.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 3316–3330; Dec. Dig. § 171.*]

Petition for writ of prohibition by S. Lewis against the Superior Court of Butte County and others. Writ denied.

Bond & Hays, for petitioner.

CHIPMAN, P. J. The action is brought to prohibit the defendants from proceeding to try the case de novo in which H. S. Parker is plaintiff and the petitioner here is defendant. It appears that the action last above referred to was commenced in the justice court of Chico township. It came on for trial. The plaintiff submitted his evidence and rested, whereupon defendant moved for a judgment of nonsuit and dismissal of the action on the ground that the plaintiff had failed to prove his alleged cause of action and the facts were insufficient to constitute a cause of action. The motion was granted and judgment of nonsuit and dismissal of the action duly entered. Plaintiff thereupon served notice of appeal to the superior court "on questions of both law and fact." The appeal was perfected and "certified copy of the justice's docket, together with the pleadings, all notices, motions, and all other papers filed in the cause, the notice of appeal and undertaking, was filed in the clerk's office of the superior court." It further appears that "said H. S. Parker, plaintiff, did not prepare a statement of the case and file the same with the said justice or judge, nor was any such statement prepared or filed or prepared or filed, or at all." Some time after the said appeal was perfected and the said papers filed with the clerk of the superior court, as aforesaid, defendant moved the court, after due notice of the motion to plaintiff Parker, to dismiss the appeal "upon the ground that the said appeal was taken upon questions of law, and that no statement of the case was made or filed in the justice's court from which the appeal was taken," and that "an involuntary judgment of nonsuit is a question of law, and that the appeal was not perfected * * * because of there having been no statement of the case filed in the said justice's court." The motion came on for hearing and was denied by the court, "and the court thereupon set the case down for trial de novo in the said superior court," to which defendant objected on the grounds above stated, and that the "said superior court was without jurisdiction to do otherwise than to dismiss the said appeal, which said objection of the defendant was overruled by the said superior court and defendant excepted thereto." The writ of this court is prayed for to prohibit the said superior court from trying said case de novo. Before the alternative writ was served defendant, the Honorable Warren Sexton, died; the Honorable John C. Gray was duly appointed to fill the vacancy; and an order was made duly substituting him as defendant, and service was made upon him. Judge Gray makes return that the matter set forth in the petition has never been brought before him for hearing, and denies that he will unless prohibited by this court proceed to try the said case de novo, and prays that before any writ issue he be given an opportunity to hear the said matter.

While the superior court is made a party defendant, the motive power of its machinery resides in the judge of that court. It speaks only through its presiding officer, through whom alone service can be made upon it. We cannot know but that the successor of Judge Sexton would, upon motion, set aside the order overruling defendant's motion to dismiss the action and the order setting the case down for trial de novo, and, upon a renewal by defendant of his motion to dismiss the appeal, grant the relief prayed for. The writ of prohibition is the counterpart of the writ of mandate. Code Civ. Proc. § 1102; and we held, in Ferguson v. Board of Education, 7 Cal. App. 568, 95 Pac. 165, that the applicant must make a demand upon the defendants to perform the act sought to be enforced by the writ. It would seem reasonable to require that before a judge should be prohibited from doing an act it should appear that he is about to proceed or threatens to do the act. Respondent denies in his return that he will do the act complained of unless prohibited. We think therefore that the peremptory writ should not issue under the present circumstances.

It may not be out of place, however, to state the law as we understand it. Where a nonsuit is granted for insufficient facts, there has been no trial on the merits. Smith v. Superior Court, 2 Cal. App. 531, 84 Pac. 54. The ruling of the trial court on motion for a nonsuit presents a question of law. Hanna v. De Garmo, 140 Cal. 174, 73 Pac. 830. An action commenced in the justice's court cannot be tried anew in the superior court until the issues of fact have been tried in the justice's court. Null v. Superior Court, 4 Cal. App. 207, 210, 87 Pac. 392.

We suggest that petitioner should be permitted to move the court to set aside and vacate its order refusing to dismiss the appeal and setting the case for trial de novo, and to renew his motion to dismiss the appeal and his objections to try the case de novo. The present trial judge will then have an opportunity to rule upon the matter, and, should he adhere to the view of his predecessor, petitioner will have his remedy open to him.

The writ is denied.

We concur: HART, J.; BURNETT, J.

11 Cal. App. 533

CAHLAN et al. v. BANK OF LASSEN COUNTY et al. (Civ. 641.)

(Court of Appeal, Third District, California. Oct. 22, 1909.)

1. Corporations (§ 133*) — Compelling Transfer of Stock—Issues, Proof, and Variance—Admissibility of Evidence.

In an action to establish title to certificates of bank stock and to compel transfer of the same on the books of defendant bank, ownership in a person deceased was alleged and a transfer by such person to plaintiffs and possession by them. *Held*, that evidence to show that the original owner after the transfer held them in trust for the transferees was admissible under the allegation of ownership and possession.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 517; Dec. Dig. § 133.*]

2. Trusts (§ 159*)—Who May Become Trustee.

It is competent for a person creating a trust to himself become the trustee or to make the beneficiary the trustee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 206; Dec. Dig. § 159.*]

3. Trusts (§ 30½*)—Creation of Trusts.

One who owns property may so deal with it while retaining the legal title as to make himself a trustee for the benefit of another.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 41, 41½; Dec. Dig. § 30½.*]

4. Trusts (§ 25*)—Creation of Trusts—Necessary Words.

Any words which indicate with sufficient certainty an intention to create a trust will be effective in so doing without the use of the words "trust" or "trustee."

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 34–37; Dec. Dig. § 25.*]

5. Trusts (§ 39*)—Creation—Acceptance.

It is not necessary to the creation or existence of a trust that the beneficiary shall be informed of the trust or express an acceptance of it, as under Civ. Code, § 2251, the mutual consent of a trustor and trustee creates a trust of which the beneficiary may take advantage at any time prior to its rescission.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 57–59; Dec. Dig. § 39.*]

6. Trusts (§ 37½*)—Creation—Validity.

Where the owner of certificates of bank stock transferred them, but retained possession of them until his death, the fact that he received dividends on the stock does not affect the validity of the trust thus established.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 53; Dec. Dig. § 37½.*]

7. Corporations (§ 133*)—Transfer of Stock—Actions to Compel Transfer on Books.

In an action to compel a bank to transfer certain shares on its books to plaintiffs and to pay plaintiffs the dividends due thereon, evidence *held* sufficient to justify a finding that the certificates were indorsed to plaintiffs, and that the original owner held the certificates in trust for plaintiffs.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 133.*]

8. Gifts (§ 54*)—Wills (§ 91*)—Contracts to Bequeath—Transfer of Stock Certificates.

Deceased placed certificates of bank stock in an envelope after indorsing a transfer in blank upon them, and wrote on the outside of the envelope, "In case of my death to go to Neva and Lena Cahlan," and placed the same in a private box kept by him in a bank vault. *Held*, that there being evidence that it was the purpose of deceased to make an actual transfer of the certificates at that time, and to hold them in trust during his lifetime, and to draw the dividends accruing thereon during his lifetime, it was not an attempt to make a gift causa mortis, and the transfer was not invalid as being testamentary in character.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 119–121; Dec. Dig. § 54;* Wills, Cent. Dig. § 220; Dec. Dig. § 91.*]

Appeal from Superior Court, Lassen County; F. A. Kelley, Judge.

Action by Geneva C. Cahlan and another against the Bank of Lassen County and others. Judgment for plaintiffs, and defendants, executors and interveners, appeal. Affirmed.

Pardee & Pardee and W. H. Carlin, for appellants. W. M. Boardman (Grove C. Julian, of counsel), for intervener. N. J. Barry and H. D. Burroughs, for respondents.

CHIPMAN, P. J. The plaintiffs in their complaint allege the ownership and present possession each of ten shares of the capital stock of the defendant bank, evidenced by two certificates numbered, respectively, 113 and 114; that both said certificates were issued to W. W. Scholl on January 8, 1902, and were thereafter duly assigned and delivered to plaintiffs; that said Scholl died in December, 1907; that defendants, executors of the last will of said deceased, claim some interest in said shares as belonging to the estate of said deceased; that plaintiffs demanded of plaintiff bank to pay to them the dividend accruing on said shares, and the same was refused. The prayer of the complaint is that defendant bank be directed to transfer the said shares on its books to plaintiffs and to pay plaintiffs the dividend due thereon, and that the court decree that said Scholl at his death had no right, title, or interest in said stock or the dividend thereon. Defendant bank disclaims any interest in the controversy and seeks only to be directed by the court as to its obligations in the matter. Defendants, the executors, deny, on information and belief, the material allegations of the complaint, and pray the court to "ascertain the truth as to the matters of fact set forth in the pleadings herein." Certain residuary legatees under the will of deceased and heirs at law filed a complaint in intervention, claiming that the property belonged to the deceased at his death. The court made the following findings: "(3) That on the 8th day of January, 1902, said Bank of Lassen County, by its officers duly authorized so to do, issued in due form and delivered to said W. W. Scholl two certificates of its capital stock Nos. 113 and 114, for ten shares each. (4) That on the 14th day of January, 1902, said W. W. Scholl duly and legally assigned said certificates mentioned in finding 3 hereof, and each of them, by indorsement on the back thereof, to the plaintiffs. That said W. W. Scholl thereupon placed said two certificates in an envelope and sealed the same and placed the following indorsement in writing on the outside of said envelope, 'In case of my death to go to Neva and Lena Cahlan,' and he thereupon placed the same in a private box kept by him in the vault of the Bank of Lassen County. That thereafter and during the month of January, 1902, and at other times thereafter said W. W. Scholl stated that said certificates and the shares of capital stock of said bank represented thereby belonged to the plaintiffs in this action, and that he held the same in trust for them, subject to his right to have and receive the dividends accruing thereon during his lifetime. That said certificates remained in said private box up to the 31st day of December, 1907, and on said day last named Fred Hines, one of the defendant executors herein, delivered both of said certificates with the envelope in which said certificates were inclosed to the plaintiffs herein." Judgment passed for plaintiffs, from which defendants, the executors, and defendants, the interveners, appeal on bill of exceptions.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It appeared by the evidence: That Scholl was for several years a partner in business with plaintiffs' father; that he was unmarried and lived with the Cahlans as one of the family and was greatly attached to them; that by reason of this attachment he gave to a brother of plaintiffs $1,000 and frequently expressed an intention to do something for plaintiffs, the two daughters of his friend. He was the owner of 20 shares of the Lassen County Bank, having a par and actual value of $100 each. He left these shares under lock and key in a tin box which was deposited in the bank vault. They were evidenced by two certificates, numbered 113 and 114, of ten shares each, were dated January 8, 1902, and bore an assignment in blank signed by Scholl and witnessed by H. W. Meylert, who was cashier of the bank. The certificates were inclosed in an envelope which was indorsed in the handwriting of Meylert as follows: "In case of my death to go to Lena and Neva Cahlan." Mrs. Cahlan, plaintiffs' mother, was a witness. She testified: That she bought some shares of this bank at the same time Scholl purchased his. That he came to her shortly after and told her "that he had given the girls each ten shares of stock and had put it in his box at the bank. He wanted me to know that he had done this, was the reason that he came and told me. He wanted to give them something and he took this method of doing it. He said he had given them each ten shares of the bank stock, Lassen County Bank stock. This was in January, 1902. I had bought some stock myself that was issued at the same time. * * * The next conversation I had with him was down to the house, and I told him with reference to that stock, if he wanted them to have it, * * * we wanted him to be sure and leave it so we wouldn't have trouble about getting it, and he said that was all fixed. He said you can ask Mr. Meylert, and he will tell you just the same." She was asked if Mr. Scholl said anything to her about retaining dividends, to which she answered: "Yes, at the time I asked him if he was sure it was all fixed so there would be no trouble in getting it. He said there would be no trouble in getting it. * * * He said this, 'As long as I am kicking,' he says, 'I will hold this and receive the dividends.'" She met Mr. Scholl at the bank a few days after the stock was issued and Mr. Meylert was present. She was asked on cross-examination to state the words or substance of the words used in the conversation that took place at that time to which she had testified in her examination in chief. She replied: "Well, when I got my own stock, Wallace (Mr. Scholl) said, 'You can put it in my box here.' He went into the vault and brought his box out. He says, 'You can put it in here with the girls' stock.' He picked that up in his hands at the time. He says, 'This is the girls' stock, and you can put this in the box with it.' I asked Mr. Meylert if this is fixed all right and there would be no trouble in getting it, and Wallace laughed and said, 'She is afraid she will have trouble with the heirs,' and Mr. Meylert said: 'No, the heirs have nothing to do with this. This was the girls' at the time of Wallace's death. This don't go into the will.' He says, 'This is the girls' property.' I remember his saying it just like that, and Wallace admitted everything there, I don't remember just what he said, yes or no. The Court: Do I understand you to say that he admitted as a fact that it was the girls' stock? A. Yes, I was talking to both men. Mr. Scholl said: 'Yes, this is the girls' stock, Mr. Meylert. This is all signed. There is nothing to do with this only transfer it on the books. This is the girls' property.' He said that at that conversation. He brought that box out, and picked that stock out of it, and he said, 'You can put it in here with the girls' stock.' I put my stock in the box. Well, he might have put the girls' stock in an envelope, but at the time he held it in his hand. He had the two pieces of stock, and Mr. Meylert said, 'You see here that he has signed it,' and I saw that it was signed. * * * The stock referred to as the girls' stock was then put back into the box, and he carried the box back into the vault. My stock is right there yet so far as I know." Mr. Scholl stated to other persons that he had given ten shares of this stock to each of these plaintiffs. The evidence leaves no doubt of his intention to do this, and that he did everything to accomplish it except to deliver the certificates to the donees, and the evidence was sufficient to warrant the inference that the indorsement on the envelope containing the certificates was made with his knowledge and by his direction; and, furthermore, that he retained possession for the donees and for the purpose only of collecting the dividends while he lived—in short, that he constituted himself their trustee for the purposes stated. Mr. Meylert died some time before the trial, and hence his testimony could not be taken. It appeared that upon the death of Mr. Scholl his executors opened his box under advice of counsel to ascertain the directions of his will known to have been made. They found the envelope heretofore mentioned, and, supposing it to be their duty to carry out the directions written thereon, they accordingly opened it and delivered the certificates to plaintiffs, which explains their possession.

All this evidence was admitted over the objection of defendants on the general grounds of irrelevancy and incompetency and particularly because not within the issues made by the pleadings. The point seems to be that as the complaint alleges ownership and possession of the bank stock, and does not allege the trust to establish which the evidence was admitted, it was not competent to prove ownership by this means. The facts present a somewhat peculiar case. The primary object of the action is to establish ownership of these certificates of stock which had been delivered to plaintiffs by the executors, but which stood on the books of the bank in the name of plaintiffs' donor. Ownership established, the bank was willing to issue certificates to the donees. Proof of ownership made necessary a disclosure of all the facts out of which was to appear the ultimate fact of ownership. The facts thus disclosed showed that Mr. Scholl held these certificates as trustee for plaintiffs. His only interest in the shares of stock was in the dividends paid during his lifetime. In the case of Booth v. Bank of Oakland, 122 Cal. 19, 54 Pac. 370, a case quite similar to this, the trusteeship in the bank was shown to establish ownership. The court said: "The ownership of the plaintiff is all that is material to be alleged." The ownership of real property is a material ultimate fact and may be pleaded as such (Garvin v. Swain, 113 Cal. 324, 45 Pac. 677), and the same is true generally of ownership of personal property (21 Am. & Eng. Pl. & Pr. p. 726). Here original ownership was alleged in Scholl and transfer by him and possession in plaintiffs. This was sufficient to admit the evidence in support thereof, although it showed a trust in Scholl. We think that this case falls clearly within the principles laid down in Hellman v. McWilliams, 70 Cal. 449, 11 Pac. 659, and Booth v. Oakland Bank of Savings, 122 Cal. 19, 54 Pac. 370. It was competent for Scholl to become the trustee of the trust created by himself. Even a cestui que trust may be made trustee of the fund of which he is the beneficiary. Nellis v. Rickard, 133 Cal. 617, 66 Pac. 32, 85 Am. St. Rep. 227. In the well-considered case of Otis v. Beckwith, 49 Ill. 121, the subject of the trust, an insurance policy, never left the possession of the trustor and was found among his other papers at his death. The court said: "In such cases, equity will look to the substance of the act alone, and the intention with which it was done, and, in the absence of fraud, carry out such intention and give it effect." One who owns property may so deal with it, while retaining the legal title, as to make himself a trustee for the benefit of another. Noble v. Learned, 153 Cal. 245, 94 Pac. 1047, and cases cited. Said the court in Booth v. Oakland Bank, supra: "It is well settled that a trust in personal property need not be in writing, and it is equally well settled that no set form of words are necessary to create a trust." Any words which indicate with sufficient certainty an intention or purpose to create a trust will be effective in so doing, without the use of the words "trust" or "trustee." Estate of Smith, 144 Pa. 428, 22 Atl. 916, 27 Am. St. Rep. 641. Nor is it necessary that the beneficiary shall be informed of the trust, or shall express an acceptance. Booth v. Oakland Bank, supra. "The mutual consent of a trustor and trustee creates a trust of which the beneficiary may take advantage at any time prior to its rescission." Civ. Code, § 2251. The trust here was not rescinded. The circumstance that Mr. Scholl retained the power to receive the dividends on the stock did not affect the validity of the trust. Id.

It is objected that there is no evidence that Mr. Scholl indorsed the certificates on the back thereof "to the plaintiffs," or that he stated in his lifetime that the certificates belonged to plaintiffs, "and that he held the same in trust for them," as found by the court. It does not appear that Scholl indorsed the certificates "to the plaintiffs," using that language. The indorsement was in blank; but the evidence clearly showed that his intention was to indorse them to plaintiffs, and his act had that effect. Nor did it appear that he ever said in words that "he held the same in trust for them"; but his declarations and acts showed beyond doubt that he did in fact so hold them and so intended. Otherwise the evidence shows that the findings are literally correct and are fully supported. If not literally supported in the particulars pointed out above, they were in those respects substantially supported. The evidence justified the court in finding that the indorsement in effect was to plaintiffs, and that he held the certificates in trust for them.

It is true, as claimed by appellants, that an ineffectual attempt to make a gift does not create a trust, and equity will not perfect an imperfect gift by establishing a trust where none was contemplated (Noble v. Learned, supra); but here the evidence is in every way consistent with the view taken by the trial court that a trust was contemplated, and its findings must stand (Noble v. Learned, supra).

It is urged that the directions on the envelope containing the certificates "are testamentary in character and as such are invalid and void in law, affecting any interest in the property," citing Hart v. Ketchum, 121 Cal. 429, 53 Pac. 931. As an attempt to effectuate a gift causa mortis, and nothing else, this may be so; but these directions are to be given effect in accordance with the purpose of the donor otherwise shown to have been his intention in making the indorsement.

We think that the judgment is correct and it is therefore affirmed.

We concur: BURNETT, J.; HART, J.

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11 Cal. App. 561

PEOPLE v. CARANTAN. (Cr. 98.)

(Court of Appeal, Third District, California. Oct. 25, 1909.)

1. Criminal Law (§ 834*)—Trial—Modification of Instructions — Credibility of Witnesses.

A requested instruction that "a witness may be impeached by the party against whom he was called by contradictory evidence, or by evidence that his general reputation for truth, honesty, or integrity is bad," may properly be modified by adding, "and the jury are the exclusive judges of his credibility."

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 834.*]

2. Criminal Law (§ 782*)—Trial—Instructions.

The court instructed that the jury, "subject to the control of the court," are the exclusive judges of the evidence, except when it is declared to be conclusive, and that their power of judging of the effect of evidence is to be exercised in subordination to the rules of evidence. *Held*, that the phrase "subject to the control of the court" did not render the instruction erroneous, as, though the phrase might well have been omitted, it must be assumed that the jury understood it to mean that, while they were to be the exclusive judges of the weight of the evidence, they were to be guided by the principles of the law announced by the court.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 782.*]

3. Criminal Law (§ 822*)—Review—Instructions.

In ascertaining whether defendant was prejudiced thereby, instructions must be considered as a whole by the review court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990–1995, 3158; Dec. Dig. § 822.*]

4. Criminal Law (§ 1172*)—Review—Harmless Error—Instructions.

Where the weight of the evidence and of the credibility of witnesses was submitted to the jury without any attempt to control their judgment, defendant was not prejudiced by the phrase in an instruction that the jury, "subject to the control of the court," are the judges of the effect and value of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1172.*]

5. Criminal Law (§ 778*)—Trial—Instructions on Burden of Proof.

An instruction that "the proof as to the defense of insanity is on defendant, and this insanity must be established by a preponderance of evidence," etc., is not subject to the objection that under it the evidence of insanity must come from defendant alone, and the jury could disregard the evidence of insanity brought out by the prosecution.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 778.*]

6. Courts (§ 50*) — Organization—Departments of Courts.

As the several departments of the superior court constitute but one court, the jurisdiction of a department to which a case has been assigned is not exclusive, but the case may be transferred to another department for trial, and such transfer does not affect previous orders in the case made in the department then having it.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 175; Dec. Dig. § 50.*]

7. Criminal Law (§ 938*)—New Trial—Newly Discovered Evidence.

Defendant did not testify on the trial, and after conviction he moved for a new trial on the ground of newly discovered evidence, and, in support thereof, presented his own affidavit, corroborated by affidavits of his counsel and physician, alleging that he was unable to remember the events leading up to the homicide, or what transpired at the time of the shooting until after the trial. He then gave the details of such events, disclosing a clear case of self-defense. *Held*, that the denial of the motion was not error.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 938.*]

Appeal from Superior Court, Shasta County; Charles M. Head, Judge.

Michael Carantan was convicted of murder in the second degree, and appeals. Affirmed.

Braynard & Kimball, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the State.

BURNETT, J. The defendant was convicted of murder in the second degree, and sentenced to imprisonment for life in the penitentiary. The victim was his wife, and according to her dying statement the crime was strikingly atrocious. It is not, indeed, claimed that the evidence is insufficient to support the verdict, but many points are made as to rulings of the court and certain instructions given and refused, some of which are not argued and only a few in our judgment can be the subject of candid disputation. Of these, in the order in which they are presented:

1. The defendant requested the following instruction: "A witness may be impeached by the party against whom he was called by contradictory evidence, or by evidence that his general reputation for truth, honesty or integrity is bad." The court gave it but added thereto this clause: "And the jury are the exclusive judges of his credibility." Appellant claims that "this modification emasculates the instruction, deprives it of

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

life, and in effect tells the jury that their province of determining the credibility of a witness is not to be invaded by any impeachment of a witness in accordance with law." We do not so understand the instruction. When fairly construed, it simply means that the jury were to be the exclusive judges of the weight and effect of the evidence as to the credibility of the witness. As a proposition of law this cannot be disputed. There is nothing in the language used from which the jury could infer that due regard should not be paid to the evidence received as to the credibility of any witness. In view of other instructions it was probably unnecessary for the court to add the said modification, but we can see in it no invasion of the province of the jury nor anything prejudicial to the rights of the defendant.

2. On the request of the prosecution, this instruction was given: "The jury, subject to the control of the court, are the judges of the effect and value of evidence addressed to them, except when it is declared to be conclusive. Their power of judging of the effect of evidence is not arbitrary, but to be exercised with legal discretion and in subordination to the rules of evidence." Appellant had requested the same instruction with the exception of the phrase "subject to the control of the court." It was refused for the reason that it was covered by other instructions. Of this action of the court complaint is made, and it is contended that the jury are not subject to the control of the court in determining the effect and value of the evidence except when declared to be conclusive, and that the instruction as given is subject to this imputation of the court's interference with the jury's prerogative. It it to be observed that the said qualification is prescribed by the Code (section 2061, Code Civ. Proc.), and, while the expression is somewhat equivocal and might well have been omitted, we must assume that the jury understood it to mean that, while they were to be the exclusive judges of the weight of the evidence, in their deliberations they were to be guided by the general principles of law announced by the court. At most, the expression is subject to criticism for uncertainty, but in the endeavor to ascertain whether defendant was prejudiced we must, of course, consider the whole charge. A conviction upon ample evidence is not to be reversed by reason of an inapt or uncertain phrase unless it be reasonable to conclude that the jurors were thereby misled to the damage of the defendant. In other instructions, as we have seen, the jury were told that they were the exclusive judges of the credibility of the witnesses, and thereby any possible misunderstanding as to the full import of the phrase under consideration was rendered harmless. In fact, the whole body of the charge proceeds upon the assumption and clearly implies that the jury were to determine all the facts in issue, and that the duty of the judge of the court was to declare the law. The only rational inference from the instructions considered as a whole, is that the jury alone were to determine the effect of the evidence; that their action, however, was not to be arbitrary, but in subordination to the rules of evidence; and that in discharging this duty they were to be mindful of the law as declared by the court. Indeed, this technical instruction proposed by defendant means very little to the average juror, and to it he probably pays very little heed. The essential principle involved was presented more satisfactorily and in terms easily understood when the jury were plainly told that every material fact essential to a conviction must be proved beyond a reasonable doubt, and in the other instructions containing the doctrine of the law as to insanity and every phase of self-defense, and charging the jury as to the degree of proof required and the principles by which they must be governed in rendering a verdict. But a complete answer to appellant's criticism of the phrase is that the determination of the weight of the evidence and of the credibility of the witnesses as a matter of fact was left to the jury without any attempt on the part of the judge of the court to control or influence their judgment; and hence it is perfectly apparent that no harm was done by the use of said expression.

3. Appellant claims that "the court in effect told the jury that the evidence and proof of insanity must come from the defendant, and that they could wholly disregard the evidence of insanity brought out on the people's case." But the conclusion is wholly unwarranted. The contention is based upon the use of the word "proof" in the following instruction: "The proof as to the defense of insanity is on the defendant; and this insanity must be established by a preponderance of evidence; that is to say, before the defendant can be acquitted on the ground of insanity, it must appear by a preponderance of the evidence that at the time the homicide was committed there was such a disordered or deranged condition of his mental faculties as to render him incapable of distinguishing between right and wrong in relation to the particular act with which he is charged." The context shows that the word "proof" was used for "burden of proof," and nowhere does it appear that the jury were directed to consider only the evidence offered by the defendant. If any doubt as to this might arise from the instruction standing alone, it was completely removed by another instruction as follows: "The defendant is entitled to the benefit of all evidence in his favor whether produced upon the people's case or upon his defense, and, if you believe that there is a preponderance of the evidence that defendant was insane at

the time of the homicide, his act is excused, and it is your duty to acquit the defendant."

4. There are two departments of the superior court of Shasta county. It appears that the case was regularly set for trial in department No. 2 thereof for January 4, 1909. Prior to this time, and on September 21, 1908, the presiding judge of this department, the honorable George W. Bush, had regularly drawn a jury for the trial of the cause, but in the meantime, by election, Judge Barber succeeded to the position of judge of said department No. 2. He had represented the defendant at the preliminary examination, and being therefore disqualified in the matter, on December 12, 1908, he transferred the cause to department No. 1 for trial. Appellant claims that department No. 1 had no jurisdiction to try said case, and erred in proceeding with the trial of the same over the objections of defendant. It is also insisted that, where a case has been assigned from one department to another department of the superior court, all previous orders such as here under consideration are thereby vacated and set aside. We think neither position can be maintained on principle or by authority. The jurisdiction to try the cause was in the superior court of Shasta county and not in either department to the exclusion of the other.

It is aptly said in White v. Superior Court, 110 Cal. 67, 42 Pac. 482, that: "The jurisdiction of causes is vested by the Constitution in the court, not in any particular judge or department thereof. The Constitution, in fact, says nothing about departments. It provides that there may be as many sessions of the court at the same time as there are judges, but whether sitting separately or together the judges hold but one and the same court, and the jurisdiction they exercise in any cause is that of the court and not the individual. * * * Transferring a cause for trial or disposition from one of those departments to another does not effect a change or transfer of the jurisdiction of that cause. That remains at all times in the court as a single entity." "The entire procedure," as stated in Brown v. Campbell, 110 Cal. 648, 43 Pac. 13, "from the commencement of the action to the execution of the judgment, is in one court, and there is no opportunity for conflict of jurisdiction either in pronouncing a judgment or in its execution after it has been rendered." If it be true that the court is but a single entity, and that it is divided into departments simply for convenience and the expedition of business, it necessarily follows that department 1 had the same jurisdiction to try the cause as department 2, and that it must proceed with it just as it finds it when the transfer was made. Otherwise, it has not the same jurisdiction. The situation is exactly the same in principle as though the judge of department 1 had been called into department 2 to try the case. In that event, it would not be contended for a moment that the former proceedings must be set aside. There is nothing in the case of People v. Wong Bin, 139 Cal. 60, 72 Pac. 505, opposed to the foregoing. There, the objection was that the jury was not properly selected, having been taken from two different panels for different departments. The requirement of the statute was not observed, and the Supreme Court very properly held that the jury was not legally impaneled. It is, of course, true, as stated therein, that the departments of the court are distinct for the trial of causes, but this obvious circumstance does not affect the question here, as there was no change of judges during the actual trial of the cause.

5. There was no prejudicial error committed by the court in its rulings upon questions of evidence. We can see no necessity for a specific review of them, as they are all based upon elementary principles and amply supported by authority.

6. The only ground for a new trial concerning which any comment seems appropriate is that of "newly discovered evidence." The position of appellant in that regard is stated by him as follows: "Upon the trial of said case, defendant did not testify in his own behalf. Upon the hearing of the motion for a new trial, defendant presented his own affidavit, corroborated by the affidavits of his attorneys, C. F. Kimball and C. H. Braynard, as well as by the affidavit of his physician, Dr. L. A. Bauter, showing that he was not able to remember the events leading up to the shooting or what transpired at the time of the shooting until after the trial of the case. Although Dr. J. D. Young and Dr. L. F. Dozier (witnesses subpœnaed by the prosecution) were in constant attendance upon defendant during the trial of the case, the prosecution made no counter showing upon the motion for a new trial. In his affidavit on motion for a new trial, the defendant details the facts and circumstances of the homicide and the events leading up to it disclosing a clear case of self-defense. In view of the fact that there were no eyewitnesses to the actual shooting, that deceased had made two previous murderous attacks upon defendant on the morning of the homicide, that the previous character of deceased for peace and quiet and truth was bad, that deceased had threatened in the presence of witness Rusconi to kill defendant, that defendant's previous character for peace and quiet was good, that defendant was so crippled in body and mind that he could not recall the circumstances of the homicide or the events leading up to it, it was an abuse of discretion to deny his motion for a new trial." Such affidavits, however, after conviction are presented under such circumstances of suspicion and discredit as to entitle them ordinarily to little weight. The trial court, considering the improbability of the sworn statement of appellant as to his mental condition and doubt-

less recalling the testimony of witnesses at the trial as to declarations of appellant regarding the homicide, which showed his distinct recollection of the occurrence, and probably having in mind the appearance and conduct of appellant at the time and the omission of his skillful counsel to offer the testimony of any alienist as to his mental sanity, no doubt concluded that his affidavit was an afterthought and utterly unworthy of credence. At any rate, we cannot say that the order denying the motion for a new trial was not entirely justified. We think it proper to add in conclusion that, if the same careful consideration for the rules of evidence and proper regard for the rights of the defendant were always shown as the record here discloses on the part of the district attorney and the trial judge, very few criminal cases would be reversed, and thereby much occasion for the criticism of our administration of the criminal law would be removed.

We find no prejudicial error in the record, and the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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11 Cal. App. 582

BASS v. LEAVITT. (Civ. 629.)

(Court of Appeal, Third District, California. Oct. 26, 1909.)

1. Elections (§ 286*)—Contest—Answer.

Though the Code of Civil Procedure does not require it, it is proper in an election contest for the contestee to answer the statement made by the contestant.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 286.*]

2. Elections (§ 293*)—Contest—Rejected Ballots—Identification.

Ballots rejected by the canvassing board, marked on the back with the word "Rejected," and inclosed and returned in an envelope indorsed "Envelope for spoiled, canceled and unused ballots and stubs of ballots used," were properly admitted in evidence on a contest and counted, the clerk of the election board testifying that he recognized them, and wrote "Rejected" on them under direction of the board, after it had concluded to reject them, and that he placed them in the envelope as directed, and that they were in the same condition as when returned by the board; the only objection made to receiving them being that they were not identified by indorsement and signatures of the members of the board, as provided by Pol. Code, § 1257, and should have been returned with the voted ballots.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 293.*]

3. Elections (§ 194*) — Ballots — Distinguishing Marks.

Under Pol. Code, § 1205, providing that, in case of a constitutional amendment submitted to vote, the ballot shall be marked by stamping in the appropriate voting square a cross opposite the answer desired to be given, the stamping is a distinguishing mark, requiring rejection of the ballot where the cross is stamped directly on the word "Yes" or "No," and not in the voting square after the square containing such word, in which the ballot clearly indicates the mark should be placed.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. § 194.*]

4. Elections (§ 194*) — Ballots — Distinguishing Marks.

Under Pol. Code, § 1211, providing that any name written on a ballot in the "blank column" shall be counted for the office near which it is written, a name written in the blank column, not under any particular office, but below and outside of all spaces in which are the names of offices, and in which the name of a person to be voted for should be written, is a distinguishing mark, preventing counting of the ballot.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. § 194.*]

5. Elections (§ 194*) — Ballots — Distinguishing Marks.

Though Pol. Code, § 1211, provides that two or more impressions of the voting stamp in one square, or a cross made partly within and partly without a voting square or space, shall not make such ballot void, a ballot has a distinguishing mark, so that it cannot be counted; there being not only a cross in the voting space opposite the name of a candidate, but another wholly outside such space, and on the line below the name.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. § 194.*]

6. Elections (§ 194*) — Ballots — Distinguishing Marks.

A ballot is not void as having a distinguishing mark because of a large blotch of ink in the circle for a straight democratic ticket, and a similar blotch opposite the name of a Republican candidate; it being plain that the stamp was used, and the defacement being attributable to other causes as readily as to design.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. § 194.*]

7. Elections (§ 285*)—Contest—Statement.

A statement of contest of an election, alleging that the boards of election rejected and failed to count certain legal ballots or votes which were given to, and should have been counted for, contestant, and counted and gave to respondent certain illegal ballots which should not have been counted, but for which contestant would have been shown to have received the highest number of votes, and entitled to be declared elected, states sufficient facts.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 266–277; Dec. Dig. § 285.*]

8. Elections (§ 285*)—Contest—Delivering List of Illegal Votes.

Code Civ. Proc. § 1116, providing that contestant of an election shall deliver to the opposite party, before trial, a list of the illegal votes, and by whom given, which he intends to prove, applies to ballots illegal because cast by an illegal voter, but not to votes cast by a legal voter, illegal because of distinguishing marks, a fact impossible of ascertainment except by a recount.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 274; Dec. Dig. § 285.*]

Appeal from Superior Court, Lassen County; F. A. Kelley, Judge.

In the matter of the contest of election of supervisor for the second supervisor district, Lassen county. Statements of contest were filed first by S. S. Bass and then by G. B. Leavitt. From the judgment, G. B. Leavitt appeals. Reversed.

Pardee & Pardee and R. L. Shinn, for appellant. W. M. Boardman and Rankin & Julian, for respondent.

CHIPMAN, P. J. In the election for supervisor of the second supervisor district, Lassen county, the canvassing board returned a tie vote between the only two candidates, appellant and respondent. On November 14, 1908, S. S. Bass filed his statement of contest. The grounds of his contest were that in Janesville precinct there were two legal ballots legally cast for him which were rejected by the board of canvassers, which would have entitled him to the certificate had they been counted. On November 25, 1908, George B. Leavitt filed his statement of contest, in which he stated that the canvassing board declared the election in the three precincts—namely, Janesville, Johnstonville, and Secret Valley precincts—to have resulted in 88 votes having been cast for each contestant. The statement then sets forth as grounds for contest that the "boards of judges of election in said Janesville and Johnstonville precincts were guilty of malconduct in the following particulars, to wit: That said board of election, or board of judges of election, rejected and failed to count certain legal ballots or votes which were given to, and should have been counted for, contestant"—and "counted and gave to the respondent certain illegal ballots, which should not have been counted at all. That had all the legal votes in said precincts which were cast for contestant, been counted for him, he would have been shown to be entitled to be declared elected. That if only such votes as were legal and entitled to be counted had been counted for the respondent, contestant would have been shown to have received the highest number of votes, and entitled to receive a certificate of election. That had said legal ballots cast in said precincts been properly counted, contestant would have been shown to have received the highest number of votes, and entitled to be declared elected to said office of supervisor." In other respects the statement complies with the provisions of the Code of Civil Procedure respecting the subject before us. The cause came on regularly for hearing on December 11, 1908, and by leave of court contestant Bass filed an answer to the statement of contestant Leavitt. The two contests were consolidated by consent of the parties, and at the close of the trial the court found that ballots numbered 1 and 2, cast in the Janesville precinct, which had been rejected by the election board, should be counted for Bass, and that ballots numbered 132 and 152, which had been counted for Bass, bore certain distinguishing marks, and should not be counted. This left the contestants still with an equal number of votes, and the court so found, overruling Leavitt's objection to certain other ballots which, in the recanvass by the court, were counted for Bass. The judgment was that "neither of said litigants is, or has been, elected to said office." Contestant Leavitt alone appeals. The bill of exceptions discloses the matters in controversy. Contestant Leavitt will hereinafter be referred to in this opinion as appellant and contestant Bass as respondent.

The recount showed the following result: Each party was given 78 ballots without objection. Appellant was given 10 ballots in the Johnstonville precinct over the objection of respondent. These ballots, however, were not brought up, and the rulings on them, being presumably correct, must stand, making the vote for appellant 88. Respondent was given 10 ballots, 5 in the Janesville and 5 in the Johnstonville precinct, over the objection of appellant, making his total vote 88, and thus a tie vote was produced. These ballots are now before the court for review. Obviously, if any one of these 10 votes should have been rejected, the trial court erred, and contestant should have been awarded a certificate of election.

Appellant's objection to respondent's filing an answer to the former's statement was overruled. It seems to us quite proper for a contestee to answer the statement made by the contestant, although the Code of Civil Procedure does not require it. Usually the contestee sets forth in his answer, not only his denials of the contestant's statement, but also the facts or grounds on which he relies to support his claim to the office. It was held in Rutledge v. Crawford, 91 Cal. 526, 27 Pac. 779, 13 L. R. A. 761, 25 Am. St. Rep. 212, that while an elector who was a candidate may institute a contest and defeat the election attacked, he may not have judgment that he was elected instead of the defendant, unless he alleges that he has the qualifications required by the Constitution to make him eligible to the office. The same result would follow, it seems to us, where the contestee answers by mere denials. Here, however, both parties file statements, and in fact both are contestants and both contestees. Appellant filed no answer to respondent's statement, but he filed his statement, thus presenting the issues as to his claim as effectively as he could have done in answer to respondent's statement.

Respondent offered ballots numbered 1 and 2, in his own favor, cast in Janesville precinct, which had been rejected, and the court admitted them over appellant's objection. It appeared that on the back of each of these two ballots was written the word "Rejected" and they were inclosed and returned in an envelope indorsed: "Envelope for spoiled, canceled and unused ballots and stubs of ballots used." It is objected by appellant that if these two ballots "had been properly returned with the voted ballots, there would have been no trouble in identifying the ballots rejected. The indorsements and signatures of the members of the board would be sufficient identification. Pol. Code, § 1257." But, "coming in as they do in the wrong envelope, and unindorsed as required by law, they should not have been counted, and the court erred in admitting the evidence." The clerk of the election board testified that he recognized the two ballots, and that he wrote the word "Rejected" on them, and that it was placed there by him under the direction of the board, after the board had concluded to reject them. He placed the ballots in the envelope as directed, and he testified that the documents were in the same condition as when returned by the board. We fail to discover anything on the face of the ballots which warranted their rejection by the board. The court was justified in receiving the ballots in evidence, and, no objection to their being counted appearing, otherwise than as suggested above, they were properly counted for respondent.

Ballot No. 3, in the Janesville precinct, cast for respondent, shows that the voter stamped the cross directly upon the words "Yes" or "No" in voting upon the several constitutional amendments, and in no instance in the voting square after the square containing these words as the ballot plainly indicated should be the place for such mark. Section 1205, Pol. Code, provides as follows: "In case of a constitutional amendment, or other proposition submitted to a vote of the people, he shall mark his ballot by stamping in the appropriate voting square a cross (X) opposite the answer he desires to give." In Hannah v. Green, 143 Cal. 19, 23, 76 Pac. 708, 709, the court held that the stamp under the word "Yes" to a constitutional amendment, instead of after it, was not a distinguishing mark. But, as the court said: "At that time the law provided that the stamp should be 'against' the 'Yes' or 'No'." The statute has since been changed, and at the time of the election in the present case read as shown above. We think the stamping as shown was a distinguishing mark, and the ballot should have been rejected.

Ballot No. 4, cast in the Janesville precinct shows in the column entitled "Blank Column," and below and outside of all spaces in which are the names of officers to be voted for, the word "Bryan," written with a pencil. This cannot be accounted for otherwise than as a distinguishing mark. Section 1211, Pol. Code, provides: "Any name written upon a ballot shall be counted for the office near which it is written, provided it is written in the 'blank column.'" Here the name is not written under any particular office, but under all of them. The ballot was erroneously counted for respondent.

Ballot No. 68, cast in Johnstonville precinct, was counted for respondent over appellant's objection. In the column entitled "Independent Nominations" occurs printed "For Judge of the Superior Court, F. A. Kelley." Opposite his name in the voting space is a cross stamped, and outside of this space, and not on the border line of either of its sides, but on the line below the name, is stamped another cross. Section 1211, Pol. Code, provides that "two or more impressions of the voting stamp in one square, or a (X) made partly within and partly without a voting square or space shall not make such ballot void." Under the law prior to the amendment of 1903 the Supreme Court held that two crosses in one voting square made the ballot void; but that a ballot with a cross after the candidate's name, but not in the voting square, should be counted. The ballot in question was not even stamped in substantial compliance with the present law. It seems to us that it bore a distinguishing mark, and should not have been counted.

Ballot No. 102, cast in the Johnstonville precinct, counted for respondent, was objected to on account of a large blotch of indelible blue ink in the circle for a straight Democratic ticket and a similar blotch opposite the name of the Republican candidate for judge of the superior court. It is plain to be seen that the stamp was used, for the arms of the cross are discernible. The defacement may be traced to carelessness or nervousness—possibly from an overindulgence in intoxicating liquor—quite as readily as from design. The choice of the voter is clearly expressed, and we do not think he intended more.

The other ballots objected to by appellant were properly admitted in the recount.

Respondent makes no reply to these various objections. His only claim is that under the pleadings appellant did not so place himself before the court as to entitle him to the evidence offered, or to authorize the court to receive it; substantially that in his statement appellant failed to state facts sufficient to constitute a cause of contest. The point is also made that appellant was required, under section 1116, Code Civ. Proc., "to furnish to respondent a written list of the number of illegal votes and by whom given which he intends to prove at such trial," and that this he failed to do. There is a distinction between a ballot cast by an illegal voter and an illegal ballot cast by a legal voter. Where a ballot is attacked as illegal because cast by an illegal voter, the contestant is required to give notice of his intention to show that such vote was cast and by whom cast. It is the eligibility of the voter that is the issue. But there may be illegal votes cast by a legal voter—for example, a ballot bearing a distinguishing mark—a fact impossible of ascertainment except by a recount. The voter himself remains unidentified, and only the ballot is considered as it appears on its face. In the case of the illegal voter the ballot is unidentified, but the evidence otherwise shows that he voted, and how he voted. In such cases a list of all such alleged illegal voters must be furnished the contestee. Code Civ. Proc. § 1116. The present case is not unlike that of Abbott v. Hartley, 143 Cal. 484, 77 Pac. 410, where it was said, as we think is true here: "There were sufficient grounds of contest here set forth to apprise the contestee of the nature of the attack which was made, and the proof was the usual proof in such cases—an inspection of the ballots and objections to certain of them as containing distinguishing marks. There was nothing in this line of proof that was not in strict accord with the allegations of the contestant, nothing that the contestee could not have anticipated and foreseen; and, even if such had been the case, upon his application time would have been granted him to meet the case on its merits"—citing Minor v. Kidder, 43 Cal. 229. We do not think the case is one where it would have been possible for either contestant to discover in advance of the trial the ballots which bore distinguishing marks, and the persons by whom they had been cast. Indeed, this latter fact did not appear at the trial, nor was it essential to a determination of the issues.

The contest was initiated in November, 1908, and was decided in December, 1908. The transcript on appeal was not filed here until July 2, 1909, and appellant's brief was filed July 30, 1909. Respondent's brief was not in when the case was placed on the October calendar. The law contemplates a speedy trial of such cases by the lower court, and gives precedence on appeal "next after the cases in which the people of the state are parties." Code Civ. Proc. § 57. The delay in reaching final judgment is not attributable to this court or the trial court and manifestly is greater than should have occurred.

The judgment is reversed.

We concur: BURNETT, J.; HART, J.

11 Cal. App. 530

Ex parte LEWIS. (Cr. 110.)

(Court of Appeal, Third District, California. Oct. 22, 1909.)

1. Insane Persons (§ 49*)—Commitment—Collateral Attack—Presumptions as to Regularity.

Upon a collateral attack on a commitment to an insane asylum, where it is clear that the court had jurisdiction of a person adjudged insane, the presumptions are all in favor of the regularity of the proceedings leading to the judgment and the order of commitment.

[Ed. Note.—For other cases, see Insane Persons, Dec. Dig. § 49.*]

2. Habeas Corpus (§ 92*)—Scope of Inquiry—Commitment of Insane—Discretion of Court—Abuse.

Under Pol. Code, § 2168, providing that persons being examined as to their sanity shall have a reasonable opportunity to produce witnesses to be examined in their behalf, what is a "reasonable opportunity" is left to the sound discretion of the court, to be exercised in view of the surrounding circumstances of each particular case, and, where it does not appear on the face of the proceedings that such discretion has been abused, the judgment of the court will not be disturbed on habeas corpus to review the commitment.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 92.*]

3. Habeas Corpus (§ 92*)—Irregular Commitment—Questions Raised.

An application for a writ of habeas corpus, on the sole ground that the proceedings under which a person was committed to an insane asylum were irregular, does not raise the question whether he has recovered his sanity and is therefore entitled to be restored to competency.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 92.*]

Original application by Austin Lewis for a writ of habeas corpus for John R. Robinson, for his release from the State Hospital for the Insane. Writ discharged, and Robinson remanded.

Austin Lewis, for petitioner. R. L. Beardsly, G. M. Reynes, and Frank M. Silva, for respondent.

HART, J. On the 26th day of February, 1909, John R. Robinson was adjudged insane by the judge of the superior court in and for the county of Solano and ordered committed to the state hospital for the insane at Napa. Said Robinson has ever since been, and is now, detained in said hospital under said commitment, and it is now claimed by the petitioner, on behalf of said Robinson, that said insane patient is illegally restrained of his liberty for the alleged reason that the court by which he was committed never acquired jurisdiction to hear and determine the charge of insanity preferred against him. The only point urged by the petitioner in support of his claim is that Robinson was not, prior to the trial resulting in his commitment to the hospital, accorded by the court the opportunity to prepare himself to meet and resist the charge to which he was entitled under the law.

The commitment upon which the authorities of the state hospital detain Robinson shows that a verified complaint in due form was, on the 25th day of February, 1909, filed in the justice's court of Suisun township, Solano county, charging Robinson with being insane; that a warrant was thereupon issued and on said 25th day of February placed in the hands of the sheriff of the county for execution; that, on the same day, the sheriff arrested Robinson and immediately took him before the judge of the superior court. On the following day—February 26th—Robinson was brought before the judge for examination as to his sanity. The judgment and commitment recite that the alleged insane patient was informed by the judge of the charge against him, of his right to make a defense to such charge, of his right to be represented by counsel, to produce witnesses on his behalf, and to have subpœnas issued to compel the attendance of witnesses, and that he was further informed that, "if at such hearing and examination he should be ordered committed, he might, within five days after the making of such order of commitment, demand that the question of his

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

sanity be tried by a jury before said superior court." It further appears from the commitment that, upon placing Robinson under arrest, the sheriff delivered to him, personally, a copy of the warrant of arrest, together with a copy of the affidavit of insanity.

It will thus be seen that the commitment upon its face discloses that all the statutory requirements essential to a legal arrest, hearing, and commitment were observed, and that the court acquired jurisdiction to hear and determine the question of Robinson's sanity (sections 2168–2174, Pol. Code, inclusive), unless it can be said that it appears from the face of the commitment itself that the court failed to accord to Robinson the "reasonable opportunity" for the production and examination of witnesses contemplated by the statute; but we cannot, from the commitment, say that the alleged insane person was not given a reasonable opportunity to produce witnesses for examination in his behalf. Upon a collateral attack, where it is clear that the court had jurisdiction of the person adjudged insane, the presumptions are all in favor of the regularity of the proceedings leading to the judgment and the order of commitment. Ex parte Clary, 149 Cal. 735, 87 Pac. 580; State Commission in Lunacy v. Eldridge, 7 Cal. App. 298, 94 Pac. 597, 600. Besides, the determination of what is "reasonable opportunity" is committed by the statute to the sound discretion of the court, to be exercised in view of the surrounding circumstances of each particular case, and, where it does not appear on the face of the proceedings that such discretion has been abused, the judgment of the court for the alleged reason that the person adjudged insane has not been given a reasonable opportunity to produce his witnesses and cause them to be examined touching his mental condition cannot be disturbed. There is nothing in the judgment and order of commitment from which we would be warranted in holding that the court abused its discretion in the respect complained of.

The question whether Robinson is now sane, and is therefore entitled to be restored to competency, does not, and obviously cannot, arise here. Section 2188, Pol. Code.

For the reasons herein stated, the writ is discharged, and Robinson remanded.

We concur: CHIPMAN, P. J.; BURNETT, J.

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11 Cal. App. 558

LAY v. SUPERIOR COURT OF LOS ANGELES COUNTY. (Civ. 761.)

(Court of Appeal, Second District, California. Oct. 23, 1909.)

1. Arrest (§ 27*)—In Civil Actions—Sufficiency of Affidavit.

Under Code Civ. Proc. § 481, providing that an affidavit for an order of arrest in a civil action must be either positive or upon information and belief, and when upon information and belief must state the facts upon which the information and belief is founded, an affidavit upon information and belief, but not stating the facts upon which such alleged information and belief were founded, was insufficient.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. §§ 54–55½; Dec. Dig. § 27.*]

2. Arrest (§ 22*)—In Civil Actions—Jurisdiction—Special Proceedings.

In special proceedings, the court in the exercise of its jurisdiction is limited by the terms under which the proceedings are authorized, and under Code Civ. Proc. § 481, giving the court power to order an arrest in a civil action upon an affidavit of a specified character, jurisdiction depends upon the sufficiency of the affidavit, and cannot be conferred by facts established at some subsequent stage of the proceedings.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. §§ 49, 50; Dec. Dig. § 22.*]

Certiorari by W. F. Lay against the Superior Court of Los Angeles County, to vacate an order for petitioner's arrest in a civil action. Order vacated.

Henry K. Norton, for petitioner. Chas. S. McKelvey, for respondent.

PER CURIAM. This is an original proceeding in certiorari to vacate and annul an order made by the superior court of Los Angeles county for the arrest of petitioner in a civil action. The complaint is not before us. It appears, however, from the affidavit that on May 7, 1909, an action was commenced in the superior court of Los Angeles county against petitioner, wherein plaintiffs therein sought to obtain a money judgment against him. Upon the filing of the complaint therein, the court, upon an affidavit made and filed by one of the plaintiffs in the action, made an order for the arrest of defendant, who, pursuant to said order, was placed under arrest by the sheriff of San Diego county. Thereafter, petitioner moved the court to annul and vacate the order of arrest, upon the ground that the averments in the affidavit upon which the order of arrest was based were insufficient to warrant the making of the order, in that they failed to comply with the provisions of section 481, Code Civ. Proc. The court denied the motion. The purpose of this proceeding is to have this ruling of the court reviewed.

Conceding the case to be one of those specified in section 479, Code Civ. Proc., the question is whether the facts as stated in the affidavit were sufficient to give the court jurisdiction to make the order. Section 481, Code Civ. Proc., provides that: "The affidavit must be either positive or upon information and belief; and when upon information and belief, it must state the facts upon which the information and belief are founded." As averred in the affidavit, the facts necessary to bring the case within the provisions of section 479 are all stated upon information and belief of the affiant; but the affidavit is wholly wanting in stating, or even attempting to state, the facts upon which such alleged information and belief is founded. In discussing a like question the Supreme Court in Ex parte Fkumoto, 120 Cal. 316, 52 Pac. 726, says: "There is another fatal defect common to the entire affidavit. Several of the statements of fact are made expressly upon information and belief, while many others, although not so stated in terms, are of a character which could in their nature only have been so made, whereas the facts upon which such information and belief are founded are in no instance given. In this the affidavit fails to comply with one of the express and most material requirements of the statute." The affidavit does not state the facts upon which affiant bases his information and belief, and "the warrant cannot be issued upon hearsay, nor upon any statement, however positive, founded upon hearsay." Proctor v. Prout, 17 Mich. 475; Neves v. Costa, 5 Cal. App. 111, 89 Pac. 860.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It appears that defendant (petitioner here) thereafter prosecuted another motion, filed at the same time as the first, which last motion was based upon the affidavit of defendant, and which the court also denied. Respondent contends that, admitting the insufficiency of the affidavit upon which the order of arrest was made, the evidence adduced upon the hearing of this second motion established facts sufficient to justify the making of the order. This evidence, other than the affidavit of defendant, is not before us. Conceding, however, all that respondent claims therefor, such facts thus established could not have a retroactive effect in conferring jurisdiction to make the order, where such power was wanting at the time of making it. "Jurisdiction of special proceedings is conferred by the Constitution upon the superior court; but, inasmuch as special proceedings are only such as are created and authorized by statute, the court, in the exercise of this jurisdiction, is limited by the terms and conditions under which the proceedings were authorized." Smith v. Westerfield, 88 Cal. 374, 26 Pac. 206; Bates v. Gage, 40 Cal. 183. So here the power of the court, under the provisions of section 481, Code Civ. Proc., was limited to the facts and conditions which were made to appear to the judge by the affidavit pursuant to which the order was made, not to the fact that, at some subsequent stage of the proceedings, facts would be established justifying his action.

The affidavit upon which the order of arrest was made being insufficient in the particulars noted, it follows that the court had no jurisdiction to make the order, and the same is therefore vacated and annulled.

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11 Cal. App. 568

Ex parte O'SHEA. (Cr. 187.)

(Court of Appeal, First District, California. Oct. 25, 1909. Rehearing Denied by Supreme Court Dec. 23, 1909.)

1. CONSTITUTIONAL LAW (§ 70*) — JUDICIAL POWERS—ENCROACHMENT ON LEGISLATURE.

The court in determining the constitutionality of a statute will not deal with the policy of the act, which is exclusively for the Legislature, but can only examine whether the Legislature in a particular case has gone beyond or contrary to the prohibitions or mandates of the Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 131; Dec. Dig. § 70.*]

2. CONSTITUTIONAL LAW (§ 48*)—STATUTES—VALIDITY—PRESUMPTION.

The Legislature is ordinarily the judge of the expediency of creating new crimes and of prescribing light or severe penalties for them, and much is left to the discretion of the Legislature, and the presumption is that such discretion has in each case been wisely exercised, and a statute will not be held unconstitutional unless it is clearly violative of the Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.*]

3. GAMING (§ 63*) — LEGISLATIVE CONTROL — STATUTES—VALIDITY.

Since the Legislature may prohibit and punish any practice or business, the tendency of which, as shown by experience, is to weaken or corrupt the morals of those who follow it, or to encourage idleness, it may prohibit and punish gambling in its many forms.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 120; Dec. Dig. § 63.*]

4. CONSTITUTIONAL LAW (§ 61*)—DELEGATION OF LEGISLATIVE POWER.

Pen. Code, § 337a, making poolselling punishable by imprisonment in the county jail or state prison for not less than 30 days and not more than a year, enumerates the various acts which are made criminal, and does not make the question whether the act prohibited shall be a crime discretionary with the court, but merely confers on the trial judge discretion in imposing the punishment depending on the act done, the circumstances under which it was done, and the character and age of accused, and is not invalid as delegating legislative power within Const. art. 3, § 1, providing that the powers of government shall be divided into the legislative, executive, and judicial, and that no person charged with the exercise of powers of one department shall exercise any function of any of the others.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 103–107; Dec. Dig. § 61.*]

5. CONSTITUTIONAL LAW (§ 61*)—DELEGATION OF LEGISLATIVE POWER—CRIMES—DEGREES—FELONY—LEGISLATIVE POWER.

The Legislature may leave much to the discretion of the jury and the trial judge as to the punishment for crime, and it makes no difference that the Legislature has designated certain crimes as felonies which at common law were offenses punishable by death, or to which forfeiture of property was attached, and certain other crimes as misdemeanors, or divided crimes into two classes based on the punishment imposed, as is done in Pen. Code, § 17.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 61.*]

6. CRIMINAL LAW (§ 1213*)—PUNISHMENT—"CRUEL AND UNUSUAL PUNISHMENT."

Pen. Code, § 337a, making poolselling punishable by imprisonment in the county jail or state prison for not less than 30 days and not more than a year, is not in conflict with Const. art. 1, § 6, prohibiting cruel and unusual punishments; imprisonment in the county jail or state prison not being cruel or unusual, which relate only to punishments of a barbarous character and unknown to the common law, such as by burning at the stake, breaking on the wheel, and the like.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3304–3309; Dec. Dig. § 1213.*

For other definitions, see Words and Phrases, vol. 2, pp. 1765–1767; vol. 8, p. 7624.]

7. Criminal Law (§ 13*)—Indictment and Information (§ 71*)—Statutes—Complaint —Sufficiency.

Where a person of common understanding, by reading Pen. Code, § 337a, prohibiting poolselling, and a complaint charging a violation thereof, will know that accused is charged with acts prohibited by the statute, the complaint and the statute are sufficiently certain within Pen. Code, § 4, requiring the provisions of the Penal Code to be construed according to the fair import of their terms.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 13, 14; Dec. Dig. § 13;* Indictment and Information, Cent. Dig. §§ 193, 194; Dec. Dig. § 71.*]

Habeas corpus by Frank O'Shea for his discharge from imprisonment under a complaint charging a criminal offense. Petitioner remanded.

Carroll Cook (Henry Ach, of counsel), for petitioner. Attorney General Webb and Raymond Benjamin, Deputy Atty. Gen., for respondent.

COOPER, P. J. Petitioner seeks to be discharged from imprisonment under a complaint charging him with violating section 337a of the Penal Code, commonly called the "Race track bill." The charge is that he committed the crime of a felony on the 5th day of July, 1909, in this: That he "did willfully and unlawfully engage in poolselling and bookmaking, and record and register a certain bet and wager and sell pools upon the result of a certain trial and contest of skill, to wit, dogs, at and upon those certain grounds known as Ingleside Coursing Park, situate on Ocean avenue near Lee street in the city and county of San Francisco and within the state of California, contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the people of the state of California." The section is entitled, "Poolselling, bookmaking, bets and wagers. Penalty," and, so far as material to the case at bar, reads as follows: "Every person who engages in poolselling or bookmaking at any time or place; * * * or who records or registers bets or wagers or sells pools upon the result of any trial or contest of man or beast or between men or beasts, * * * is punishable by imprisonment in the county jail or state prison for a period of not less than thirty days and not exceeding one year." It is not the province of the court to deal with the policy of the law, as that belongs exclusively to the Legislature, which is composed of the representatives of the people and which acts for the people, and within the limits imposed by the Constitution is vested under our system with the right to voice the will of the people in public enactments; and it is ordinarily the judge of the expediency of creating new crimes, and of prescribing penalties for them, light or severe. The courts can only examine the question as to whether or not the Legislature in any particular case has violated the Constitution by going beyond or contrary to its prohibitions or mandates. The rule is well established that in such case much is left to the discretion and judgment of the Legislature; and the presumption always is that such discretion has in each case been wisely and justly exercised, and the law will not be held unconstitutional unless it is clearly in violation of the fundamental law. It has long been the practice in this country for the Legislature of the state, or the legislative body of municipal corporations, to pass laws prohibiting and punishing any practice or business the tendency of which, as shown by experience, is to weaken or corrupt the morals of those who follow it, or to encourage idleness, instead of habits of industry, and to prohibit and punish gambling in the various forms in which it is practiced. Such regulations, when not in conflict with general laws, or with the constitution or charter under which they are enacted, are universally upheld by the courts. In fact, it has been said that gambling in its many forms may be rightfully suppressed and punished, and that the question is no longer open for discussion in this country. Harper v. Commonwealth, 93 Ky. 290, 19 S. W. 737; Ex parte Tuttle, 91 Cal. 589, 27 Pac. 933. In the case at bar it is contended on behalf of the prisoner that the section of the Penal Code is unconstitutional and void.

It is claimed, in the first place, that the act authorizing the trial judge in effect to make the crime either a felony or misdemeanor is an attempt to delegate legislative power to the trial judge, and hence is in violation of article 3, § 1, of the Constitution of the state, which reads as follows: "The powers of the government of the state of California shall be divided into three separate departments, the legislative, executive and judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function pertaining to either of the others except as in this constitution expressly directed or permitted." The section does not delegate legislative power. It enumerates the various acts which are prohibited and made criminal, and such acts are made criminal by the express will of the Legislature. It prescribes what the law shall be in future cases arising under it. It does not attempt to make the question as to whether or not the act prohibited shall be a crime depend upon the will or discretion of the court or judge. It is the province of the court, through the machinery of a trial, to investigate and determine the question as to whether or not the defendant in the particular case has done the particular act charged as a violation of and prohibited by some particular part of the section. The Legislature has said the punishment shall be imprisonment not less than 30 days in the county jail or state prison and not exceeding one year. The minimum and maximum punishment is stated. The court cannot make it less, nor can it make it greater, than the statute prescribes. The places where the defendant is to be imprisoned are stated, and the court cannot send the defendant to any other place than the county jail or the state prison. It was evidently in the mind of the Legislature that there should be some power whereby mercy could be shown and discretion exercised in the severity of the punishment, depending upon the act done, the circumstances under which it was done, and the character and age of the person who committed the act. That discretion was left to the trial judge, who is selected by the people as the agent of the people for the purpose of seeing that the laws are applied according to their true spirit and intent. It was not the intention of the Legislature that a young person of previous good character for his first offense, whether intentional or not, should by an unbending rule receive the same punishment as the experienced bookmaker who has followed the race track for years. In most crimes the punishment is left to the discretion of the trial court within the limits prescribed by the legislative will, and in some cases with the jury; and it has never been held in any case to which our attention has been called that such power was a delegation of the power vested in the Legislature. In murder cases the jury, if it return a verdict finding the defendant guilty of murder in the first degree, may recommend that he be imprisoned in the state prison for life, evidently leaving the jury by its verdict to impose the death penalty or life imprisonment; and such power has never been questioned; and in such case, when the defendant pleads guilty of murder in the first degree, the judge may impose a sentence of imprisonment for life, or in his discretion impose the penalty of death. People v. Dabner, 153 Cal. 398, 95 Pac. 880. Where the defendant is charged with grand larceny, the jury may, in cases where the evidence would justify a verdict of either grand larceny or petty larceny, bring in a verdict for the lesser offense, which is in effect leaving it to the discretion of the jury to make the crime either a felony or misdemeanor, and yet such power has never been questioned. The punishment for the crime of assault with a deadly weapon is imprisonment in the state prison or in the county jail not to exceed two years, or a fine not to exceed $5,000, or both, thus leaving it to the trial judge to impose a fine of $1 or a fine of $5,000, or two years in the state prison. Pen. Code, § 245. While the section has been in force since the Codes were adopted in 1872, and has been before the courts in many cases, it has never been held to be unconstitutional as being a delegation of legislative power.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The Penal Code contains similar provisions as to many other crimes, the punishment imposed for which may make them either felonies or misdemeanors, a few instances of which selected from many are the crimes of seduction for the purpose of prostitution (section 262); receiving stolen property (section 496); forging telegraph or telephone messages (section 474); injuring highways or bridges (section 588); fraud in keeping accounts in books of corporations (section 563); bribing telephone or telegraph operators (section 641). In fact, our whole system in regard to crimes and punishments necessarily leaves much to the discretion of the jury and to the trial judge. It makes no difference that the Legislature has designated certain crimes as felonies, and certain other crimes as misdemeanors, or divided crimes into two classes. The crime is in many cases classified by the punishment under the express provisions of the Penal Code (section 17). It was said in People v. Gray, 137 Cal. 267, 70 Pac. 20, in speaking of the crime of seduction: "It may therefore be either a felony or a misdemeanor. Whether it is considered the one or the other depends upon the character of the judgment rendered by the trial court. If the judgment be imprisonment in the state prison, the crime is a felony. If a fine only, or imprisonment in the county jail, a misdemeanor. It is provided in section 17 of the Penal Code that in such case, if the judgment impose a punishment less than imprisonment in the state prison, the offense shall be deemed a misdemeanor for all purposes; and that in such a case the offense shall be deemed to be a misdemeanor has been expressly held by this court in a number of cases. People v. Cornell, 16 Cal. 187; People v. Salorse, 62 Cal. 142; People v. Ayhens, 85 Cal. 88, 24 Pac. 635; People v. Perini, 94 Cal. 573, 29 Pac. 1027." In the last cases cited the defendant was prosecuted for receiving stolen goods, which offense is punishable by imprisonment either in the state prison or the county jail, and the court said: "Whether the person convicted of this offense has committed a felony or a misdemeanor can be ascertained by the nature of the judgment. If the defendant is sentenced to serve a term in the state prison, the crime is a felony; otherwise a misdemeanor." See People v. Smith, 143 Cal. 597, 77 Pac. 449; In re Sullivan, 3 Cal. App. 193, 84 Pac. 781.

A felony at common law was an offense punishable by death, or to which the old English law attached the total forfeiture of lands or goods; but the essential difference between a felony and a misdemeanor is now practically lost in England since the felony act of 1870, Bouvier's Law Dic.; Moz. & W. Law Dic. In this country it simply denotes the degree or class of crimes. Bishop's New Criminal Law, § 616. In fact, the distinction between a felony and a misdemeanor is for the Legislature, and our Legislature has expressly stated where a crime may be punishable by imprisonment in the state prison, and also by fine and imprisonment in the county jail in the discretion of the court, such crime shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the state prison. The Legislature has designated the classification and the means whereby such classification shall be ascertained. The distinction between a judicial act and a legislative act has been defined by Judge Field as follows: "The one determines what the law is and what the rights of the parties are with reference to transactions already had. The other prescribes what the law shall be in future cases arising under it. Wherever an act undertakes to determine a question of right or obligation or of property as the foundation on which it proceeds, such act is to that extent a judicial one, and not the exercise of legislative functions." Sinking Fund Cases, 99 U. S. 700, 25 L. Ed. 496. And our own Supreme Court has said: "Legislative power prescribes rules of conduct for the government of the citizen or subject, while judicial power punishes or redresses wrongs growing out of the violation of rules previously established. The distinction in short lies between a sentence and a rule." Ex parte Shrader, 33 Cal. 279. In the case at bar the court will be called upon to declare the law and impose the penalty under the section passed by the Legislature making the act a crime. The Legislature has vested discretion in the court, but has not authorized the court to determine as to whether or not certain acts would constitute a crime.

It is further claimed that the section violates article 1, § 6, of the Constitution of the state, which prohibits cruel and unusual punishments. It is hardly necessary to discuss this contention, even if it could be raised by the prisoner, who may never be convicted, and, even if he should be convicted, might receive a sentence of 30 days in the county jail. Imprisonment in the county jail or in the state prison is not unusual; in fact, it is the most common mode of punishment in all civilized countries. It is not cruel in the sense used in the Constitution. Cruel and unusual punishments are punishments of a barbarous character and unknown to the common law. The word, when it first found place in the Bill of Rights, meant not a fine or imprisonment or both, but such punishment as that inflicted by the whipping post, the pillory, burning at the stake, breaking on the wheel, and the like; or quartering the culprit, cutting off his nose, ears or limbs, or strangling him to death. It was such severe, cruel, and unusual punishments as disgraced the civilization of former ages, and made one shudder with horror to read of them. Cooley on Constitutional Limitations (7th Ed.) p. 471 et seq.; State v. McCauley, 15 Cal. 429; Whitten v. State, 47 Ga. 297; State v. Williams, 77 Mo. 310. The Legislature is ordinarily the judge of the expediency of creating new crimes, and prescribing the punishment, whether light or severe. Commonwealth v. Murphy, 165 Mass. 66, 42 N. E. 504, 30 L. R. A. 734, 52 Am. St. Rep. 496; Southern Express Co. v. Com., 92 Va. 59, 22 S. E. 809, 41 L. R. A. 436.

Counsel for petitioner have devoted many pages of their brief to an analysis of the grammatical construction of the section of the Penal Code in question, contending that it is a complex sentence of over 30 lines, and of such phraseology as to make it impossible to determine what particular acts are necessary to be grouped together to constitute the crime intended to be denounced by the section. It is sufficient to say that the complaint charges the prisoner with doing certain acts which are prohibited by the section, and which, if proven, will subject him to a punishment thereunder. A person of common understanding would be reading the section and reading the complaint know that the defendant was charged with certain acts prohibited by the section. The provisions of the Penal Code must be construed according to the fair import of their terms with a view to effecting their object and to promote justice (section 4). Of course, if the act charged is one which is not a crime under any section of the Code, the prisoner would have to be discharged, but this is not such case.

It is not necessary to discuss other questions, as we do not deem any of them of sufficient importance to justify us in discharging the prisoner.

We conclude that the section of the Penal Code is constitutional, and that the complaint states an offense thereunder.

Let the prisoner be remanded.

We concur: HALL, J.; KERRIGAN, J.

11 Cal. App. 542

PEOPLE v. PINER. (Cr. 100.)

(Court of Appeal, Third District, California. Oct. 22, 1909.)

1. Indictment and Information (§ 129*)—Joinder of Offenses—Burglary and Larceny.

An information may properly charge accused in one count with the crime of burglary, and, in another count, with the crime of grand larceny as a part of the same transaction, under Pen. Code, § 954, as amended by St. 1905, p. 772, c. 574, providing that "the indictment or information may charge different offenses or different statements of the same offense under separate counts, but they must all relate to the same act, transaction or event, and charges of offenses occurring at different and distinct times and places must not be joined."

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 414–418; Dec. Dig. § 129.*]

2. Burglary (§ 31*)—Evidence—Admissibility.

The gist of the crime of burglary is in the entry of the building with the intent to commit any of the crimes mentioned in Pen. Code, § 459, and it is therefore immaterial whether the proof shows the actual commission of larceny or other felony, if the intent to do so is present; but proof that a larceny or felony had been committed in the building by the person making the entry is competent, not alone to show the intent, but also the fact of the entry.

[Ed. Note.—For other cases, see Burglary, Dec. Dig. § 31.*]

3. Criminal Law (§ 519*)—Evidence—Admissibility of Confession.

After a store had been broken into and robbed of a large sum of money, accused, a cousin of the proprietor, came to him and told him that he had heard that he (accused) was under suspicion, and was told by the proprietor that such was a fact, that he was making an investigation and would like to have accused, if he was not guilty, help him to clear up the matter, and that if he was guilty that he would help him out of the trouble, but accused at that time protested his innocence. On the following day accused again called on the proprietor, telling him he was in trouble, whereupon the proprietor said that he would do all that he could to help him, and this was followed by confession by accused that he took the money. The two then made an arrangement by which the money could be restored. *Held*, that the confession was not open to the objection that it was involuntarily made, as accused knew that the proprietor was not an officer of the law and had no authority to guarantee him immunity from prosecution, and the promise made was simply to help him if he was in trouble.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1163–1174; Dec. Dig. § 519.*]

4. Criminal Law (§ 811*)—Instructions—Evidence as to Good Character.

An instruction, in a prosecution for grand larceny, that evidence of previous good character should be considered with great caution, is erroneous, as evidence of good character is to be considered in the same manner as evidence of any other essential fact, being in aid of the presumption of innocence, and, while all evidence in a criminal case should be considered with that deliberation which will insure a just verdict, it is not within the province of the court to select a particular species of evidence for a special caution to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1787, 1969–1972; Dec. Dig. § 811.*]

5. Criminal Law (§ 1172*)—Appeal—Harmless Error—Instructions.

Where guilt is conclusively proved, an instruction that evidence of previous good character should be considered with great caution, although erroneous, is harmless.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1172.*]

6. Criminal Law (§ 781*)—Instructions—Admissibility of Confession.

In a criminal prosecution, an instruction that a person's declaration or voluntary confession is always evidence against him, for the law presumes that a person will not say anything untrue against himself or his own interests, while true in itself, is improper, since, while the theory upon which voluntary confessions are admitted is of interest to the courts, there is danger in explaining it to the jury that the right of accused to a determination of all questions of fact by the jury may be violated.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 781.*]

7. Criminal Law (§ 1172*)—Appeal—Harmless Error—Instructions.

The instruction, although improper, was harmless; the evidence of defendant's guilt being uncontradicted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3154–3163; Dec. Dig. § 1172.*]

Appeal from Superior Court, Lake County; M. S. Sayre, Judge.

William A. Piner was convicted of grand larceny, and appeals. Affirmed.

T. J. Geary and Bond & Churchill, for appellant. C. M. Crawford, Dist. Atty., for the People.

HART, J. The defendant, having been convicted of the crime of grand larceny, brings the cause to this court on an appeal from the judgment and from the order refusing to grant his motion for a new trial. The appellant claims a reversal for these reasons: (1) That the demurrer to the information should have been sustained because there are set out in the accusatory pleading two separate and distinct offenses; (2) that the court erred to his prejudice in allowing, over his objections, the testimony of the witness Robison purporting to give a confession of guilt by the defendant, the specific contention upon this point being that said alleged confession was not voluntarily made, and therefore, in law, was no confession at all; (3) that the court committed prejudicial error in giving certain instructions to the jury.

1. The information, in the first count thereof, charges the defendant with the crime of burglary, alleging that, on the 23d day of August, 1908, he burglariously entered the store of one P. Q. Robison, at Kelseyville, Lake county, with the intent, etc. The second count of the information charges the crime of grand larceny in the following language: "The said William A. Piner, as a part of the same act, transaction, or event, alleged in the first count of this information, aforesaid, on the 23d day of August, 1908, at the said county of Lake, and before the

filing of this information, willfully, unlawfully, and feloniously did take, steal, and carry away from the aforesaid store of P. Q. Robison, aforesaid, 25 $20 gold pieces, of the gold coin of the United States of America, the personal property of one Matt L. Rowden, of the value of $500, lawful money of the United States; contrary to the form," etc. The contention of the appellant is, as before suggested, that two distinct offenses cannot properly be charged in an indictment or information, and that, as two distinct offenses are charged in the information upon which the defendant was tried and convicted, the court erred in its order overruling the demurrer. The Attorney General insists that the information conforms to the provisions of section 954 of the Penal Code, as amended by the Legislature of 1905 (St. 1905, p. 772, c. 574), and that the demurrer was therefore properly overruled.

The section of the Penal Code just mentioned reads: "The indictment or information may charge different offenses, or different statements of the same offense, under separate counts, but they must all relate to the same act, transaction, or event, and charges of offenses occurring at different and distinct times and places must not be joined. The prosecution is not required to elect between the different offenses or counts set forth in the indictment or information, but the defendant can be convicted of but one of the offenses charged, and the same must be stated in the verdict." So far as we are advised to the contrary, this is the first occasion on which the foregoing section, in its amended form, has been before any of the reviewing courts. Prior to its amendment by the Legislature of 1905, the section read: "The indictment or information must charge but one offense, but the same offense may be set forth in different forms under different counts," etc. From a comparison of the section as it formerly read with the section as, under the amendment, it now reads, it would seem to be very clear that there has been, practically, no material change effected by the amendment except in that part of it authorizing the charging of different offenses in the same indictment or information where such offenses "relate to the same act, transaction or event." The other provisions of the section merely authorize, in perhaps a little different language, what the old section declared could be done, or, in other words, are only a re-enactment of the old section with some immaterial verbal changes.

We can perceive no reason for holding that the Legislature did not mean exactly what the language of the section very plainly and unambiguously declares. That it was intended, by the amendment, to authorize the statement in an indictment or information of two or more distinct offenses, where the same grow out of precisely the same act, transaction, or event, is a proposition which we think admits of no possible room for debate. If the language of the section with regard to this proposition were not itself so clear and unquestionable as that it would require the aid of construction in order to gather its true meaning, there would be no necessity for going further than that part of the section itself wherein it is expressly provided that "charges of offenses occurring at different and distinct times and places must not be joined." It will thus be observed that the Legislature, while recognizing the fact that no danger of violating any of the substantial rights of an accused person could result from charging in an indictment or information two different offenses which have arisen from exactly the same particular circumstances—that is, from the same act, transaction, or event—was careful to protect and safeguard such person against the harm which would inevitably follow the charging of two different offenses occurring at different times and places, and which, in the very nature of things, could have no possible bearing upon or relation to each other whatever. We can discern no distinction in principle between the provision authorizing the charging of two different offenses relating to the same act or event and those provisions of our criminal law which authorize a jury in a case where the offense charged embraces more than one crime—as, for instance, the crime of murder, within which is included manslaughter, or robbery, within which is included larceny, or assault with intent to murder, within which is included assault with a deadly weapon and often simple assault—to return a verdict of guilty of any one of the offenses comprehended within the one charged which the evidence justifies or warrants.

There is no claim put forward here that section 954 of the Penal Code, as amended in 1905, violates any provision of the Constitution, nor can we see how such a claim could be sustained if it were urged. As we have suggested, there is no ground for apprehending that any injury would result to a defendant from the method of criminal pleading authorized by section 954, for only one set of facts and circumstances, directed to a single act or event, could be proved, and, of course, it would not only be competent, but absolutely necessary, to prove those same facts and circumstances where but one offense was charged. Therefore we can think of no principle forbidding the Legislature to authorize the setting out of two distinct offenses in as many counts in cases where the circumstances under which a criminal act is committed are such as to inspire in the prosecuting officer serious doubt as to which of two offenses the evidence would show had been committed. Such a method, while, obviously, inocuous in its effect upon any of the rights of the accused, must result in a just administration of the criminal law, for, where as under the old method, the result of not proving the specific charge would be the acquittal of the accused and to cause another trial of the same facts with its attendant trouble and expense, assuming that once in jeopardy and former acquittal could not be successfully pleaded at the subsequent trial, under the present method the jury, under the court's instructions, could return a verdict of guilty of that offense of the two charged which the evidence disclosed had been committed, and thus there would be avoided, in a large measure, the mistrials which too often result from a want of correspondence between the proof and the allegations of the indictment or information.

But, while, as stated, the precise question here has never until now been before the higher courts of this state, we are not altogether without authority upon the proposition from other jurisdictions. The state of Wisconsin has a statute upon the subject of pleading criminal offenses similar in terms to section 954 of our Penal Code. In Porath v. State, 90 Wis. 527, 63 N. W. 1061, 48 Am. St. Rep. 954, the defendant was charged in the first count of the information with the crime of rape upon his daughter, and in the second count with the crime of incest, of which latter offense he was convicted. A plea in abatement was interposed to the first count on the ground that the defendant had not had a preliminary examination on the charge set out in said count, and the trial court overruled said plea. In sustaining said ruling, the Supreme Court of Wisconsin has this to say: "The plea in abatement to the first count of the information was properly overruled. It appeared that both counts were founded upon the same transaction, and were introduced to meet the legal aspects of the evidence as it might be produced at the trial, and in order that the defendant might not escape conviction of any offense which it might be found the defendant had committed by the single transaction in question. * * * Both counts were founded on the same transaction, and the defendant had in fact had a preliminary examination upon the charge of incest." In Korth v. State, 46 Neb. 631, 65 N. W. 792, the information contained four counts in which separate and distinct felonies were charged, and the Supreme Court, upholding the refusal of the trial court to compel the people to elect at the beginning of the trial to which of the counts the testimony would be addressed, says: "The offenses were all of the same general character, required for their proof the same quality of testimony, the same manner of trial and mode of punishment, and it was proper to try the plaintiff in error upon the several counts at the same time." See: Jackson v. State, 91 Wis. 263, 64 N. W. 838; Com. v. Drum, 19 Pick. (Mass.) 479; Com. v. McLaughlin, 12 Cush. (Mass.) 612; People v. Rynders, 12 Wend. (N. Y.) 426.

So, in the case at bar, the offenses charged required for their proof the same quality of testimony and the same manner of trial and mode of punishment. It is true that the gist of the crime of burglary is in the entry of a building with the intent to commit any of the crimes mentioned in section 459 of the Penal Code, and it is therefore immaterial, in the proof of the consummation of said crime, whether a larceny or other felony is shown to have been actually committed or not, if the intent to do so is present; but it will not, of course, be denied that proof that a larceny or felony had been committed in the building by the party making the entry would be perfectly competent, not alone for the purpose of showing the intent, but also the fact of the entry. Interesting discussions of the principle at the bottom of section 954, as it now reads, may be found in the following cases, decided by the federal courts, where the rule as to joinder of offenses originating in the same act or transaction has long been recognized and applied: Pointer v. U. S., 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208; Potter v. U. S., 155 U. S. 438, 15 Sup. Ct. 144, 39 L. Ed. 214; Dunbar v. U. S., 156 U. S. 185, 15 Sup. Ct. 325, 39 L. Ed. 390; U. S. v. Jones (D. C.) 69 Fed. 973. Our conclusion upon this point is, as must be manifest from the foregoing discussion, that the court below properly overruled the demurrer. A motion was made, before the trial, to set aside the information on the ground that the defendant had not been legally committed by a magistrate for either of the offenses charged in the information, and the same was denied; but, as there is no point made on said motion other than the point raised by the demurrer and which we have discussed and disposed of, there is no necessity for giving the ruling special attention. There can be no doubt but that the defendant had a preliminary examination on both charges, since it is clear that the facts necessarily applied to both offenses.

2. The objection that the court erred in allowing the witness P. Q. Robison to testify to an alleged confession of guilt, for the asserted reason that said confession was not voluntarily made, will be better understood by a brief reference to the facts. It appears that the store of said P. Q. Robison, at Kelseyville, in Lake county, was, on the night of August 23, 1908, entered by some party, and a large sum of money abstracted from the safe in said store. The bulk of the money so taken, which exceeded the sum of $1,000 in amount, was the property of other parties than the proprietor of the store; it having been deposited with Robison for safekeeping. Of said money, the sum of $500 belonged to one Rowden, and it is this particular money which formed the basis of the charge for which the defendant was tried and of which he was convicted. It appears that immediately after the theft suspicion was fastened upon both Robison, the proprietor of the store, and the defendant, as the guilty

parties. Robison and Piner are related by blood, being first cousins. About six weeks prior to the larceny, Piner, according to the testimony of Robison, called at the latter's house at about 11 o'clock at night, and asked for a key to the store, explaining that he (defendant) had received a call to go to "Pieta and Hopland with his auto and was out of gasoline." Robison gave the defendant a key to the store door so that he could go to the gasoline tank, and told him to keep the key. From that time to the night the store was entered and the money taken the defendant retained the key in his possession. On the Saturday following the day upon which the money was stolen (the larceny was perpetrated on a Sunday night), the defendant went to the store and, addressing Robison, said: "I understand you suspicion me of taking the money," to which statement Robison replied, "Yes, that was a fact." Piner protested his innocence, declaring that he could not understand how anybody could suspect him, and asking Robison if he thought that he (defendant) took the money. Robison then said: "I did not think you took it until my suspicions were directed to you by others, and that I am making this investigation as much for your own good as for my own, as you know I am suspicioned as well as yourself. If you are not guilty, why, I want you to help me clear this thing up, and, if you are, why, I will help you out of this trouble." On the succeeding day (Sunday), so Robison testified, the defendant called at the home of the former and, addressing Robison, said: "Perry, I am in trouble. I want you to help me." Robison answered, "Well, if there is anything I can do to help you, I will do it." Piner then said to Robison that the latter could help him, and, after Robison again promised to assist the defendant out of the trouble to which he referred, the latter said: "I took the money, and I want you to help me. Don't know why I took it, and I am very sorry that I took it." Piner exhibited a pistol during this conversation and threatened to take his own life unless he was assisted out of the trouble by Robison. It was subsequently arranged between Robison and the defendant, with the view and in the hope of stopping further investigation by the officers, and further effort to disclose the identity of the perpetrator of the crime, that Robison should get together a sufficient amount of money to cover the losses sustained by parties who had money on deposit with him on the night the larceny or burglary was committed, and that Piner should place said money in some spot where it could be found by the sheriff, aided by Robison, who was, previously to the search, to be apprised by Piner of the exact location of the money. In accordance with this arrangement, Robison procured the sum of $1,058.65 and placed it under the steps of a Mrs. Piner's house, and later informed the defendant where it could be found. Piner then secured and carried the money to a point not far distant from the town and cached it in the bed of a creek. The defendant later told Robison where the money had been left by him, and, subsequently, the latter and the sheriff found and recovered the money. Robison declared, on cross-examination, that the defendant did not admit having entered the store and taken the money until he (Robison) promised to assist him in "getting out of the trouble."

The facts as thus briefly detailed disclose the circumstances under which the alleged confession was made, and it is earnestly argued that it is thereby shown that said confession was not free and voluntary. It will be observed that there was nothing said by the defendant during the course of the first conversation between himself and Robison involving in the slightest degree a confession of guilt. On the contrary, the defendant at that time stoutly denied connection with the commission of the crime, and expressed surprise that he should be under suspicion. Nor was there on that occasion any inducement held out by Robison to Piner to make a confession, except upon the condition that he was actually guilty. Robison merely said, addressing Piner, "If you are not guilty, why, I want you to help me clear this thing up, and, if you are guilty, why, I will help you out of this trouble." As to the second conversation between Robison and the defendant, which occurred at the former's residence, and in which Piner admitted his guilt, it is clear from the testimony of Robison that the defendant called upon the former for no other purpose than to acknowledge his guilt. He called Robison out of the house and declared that he was in trouble. It was not, let it be noted, until after Piner stated that he was in trouble and besought Robison to help him out of it that he obtained from the latter a promise to so assist him. Piner well knew that Robison was not an officer of the law, and that he was clothed with no authority for guaranteeing him immunity from prosecution and punishment, and it is not at all probable, nor, in fact, is it a sensible assumption when all the circumstances of the case are considered in the light of reason and common sense, that Piner asked for Robison's promise of assistance with any other understanding that such promise meant or could mean anything more than what the latter in fact did do—undertake to conceal and keep from the authorities the identity of the guilty party. As was suggested by the court below, in ruling on the objection to the testimony of the declarations of the defendant, the promise of Robison does not appear to have been made in consideration of a confession, but merely involved an agreement upon his part to assist the defendant out of some trouble which the latter had, previously to exacting the promise, expressed a willingness to admit that he had either brought upon himself or had come to him in some other way. It becomes plainly manifest from an examination of Robison's testimony that, whatever may have been the circumstances of Piner's confession of guilt, the object the former had in view in securing it, and the latter's purpose in making it, were not that said confession should be used against the defendant in his prosecution for the crime, but that it should be kept from the authorities. The two men are closely related in blood, and, while Robison was anxious to get at the truth of the matter in order to remove suspicion from himself, there can be no possible doubt that, after Piner acknowledged his responsibility for the crime, the former exerted every effort before the arrest of the defendant and during his trial to exculpate the accused. Robison, it will be remembered, joined Piner before the latter's arrest in a scheme to mislead the authorities as to the identity of the party who had committed the crime, and at the trial, it is clearly apparent from the record, persistently sought to make it appear that Piner's admission of guilt to him was made under circumstances which would render his testimony upon the question of the confession incompetent and inadmissible.

Greenleaf, at section 219 of his treatise on Evidence, states the rule as to confessions in the language of Eyre, C. B., in Waricksball's Case, 1 Leach Cr. Cases, 209, that "a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it, and therefore it is rejected." The theory, of course, is that the prisoner, in making a confession obtained by the influence of hope or fear, applied by a third person to his mind, may be induced by such pressure to admit facts unfavorable to him, without regard to their truth, in order to secure the promised relief or avoid the threatened danger. Greenleaf on Evidence, § 219a. In the early case of People v. Smith, 15 Cal. 408, it is said that: "A distinction is made by many English cases between confessions induced by one having no authority or control over the prisoner and those induced by persons who have such authority, as constables, prosecutors, and the like; but the cases seem to hold the owner of goods stolen to stand in this relation."

We are in no doubt that if Robison had, in order to extort a confession from Piner, and by such means obtained it, represented to him that he (Robison) was in a position to insure him (defendant) either complete immunity from prosecution or lenient treatment in the matter of punishment, or had induced the defendant to confess by threats which inspired in Piner fear that his crime would be apprehended and he severely punished unless he admitted his guilt, testimony of the confession could not have been properly received; but, as seen, the hope held out by Robison was not that Piner might escape prosecution and punishment at the hands of the public authorities, but that Robison would do all in his power, as the evidence shows that he did do, to prevent the defendant's connection with the crime becoming known to the authorities. The court's ruling admitting the evidence of the confession was proper.

3. Instructions 7 and 12, given by the court, are assailed as being erroneous and prejudicial. Instruction 7 relates to the evidence of the previous good character of the defendant, and the specific complaint urged against it is that the court, in giving it, violated article 6, § 19, of the Constitution, in that it thus instructed upon the weight or effect of the evidence by declaring that evidence of good character should be considered "with great caution." Where the court found its authority for thus instructing the jury, we are not advised by the Attorney General. Evidence of good character is to be considered by the jury in the same manner as evidence addressed to any other essential fact in the case. The proof of good character is in aid of the general presumption of innocence, and, as the Supreme Court says in People v. Ashe, 44 Cal. 291, "is no more to be laid out of view by the jury in their deliberations than is the original presumption itself," notwithstanding the dictum to the contrary in the case of People v. Swift, 28 Cal. 397. Nor is there any more reason for an admonition by the court that evidence upon previous good character should be considered with "great caution" than there is for a similar instruction with regard to any other of the general class of evidence in criminal cases. The Legislature has not authorized such an instruction, and, if it could legally do so, we can see no reason upon principle why it should. As a matter of fact, all evidence of whatsoever nature in a criminal case should be considered with caution or with that deliberation which will insure a just verdict, but to select a particular species of evidence from the record as the theme for a special caution to the jury, thus disparaging the probative effect thereof is a function which is specially excluded from the province of trial courts, even in those few special cases where the Legislature has declared that it may be done. People v. Wardrip, 141 Cal. 229, 74 Pac. 744. But we are of the opinion that the instruction could not have prejudiced the rights of the defendant for the reason that his guilt is conclusively proved by the evidence. Evidence of good character is, as a general proposition, important only where there may exist some doubt of the defendant's connection with or participation in the commission of the crime; but where, as here, there is and could be no doubt of any kind of the defendant's guilt under the evidence, there was no other just alternative left to the jury but to convict the accused, notwithstanding the evidence of good character. The jury could have found, consistently with a verdict of guilty, that the evidence conclusively established the previous good character of the accused. People v. Ashe, supra; People

v. Mitchell, 129 Cal. 585, 62 Pac. 187. The confession as proved stood before the jury uncontradicted, the defendant not testifying, and it would be extremely difficult, under this state of the record, to reconcile a verdict other than that of guilty with the testimony produced before the jury. There is practically no distinction between the situation here and where the defendant had entered a plea of guilty. Obviously, in the latter case, evidence of previous good character could not affect the question of the defendant's guilt, and it is equally as obvious that such evidence is unimportant where guilt is admitted and the admission proved and uncontradicted. Under the circumstances of the case as presented here, we are unable to understand how the instruction complained of could have exerted in the least degree any prejudicial influence on the determination of the verdict.

The other instruction to which objection is made reads as follows: "A person's declaration or voluntary confession is always admitted in evidence against him, for the law presumes that a person will not say anything untrue against himself, or his own interests." It is claimed that said instruction is also violative of section 19, art. 6, of the Constitution, in that it deals with the question of the weight which the jury should attach to the confession. The impropriety of giving such an instruction to a jury cannot for a moment be doubted; yet, there having been no denial that the confession was made, nor any attempt to impeach the testimony of Robison, who gave the testimony of the confession, the instruction could have resulted in no harm to the defendant. The first part of the instruction merely declares what the court had virtually already stated in the presence of the jury in its ruling on the admissibility of the confession, that the same was voluntarily made, and therefore competent to be received in evidence. This is followed by a statement of what the court conceived to be the reason or theory upon which a voluntary confession is admissible against an accused. The court does not say that the evidence of the confession is presumed to be true, which, in effect, it had a right to do (section 1847, Code Civ. Proc.), but only (in effect) that a confession voluntarily made by an accused becomes evidence admissible against him for the reason that it is not likely that a person will deliberately tell an untruth which would militate against his own interests. The proposition stated in the instruction cannot be gainsaid; but, as we have before declared, the giving of it to a jury in any case is manifestly improper. The theory upon which voluntary confessions are admissible in evidence is of interest to the courts; but in elucidating or attempting to explain such theory to a jury there is great danger that the constitutional right of the accused to a determination of all questions of fact by the jury may be violated, so far as are concerned the facts to which such an instruction is applicable. But, as stated, it would indeed be unreasonable to say, in view of the uncontradicted evidence of the defendant's guilt, that the instruction played a material part in influencing the verdict returned by the jury.

We have been shown no substantial reason which calls for the return of this cause to the court below for trial de novo.

The judgment and order appealed from are therefore affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

11 Cal. App. 577

NEWMAN v. LESTER, County Auditor.

(Civ. 705.)

(Court of Appeal, Second District, California. Oct. 25, 1909.)

1. Taxation (§ 316*) — Deputy Assessor — Right to Compensation — How Determined.

The right of the additional deputy assessor in counties of the fifteenth class provided for by the amendment to Pol. Code, § 4244, by the act of 1909 (St. 1909, p. 727, c. 416) to compensation, must be determined on the theory that he is a deputy in the assessor's office doing the work of the assessor, and not the incumbent of a newly created office, though, unlike other deputies, he holds office for 12 months, and is required to keep an account of transfers in addition to assisting in assessing property.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 523; Dec. Dig. § 316.*]

2. Officers (§ 100*)—Increase of Compensation During Term of Office—Additional Deputy.

Where a statute provides a fixed salary for an officer and a separate allowance for expenses of his office, or a fixed salary for the office and a fixed salary for a certain number of deputies or clerks, all payable out of the county treasury, an increase of such separate allowance for expenses or for deputies, whether in the number of the deputies or the amount paid to each, is not a violation of Const. art. 11, § 9, forbidding an increase of compensation during an officer's term, and the additional deputy provided for by the act of 1909 (St. 1909, p. 727, c. 416), amending Pol. Code, § 4244, giving assessors in counties of the fifteenth class a fixed salary and a fixed salary for a certain number of deputies, comes within the rule stated, and he is entitled to the salary allowed him.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 152, 153; Dec. Dig. § 100.*]

Application for mandamus by W. R. Newman against Cal D. Lester, auditor of Orange county. Writ ordered to issue.

Williams & Rutan, for petitioner. S. M. Davis, Dist. Atty., for respondent. J. D. Fredericks, Dist. Atty., Los Angeles County, amicus curiæ.

PER CURIAM. Application for writ of mandate to compel respondent as auditor of Orange county to issue to plaintiff a warrant for $100, claimed to be due him as salary as deputy county assessor for the month of May, 1909.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

In the classification of counties made by section 4006 of the Political Code in 1907, Orange county is a county of the fifteenth class, and by section 4244, as enacted in that year, the provision relating to salaries for the assessor's office was as follows: "(8) The assessor, thirty-five hundred dollars per annum; provided, that in counties of this class there shall be seven field deputy assessors, who shall be appointed by the assessor of said county, and who shall hold office from twelve o'clock meridian from the first Monday in March of each year up to twelve o'clock meridian of the first Monday of July of each year; the salaries of each of said seven deputy assessors herein provided for is fixed at the sum of one hundred dollars per month, to include horse hire and traveling expenses for each month during which they hold office as herein provided, which said salaries shall be paid by said county at the same time and in the same manner and out of the same fund as the salary of the assessor; provided, that all commissions shall be paid into the county treasury." This section, so far as it affects the matter before us, was but a re-enactment of section 172 of the county government act as amended in 1905 (St. 1905, p. 430, c. 359). In 1909 this provision of section 4244 was amended by changing the number of deputies from "seven" to "eight," and further providing: "One of said deputy assessors shall hold office for twelve months of each year, at a salary of one hundred dollars per month, whose duty shall be to keep an account of all transfers of property in said county during the year, and to assist in the assessment of property." This amendatory act was made to take effect immediately (St. 1909, p. 730, c. 416), and petitioner was appointed by the assessor of Orange county as the deputy so provided for and demanded a warrant for his salary for the month of May, 1909, as such deputy, and his demand was refused by respondent.

In support of his refusal respondent contends that the payment of the demand would be a violation of section 9 of article 11 of the Constitution, being an increase of compensation of the county assessor during his term of office. That the term of office for which the assessor was elected began January 7, 1907, and that the salaries and compensation for all official services rendered by that office are fixed and determined by the county government act as amended in 1905, and cannot be increased until the expiration of the four years for which the county assessor was elected. Petitioner meets this contention with two arguments: First, that the allowance for the additional deputy does not increase the compensation of the assessor, because his salary remains the same ($3,600); and, second, that it cannot be contended that the work to be done by the assessor is reduced as the statute provides other and additional services to be performed by the deputy created by the act of 1909 which are not necessarily within the general duties provided to be performed by the assessor. The brief of the amicus curiæ, presents chiefly an argument ab inconvenienti, etc., to support the position of petitioner; all parties agreeing that the exact question has never been directly passed upon by any of the appellate courts of the state.

The argument based upon the disastrous results which would follow a holding that the law was unconstitutional appears to be fully answered in the concurring opinion of Beatty, C. J., in the case of Dougherty v. Austin, 94 Cal. 607, 29 Pac. 1094, 16 L. R. A. 161, and we do not think much stress can be laid upon the contention that the provision for the additional deputy in effect created a new office with new duties. It is clear that the petitioner's right to any compensation must be determined upon the theory that he is a deputy in the assessor's office doing the work of the assessor. County offices are not created by special act fixing a salary for them, but by a general law enumerating the offices so designated. Pratt v. Browne, 135 Cal. 649, 67 Pac. 1082. The concurring opinion of Chief Justice Beatty, above referred to, approves a distinction drawn by the Supreme Court of Illinois in Daggett v. Ford County, 99 Ill. 334, between the rule applicable to statutes in which the principal in the office is allowed a lump sum to cover his own compensation and his expenses for clerk hire or deputies and that applied to statutes by which the officer is allowed a certain amount for his personal compensation and a certain amount for the expenses of his office. Under a constitutional provision that the compensation of no officer shall be increased or diminished during his term of office, it was held that, where the "lump sum" system existed to increase or diminish the allowance during the term would be a violation of the constitutional provision, while under the other system an increase of the allowance of the amount for expenses would not. Or, as said by Chief Justice Beatty: "In other words, the Supreme Court recognized this distinction between the allowance for compensation and for clerk hire, etc., when separately fixed —that the latter could, but the former could not, be increased or diminished during the officer's term." Holding to this view, the Chief Justice concurred in the decision in Dougherty v. Austin, from which, as well as the other mention of the statute then before the court, we conclude that the provision as to Marin county in the county government act of 1887 placed it among those counties as to the officers of which a lump sum allowance was made.

The distinction so adopted by the Chief Justice is not made a part of the leading opinion in bank, or the department opinion, which is approved by the court in bank in the Dougherty-Austin Case, but it is reasserted in Tulare County v. May, 118 Cal. 303, 308, 50 Pac. 427, 429, and the constitutionality of an act containing both methods of compensation is declared. It is said in this case: "There are two rules for the compensation of deputies in the different counties of the state. In most of the classes a lump sum is allowed to the principal, out of which he is required to pay his deputies; in a smaller number of classes—including the eleventh—the principal is allowed a fixed salary, and certain deputies are allowed fixed salaries." In both cases the salaries are to be paid out of the county treasury. The exercise of the legislative power in so classifying the counties in this manner for the purpose of fixing the compensation of county officers is declared to be constitutional, because "under either rule a compensation proportionate to duties may be secured." In the case of Tulare County v. May it was held that where there was a provision in the statute for the appointment by a county officer of a clerk or deputy at a fixed salary upon the happening of a specified contingency, and the officer appointed such deputy upon the happening of the contingency, which was after the commencement of the term of office of the principal, this was not an increase of compensation of such officer in violation of section 9 of article 11 of the Constitution. The court reviewed the opinions in Welsh v. Bramlet, 98 Cal. 220, 33 Pac. 66, and Walser v. Austin, 104 Cal. 128, 37 Pac. 869, and says the latter rests upon the former, and declares that the portion of the former opinion in conflict with the views expressed in the Tulare County v. May opinion was not necessary to the decision in the Welsh v. Bramlet Case. The decision in Farnum v. Warner, 104 Cal. 677, 38 Pac. 421, which is distinguished from that in Welsh v. Bramlet, is accepted as authority. The reasoning in the Welsh-Bramlet opinion, which is distinguished and disapproved, related to a clause in the county government act of 1891 by which the district attorneys in counties of the twenty-sixth class were permitted to appoint an assistant and a deputy for each of whom the act provided a fixed salary. It was held that such a provision was violative of the constitutional prohibition against special legislation, and also of section 9 of article 11. We are of opinion that its weight as authority upon the point last mentioned is destroyed by the opinion in Tulare County v. May, and that the effect of the foregoing decisions and opinions is to adopt the distinction drawn by the Illinois Supreme Court as the rule of construction in this state; that is to say, that, where the statute provides a fixed salary for the officer and a separate allowance for expenses of his office (Kirkwood v. Soto, 87 Cal. 394, 25 Pac. 488), or a fixed salary for the officer and a fixed salary for a certain number of deputies or clerks, all payable out of the county treasury, an increase of such separate allowance for expenses or for deputies, whether in the number of deputies or the amount paid to each, is not a violation of the constitutional provision that "the compensation of any county, city, town, or municipal officer shall not be increased after his election or during his term of office." Const. art. 11, § 9.

The petitioner in this application comes within the rule stated and is entitled to the salary claimed by him. It is therefore ordered that a writ of mandate issue in accordance with the prayer of the petition.

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11 Cal. App. 597

SMITH v. HYER. (Civ. 636.)

(Court of Appeal, Second District, California. Oct. 27, 1909. Rehearing Denied by Supreme Court Dec. 23, 1909.)

1. Appeal and Error (§§ 262, 501*)—Review—Nonsuit.

The improper granting of a nonsuit is an error of law, and, prior to the amendment of Code Civ. Proc. § 647, by Laws 1909, p. 586, c. 355, could be reviewed by an appellate court only where an exception was entered at the time of the ruling, and was specified in the motion as ground for a new trial, or upon an appeal from the judgment based upon a bill of exceptions disclosing that such exception was taken at the time the order was made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1589, 2302; Dec. Dig. §§ 262, 501.*]

2. Appeal and Error (§ 856*)—Review—Order Granting New Trial.

Where an order granting a motion for a new trial is general, it must be sustained, if good, on any of the grounds upon which the motion was based.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3425-3426; Dec. Dig. § 856.*]

3. Appeal and Error (§ 981*)—New Trial—Grounds—Newly Discovered Evidence—Discretion of Court.

The granting or refusing of a new trial on the ground of newly discovered evidence is so far within the discretion of a trial court that its decision will not be disturbed unless there is a clear abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3874, 3875; Dec. Dig. § 981.*]

4. New Trial (§ 99*)—Newly Discovered Evidence—Discretion of Court.

The determination of the effect of cumulative newly discovered evidence is peculiarly within the province of the trial court; and, if in its opinion newly discovered evidence was such as, had it been considered in the first instance, would have changed the result, a new trial should have been granted.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 99.*]

Appeal from Superior Court, Riverside County.

Action by Earl B. Smith against W. E. Hyer. Judgment of dismissal, and from an order granting a new trial defendant appeals. Affirmed.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

P. N. Myers, for appellant. Earl B. Smith, in pro. per.

ALLEN, P. J. The action is one upon a promissory note executed by defendant to the assignor of plaintiff. The latter is shown by the record to be an attorney at law and appearing in the action in propria persona. The note was admitted in evidence, together with evidence tending to show that the assignment to plaintiff was one for collection purposes only. Upon the conclusion of the evidence offered on behalf of plaintiff a motion for a nonsuit was granted, the effect of which was to grant a judgment of dismissal as against plaintiff. The trial court, as appears from the reasons assigned for granting such motion, was of opinion that an action brought by an attorney upon a note so assigned could not be maintained. This upon the theory that the policy of the law forbids such a transaction, and courts should not grant relief where such facts are made to appear. The plaintiff did not except to the ruling of the court in granting this motion, but thereafter in due time interposed a motion for a new trial based upon newly discovered evidence material for the party making the application which he could not with reasonable diligence have discovered and produced at the trial, and supported such motion by an affidavit used upon the hearing. This affidavit was largely cumulative, but tended in a degree to establish the grounds of the motion, and was by the court held sufficient for the purposes intended. The court upon the hearing of the motion for a new trial granted the same, and from the order granting the new trial defendant appeals under the alternative method.

A motion to dismiss the appeal was, by stipulation, ordered submitted with the appeal upon the merits. Entertaining the views hereinafter expressed, we do not consider it necessary to discuss the matters involved in the motion to dismiss the appeal, which, even if sustained, would but have the effect to affirm the order, which result is attained by an affirmance upon the merits, which we think proper in the premises. It is settled law in this state that the improper granting of a nonsuit is an error of law, and, prior to the amendment of section 647, Code Civ. Proc., by Laws 1909, p. 586, c. 355, could be reviewed by an appellate court only where an exception was entered at the time of the ruling, and the same was specified in the motion as grounds for a new trial, or upon an appeal from the judgment based upon a bill of exceptions disclosing that such exception was taken at the time the order was made. But the motion for a new trial in this case was not entirely based upon the error of law involved in the nonsuit. The order granting the motion is general, and must be sustained, if good, on any of the grounds upon which the motion was based. The granting or refusing of a new trial on the ground of newly discovered evidence is so far within the discretion of the trial court that its determination will not be interfered with, unless there is a clear abuse of discretion. The determination of the effect of newly discovered evidence which is cumulative is peculiarly within the province of the trial court (Hubbell Oil Co. v. Morrison, 7 Cal. App. 459, 94 Pac. 589); and if, in the opinion of the trial court, the newly discovered evidence was such as, had it been considered in the first instance, would have changed the result, it was the duty of the court to grant a new trial. The action of the court in granting this new trial amounts to a declaration that such effect would have been given by the court to the newly discovered evidence had the same been actually produced upon the original hearing.

We see no error in the record sufficient to warrant a reversal, and the order is therefore affirmed.

We concur: SHAW, J.; TAGGART, J.

11 Cal. App. 604

In re COBURN. (Civ. 632.)

(Court of Appeal, First District, California. Oct. 29, 1909. Rehearing Denied Nov. 26, 1909; Denied by Supreme Court Dec. 27, 1909.)

1. INSANE PERSONS (§ 30*)—GUARDIANSHIP—GROUNDS.

Under Code Civ. Proc. §§ 1763, 1764, providing for the appointment of a guardian on the court finding that a person is incapable of taking care of himself and managing his property, to justify the appointment of a guardian, it must clearly appear that such person's mind is affected to such a degree as to deprive him of sane and normal action, and power to comprehend the value and prudent management of his property.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 43, 61; Dec. Dig. § 30.*]

2. APPEAL AND ERROR (§ 1011*)—FINDINGS—CONFLICTING EVIDENCE.

A conflict, within the rule that where there is a substantial conflict in the evidence the appellate court will not reverse a finding, must be such as to present a fair and reasonable ground for a difference of opinion, and a finding must have meritorious support in the evidence, and a general statement without substantial reasons is not sufficient to raise a conflict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3983; Dec. Dig. § 1011.*]

3. EVIDENCE (§ 501*)—OPINION EVIDENCE—MENTAL CAPACITY—REASONS FOR OPINION.

Under Code Civ. Proc. § 1870, subd. 10, permitting opinion of an acquaintance as to the sanity of a person, the reason for the opinion being given, a person giving his opinion as to the sanity of another must give the reason on which the opinion is based, and the opinion itself has no weight other than that which the reason brings to its support.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2297; Dec. Dig. § 501.*]

4. EVIDENCE (§ 478*)—OPINION EVIDENCE—MENTAL CAPACITY.

In proceedings for the appointment of a guardian for a person on the ground of his inability, by reason of physical disability and weakness of mind, to take care of himself and manage his property, it is error to permit witnesses to give their opinions as to the ability of such person to manage his property and as to whether he is likely to be imposed on by designing parties.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2242–2244; Dec. Dig. § 478.*]

5. Appeal and Error (§ 1010*)—Findings—Conclusiveness.

A finding supported by any substantial evidence is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3979; Dec. Dig. § 1010.*]

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Petition by Azro A. Coburn for the appointment of a guardian of Loren Coburn, an alleged incompetent. From an order appointing Charles A. Coburn guardian and from an order denying a new trial, Loren Coburn appeals. Reversed.

A. J. Treat and A. Kincaid (A. H. Jarman, of counsel), for appellant. Ross & Ross and Jordan, Rowe & Brann, for respondent.

COOPER, P. J. In the month of February, 1908, a petition was filed by Azro A. Coburn, a resident of Massachusetts, to have Loren Coburn, his aged uncle, who resides in San Mateo county, adjudged incompetent, and to have a guardian appointed of his person and estate. The petition as amended alleges that the said Loren Coburn, by reason of old age, physical disability, and weakness of mind, is unable to take care of himself and manage his property. This allegation was denied, and upon the issue so made the case went to trial before the court without the jury. At the conclusion of the trial the court made an order adjudging Loren Coburn incompetent and unable to take care of himself and manage his affairs, and appointing Carl J. Coburn, another nephew, guardian of his person and estate. This appeal is from the order so made and from an order denying appellant's motion for a new trial.

It is contended that the evidence is insufficient to support the order, and, in view of the conclusion we have reached, that is the principal question that will be discussed. It is provided in the Code (Code Civ. Proc. § 1763) that, when it is represented to the court upon a verified petition "that any person is insane or from any cause mentally incompetent to manage his property," the court or judge must cause notice to be given and hear the matter. It is further provided (section 1764): "If, after a full hearing and examination upon such petition, it appear to the court that the person in question is incapable of taking care of himself and managing his property, such court must appoint a guardian of his person and estate, with the powers and duties in this chapter specified." It is evident from the provisions quoted that, in order to justify the appointment of a guardian, the court must find the party for whom the guardian is appointed mentally incompetent to take care of himself and manage his property.

It is a fundamental principle, based upon the plainest dictates of justice, that, before a person can be deprived of his liberty and his property on account of his mental incompetency, he must be brought clearly within the terms of the statute, and the evidence must show that his mind is so far gone and so weak and feeble that he does not realize and comprehend the value and prudent management of his property, and is not sufficiently normal to care for it in the usual acceptation of that term. A man whose mental capacity has been such that he has outstripped the great majority of mankind in business affairs, and has accumulated much of this world's goods, is not for light or trivial reasons, or even on account of hallucinations, to be deprived of his property and of his liberty. It must clearly appear to the court that he is mentally incompetent to manage his property; that his mind is affected to such a degree as to deprive him of sane and normal action.

It was the doctrine of the earlier cases in the English Court of Chancery not to deprive a person of his liberty or his property for mere imbecility of mind not amounting to idiocy or lunacy. It was not sufficient that he was weak, worn out with age, and incapable of managing his estate. Ex parte Banerley, 3 Atk. 168; 3 Eq. Cases Abr. 580; Lord Donegal's Case, 2 Ves. 407; Beaumont's Case, 1 Whart. (Pa.) 52, 29 Am. Dec. 33. The doctrine is not now so strict as formerly, and the jurisdiction of the courts has been held to extend to some cases where the party is not an idiot or a lunatic. In the Matter of Barker, 2 Johns. Ch. (N. Y.) 232. It was there said by Chancellor Kent: "The object is to protect the helpless; and the imbecility of extreme old age, when the powers of memory and judgment have become extinct, seems, as much as the helplessness of infancy, to be within the reason and necessity of the trust. I am aware, however, that the inquiry must in many instances be peculiarly delicate, because it concerns the character of the party, and his natural rights, and because of the difficulty there is in ascertaining the extent of the decay of the mind necessary to form a proper case for the interference of the court."

In Woerner on American Law of Guardianship, § 113, many cases are cited, and the history of the law and the modern doctrine given. It is thus stated: "It is sufficient that he be mentally incompetent to govern himself or to manage his own affairs, from whatever cause this incapacity may arise. Hence permanent mental weakness amounting to such incapacity, arising from advanced age, sickness, habitual drunkenness, or imbecility, constitutes in law 'unsoundness of mind,' and as such becomes tantamount in its effects to those produced by idiocy or lunacy, for such conditions all equally express mental incapacity for the government of one's affairs. Such a person is in legal intendment non compos mentis. * * * It is to be observed, however, that the unsoundness of mind which will justify the appointment of a guardian must be more than mere debility or impairment of memory; it must be such as to deprive the person affected of ability to manage his estate. If the defendant is capable of transacting the ordinary business involved in taking care of his property, and if he understands the nature of his business and the effect of what he does, and can exercise his will with reference to such business with discretion, notwithstanding the influence of others, he is not of unsound mind within the meaning of the statute, and should not be deprived of the control of his property." And it has been held that the mental imbecility (in the language of the Code) must be such as to make the incompetent incapable of taking care of himself and managing his property. In re Lindsley, 44 N. J. Eq. 564, 15 Atl. 1, 6 Am. St. Rep. 913.

In the Matter of Sarah Collins, 18 N. J. Eq. 253, it appeared that the alleged incompetent was in the hundredth year of her age. Her sight was very much impaired and her hearing somewhat; but the court held that a commission de lunatico inquirendo should not issue. The court said: "Her sight is very much impaired and her hearing somewhat. At her age the presumption of law is not against her soundness of mind, however great the probability in fact may be that she is not sound. * * * The facts proved, while they show that her senses and physical powers are much impaired, and that her mental faculties are somewhat weakened, fail to show anything that would amount to unsoundness so as to make her incapable of managing her affairs. She may be so weak and infirm as to be easily influenced and imposed upon, which would be a reason for setting aside any instruments or transactions executed under the effect of such influence; but this does not amount to unsoundness, such as to take from her the control of herself and her property."

In Re Storick, 64 Mich. 685, 31 N. W. 582, it was said by the Supreme Court of Michigan, in an opinion written by the chief justice: "The statute does not say merely 'incompetent' but 'mentally incompetent.' It does not refer to persons who are sane, but not perhaps as wise or intelligent as some other persons. It applies to those whose mind is so affected as to have lost control of itself to such a degree as to deprive the person affected of sane and normal action. Unless the petition either follows the words of the statute, or uses language and states facts fully equivalent, it cannot give jurisdiction. This is a class of cases in which the citizen is sought to be deprived of both liberty and property; and those who seek to accomplish such a result must do so upon statements that, if true, leave no doubt that the case falls within the statute. * * * One may be so weak or crippled as to be compelled to leave his affairs in the hands of servants or agents, and is no more incompetent for that reason than a very wealthy man is who cannot possibly look after all the details of his business. Neither is there any legal standard of business wisdom. Men may be unwisely speculative or unwisely penurious; but this is not insanity. A jury of merchants might very easily approve or disapprove where a jury of persons unaccustomed to commercial ventures and expenditures would think the reverse. Every man may spend or save as he chooses, as long as he does not come within the prohibitions of the law. As long as he possesses a mind normally sound, he is entitled to free agency. It is as cruel and unlawful to interfere with the liberty of the old as of any one else, and the law cannot favor or permit this liberty to be diminished." See, further, In re Bassett, 68 Mich. 348, 36 N. W. 97.

In the case at bar the court found that appellant "is incapable of taking care of himself and managing his property." In our opinion the evidence fails to sustain the finding. The appellant, at the time of the trial, was over 82 years of age, and was in the enjoyment of good health. The evidence shows without contradiction that he was active, attentive to business, and had not been confined to his bed for years. He is the owner of some 35,000 acres of grazing and farming lands situate in San Mateo county, Monterey, Merced, and Fresno counties. He is also the owner of timber lands, cattle, horses, and farming utensils. His property is stated to be worth over a million dollars. His life has been devoted to the accumulation of property. While he has been penurious, a close man to deal with, yet he has always been frugal and free from dissipation of any kind. His wife died about 13 years before the trial, and he has only one child living—a son about 52 years of age, who is helpless, and who has been nursed and cared for by appellant and Miss Upton, his sister-in-law, who has lived with him. There is no evidence of any physician or alienist as to any unsoundness of mind or mental incompetency. There is not a scintilla of evidence that the appellant has ever squandered any of his property, or that he has been imposed upon by any designing person. He has never, so far as the evidence shows, lost a dollar, an acre of land, or a cow through any mismanagement. The evidence relied upon to show mental incompetency is almost entirely that of two nephews, the most active of whom was appointed guardian of his person and estate. It may not be amiss to remark that it plainly appears that there was some fear in the minds of the nephews that the appellant might by will leave some portion of his estate to his wife's sister, Miss Upton. In any event, it appeared in evidence that the appellant had made no will, and, of course, if the order should stand, he could never hereafter make a will unless restored to competency by a decree of court.

The main acts which it is claimed show mental incompetency are certain deeds, alleged to be signed by appellant, to different pieces of property which he did not and never did own. There is some evidence tending to show that appellant believed that he owned more land in San Mateo county than he really did own, and this belief was founded upon the fact that the title to his ranch, the Punta del Ano Nuevo, which was a Mexican grant, was bounded on the north by the Gonzales ranch, and appellant claimed—whether founded upon sufficient reasons or not—that the northern boundary of the grant extended some three or more miles further north than the line up to which he had occupied. The claim of appellant is stated by Dr. Robertson, the experienced alienist, who examined him as to the matter, as follows: "I examined him and others in regard to that, and he went into the details with me, explained the long Spanish grant story, and the final answer he made to my last question was that the Pacific Ocean bound him on the west, and he could not go into the ocean; that his southern boundary was absolutely fixed, and he could not go beyond a certain point; that his eastern boundary was the mountain—he could not be certain of that because it had not been surveyed, but on the north he was bounded by the Gonzales ranch. Wherever that line ran his property stopped. He insisted he owned around the town of Pescadero, and he is a little bit garrulous. There is another evidence of old age, I forgot to mention, when I got him on the subject of his property, it was hard to divert his mind from it; but at the same time he said, when that survey was run, he would only claim what was his in this survey, and what the law said was his he would take; if the land happened to be two or three miles beyond his present property, that he was paying taxes on, he would accept that as the boundary, and certainly force his neighbors out of what belonged to him; but if it came back a half a mile or mile within the property he now claims, that he would at once vacate; that he did not want an acre of land belonging to anybody else, and whatever that survey showed to be the truth he would be absolutely willing to stand by it; that he wanted nothing but his own; but what was his own he absolutely wanted, irrespective of present possession. In other words, he realized that the property he now owns and now occupies and now pays taxes on belongs to him and will belong to him until that survey is made. He hopes when the survey is made it will include two or three miles that belong to his neighbors." And the appellant says that Carl Coburn told him that he owned more land north of his grant, and he thus states the matter in his testimony: "Q. Has Carl Coburn ever said anything to you about the northern line of your property? A. He spoke to me about the northern boundary. I told him my northern boundary joined on what is called the Gonzales—I think that that is the name of the grant—the southern boundary of Gonzales was my northern boundary of the Punta del Ano Nuevo. That shows on the record. The west of my grant is the ocean. Q. Yes, sir. Now, without regard to the other boundaries, what did he tell you with regard to the northern boundary, where he thought that was? A. He said he had been looking the thing over, and it was north of Spanish Town about a mile. I said I didn't know that. I wasn't aware it ran so far north. Well, he said my grant called for so many thousand acres. He wanted to know how many acres there was, and I said I understood there were 7,700 and some odd acres in the Spanish grant—not American grant, but Spanish grant. Well, to come to reckon that, the American is four times that amount, and it comes close on to 30,000 acres in the grant. The grant of course was a Spanish grant. I don't know anything about the United States grants. I never had anything to do with the United States grants. My deed of the property came from Mexico. Q. Well, now, without regard to the history. I am not going into the history of the Mexican grant, but just what Carl Coburn told you. I understand that Carl Coburn told you that the northern line was far to the north of Pescadero? A. He said it was beyond Spanish Town. 'Well,' I said, 'I wasn't aware of that.' 'Well,' he said, 'It comes to the Gonzales southern boundary.' 'Well, I don't know exactly where the Gonzales southern boundary was, because I had never had that surveyed, and the grant has never been surveyed, only little portions of it—that is, the grant Punta del Ano Nuevo.'"

With these facts as a basis, let us examine and analyze the testimony as to incompetency. It appears that in the year 1907 the appellant had litigation with the Gazos Creek Mill Company, involving important rights as to a sale of growing timber and rights of way by the appellant to said company. The case had been decided against appellant in the superior court of San Mateo county, and Carl J. Coburn appeared to be very anxious to assist in appealing the case, and offered his services free to assist his uncle in any manner he could. At all events, Carl testified that he told the old man that he could not go ahead and assist in employing attorneys and attending to matters without some authority, and that he not only told his uncle this, but that he refused to do anything without a power of attorney; that on the 17th day of August, 1907, a general power of attorney was executed to him and signed by Loren Coburn. The power of attorney was introduced in evidence, and hence we may assume that thereafter Carl was the attorney in fact of his old uncle. Of course, as such it was his duty to act with the utmost good faith with his uncle who had imposed confidence in him. It appears that about the 15th day of January, 1908, Carl wrote to the other nephew, Azro Coburn, who resided in Holyoke, Mass., and in response to the letter Azro came to California. This letter was not shown, nor was it produced in evidence, although some reference was made to its contents. There is nothing to show that any deed had been made by appellant, or any property disposed of up to this time. In fact, the only thing that is stated by Carl as a reason why he wrote to Azro is the situation regarding the lawsuit with the Gazos Creek Mill Company, which he was trying to compromise, and of which one of the attorneys he had employed advised the compromise or settlement, by having appellant pay the company $23,000. This appellant refused to do, claiming that he was right, and would win the case on appeal. The result shows that the judgment of appellant was correct, for he did win the case on appeal. Gazos Creek Mill Co. v. Coburn, 8 Cal. App. 150, 96 Pac. 359. It is a significant fact that proceedings had been instituted to have appellant declared incompetent some eight or nine years before, in which proceedings Carl Coburn was a witness, and claimed at that time that his uncle was mentally incompetent. Those proceedings resulted in favor of appellant, and it is in evidence, and not contradicted, that since that time he has accumulated some $300,000. We have looked in vain for any evidence of any act tending to show mental incompetency up to the time that the letter was sent to Azro by Carl.

In response to the letter from Carl, Azro arrived in San Francisco on January 26, 1908, and it appears, by appointment, met his cousin Carl at the Hotel Jefferson in San Francisco. While there appellant called to see his nephew—whether by request or not does not appear. Azro describes the visit as follows: "We went upstairs into my room and visited there during the evening, and during the evening I had pleasant conversation with uncle, and talked some about his affairs, and I asked him about certain litigation he had got into, how he was coming out on it, and he told me he was coming out all right, and I told him I hoped he would. He made only a short call that evening." Carl describes this call of his uncle as follows: "He came to the Jefferson Hotel, where Mr. Azro Coburn and I were stopping, and he met us there. Azro Coburn took him up to his room, and they began to have a talk about the timber case. The timber case I believe was set for the 27th of this month. Mr. Azro Coburn and I had consulted Mr. Loren Coburn's attorneys. We knew—at least I knew—the case was in a very precarious condition; that there was danger of the case being decided against us. Mr. Azro Coburn asked his uncle, he says, 'How is everything?' and asked him about his cases and how they were going along; asked him if he had not better try and do something to settle the case before it was decided."

We will now review briefly what these two nephews did, according to their own testimony, in order to procure evidence as to the mental incompetency of appellant. The first thing, according to their testimony, was to procure a deed from appellant to one Richards of the city hall in San Francisco, which deed made no reference to the city hall by name. Both Azro and Carl testified that they saw the old man sign this deed. It is dated January 28, 1908, evidently showing that diligence was being used after Azro arrived in San Francisco. It does not appear that any explanation was made to appellant as to why they wanted the deed signed. Azro testified: "I did not read the deed to Loren Coburn. Nobody read it to him. I don't know that anybody called his attention particularly to the property described therein. I don't know what Carl said. I saw him sign it. That is all I saw about it. I saw him read it. That is all. I assume he did because his lips moved. I don't know whether or not he was told that this was some other document, a lease of a portion of his property in Pescadero. I did not hear any such remark." Carl testified that the deed was signed by appellant without any representations being made to him; that "he came to sign that document by me asking him to in my office at Pescadero." There were two deeds offered in evidence procured in substantially the same way, and some four or five leases. The leases were obtained by stating, or leaving appellant to infer, that they were of property claimed by him to be within the calls of his grant. These instruments were procured in nearly every case at the instance of Carl, without any explanation to the old man as to the description. We think it is sufficient to say that they were procured by one in whom appellant had confidence and who held his power of attorney. Azro testified that the papers, deeds, and leases were all procured for the purpose of being used in these proceedings. In his own language he said: "It was contemplated, if we could get sufficient evidence that he had done something that was detrimental to his own property, or liable to, then there might be grounds for this proceeding. It seems to me the power of attorney was almost sufficient; but at the same time I wanted to have sufficient evidence. I wanted to be sure, not that Mr. Coburn could escape these proceedings, but I wanted to be sure and prove to the court that he was incompetent; that he might be likely to be influenced by some designing person." And Carl testified to the same effect. He said:

"All of these papers were prepared in contemplation of proceedings of this character, just as testified to by Mr. Azro Coburn, and also to please Mr. Coburn. Mr. Coburn was not satisfied unless somebody would agree to take a lease, and acknowledge his authority over that grant, and I saw no harm in doing so; that is, so far as this lease to Dr. Banks and Mr. Perry were concerned—simply to satisfy him."

Not only was Carl Coburn the attorney in fact of the old man, but he admits that he was friendly with him, pretending to advise and assist, while in fact consulting with Azro and his attorneys in the initiation of proceedings hostile to him, and preparing the deeds and procuring the signatures thereto for evidence. He not only advised appellant, but assisted him in getting witnesses for the trial, not even intimating that he was using all his endeavors to have his uncle adjudged incompetent, and to be appointed guardian. If appellant was mentally incompetent, Carl should at least have been honest and fair with him, and not have resorted to deception for the purpose of procuring evidence. These deeds and leases were prepared from January 30 to February 6, 1908, at least seven of them within a period of seven days. The petition to have a guardian appointed was filed on the 8th day of February, 1908, and the trial commenced on the 15th. Azro Coburn thus procured sufficient evidence within a week to satisfy himself that his uncle was incompetent, not based upon evidence of what occurred before he came to California, but based upon evidence of acts done within the week. Surely if appellant was mentally insane on the 1st day of February, 1908, ample evidence could have been procured among his neighbors in the community where he had spent nearly all his life. In our opinion the mere signing of these deeds and leases, if true, is not sufficient to show mental incompetency; and it may further be remarked that appellant denies that he ever signed them. We do not attach any great importance to the testimony of Carl Coburn to the effect that appellant wanted him to raise quite a sum of money to be used in part in bribing certain judges. Appellant denies that he ever made such a request or even intimated it. It does not appear that such bribes were ever offered or attempted, and the fact, if true, would not of itself be sufficient to show mental unsoundness. Carl, according to his own evidence, agreed to take part in the contemplated bribing, and it does not appear that he ever protested or even suggested that it would be wrong.

We therefore may eliminate from the case the acts as to the Gazos Creek litigation, in which the appellant had the best judgment of them all; the signing of the deeds and leases without explanation to him by his attorney in fact, who had been a witness against him nine years ago in a similar proceeding, and who deceived him by pretending to be his friend; the claim to lands north of Pescadero, which claim, even if not well founded, was a harmless delusion. Then what is the evidence of the mental unsoundness of appellant? No physician or alienist was called by petitioner, nor did he have any medical examination made of appellant. Dr. Banks testified that in his opinion appellant was "not competent to manage his own business"; but he said nothing as to his "mental sanity," and not only this, but it appeared from his evidence that his acquaintance was what he called a "mere casual one." He further testified that his opinion was based to a great extent upon the signing of a lease by appellant to himself. Dr. Banks, upon consultation with Carl and Azro Coburn, paid appellant $5 for one month's rent, and agreed to continue to pay $5 per month for a lot which appellant claimed to be within his boundaries. In cross-examination he said: "I cannot recall one instance that I know of by observation in which Mr. Coburn has been gotten the best of."

E. B. Gayety, a witness for petitioner, when asked whether he regarded appellant as a man who is competent to manage his own affairs, replied: "Sometimes I do; sometimes I do not." In cross-examination he said, in speaking of appellant: "He gives his own personal attention to that, and makes his own leases with his tenants, and collects his own rents. * * * The conditions were very binding upon the tenants. I should judge they were what I used to term when I made leases an 'iron-clad lease.' Mr. Coburn in those leases has safeguarded his interests in every imaginable way. * * * In one sense of the word he is a very careful business man in his dealings there with his tenants and in other business transactions."

N. J. Perry testified that he had known appellant off and on for 12 years. He did not pretend to be an intimate acquaintance, or testify as to his mental sanity. In cross-examination he said: That he could not state that appellant is in such a condition physically that he is not able to take care of himself. That appellant "has a great deal of property over there, a great many tenants, makes a great many leases, has a great deal of rent to collect at different times. He drives around, sometimes the old man Upton with him, and at other times I think Miss Upton goes out with him. * * * I have said before, in the way that Mr. Coburn has expressed himself to me, I believe that he is lacking in vitality, that is all."

Manuel Goulart testified that he had known appellant since 1882, and in his opinion appellant was not competent to manage his property. In cross-examination he said, however: "All the business that I have done has been with Mr. Coburn. I have leased some land from him. I leased land last year from him, and had my dealings with him direct. I found him able at that time to transact the business with me. * * * The business was transacted satisfactorily to both sides; that is, I leased some land, and we agreed upon the rental, and Mr. Coburn agreed upon the amount I should pay. I rented a ranch for cash rent, and another piece of land I had on shares."

Gehiel Coburn, a brother 10 years younger than appellant, testified that in his opinion appellant was not competent to manage his business. It appeared, however, in cross-examination, that the witness had sawed wood for appellant; but evidently the alleged incompetent was the one who could pay the unsuccessful witness for sawing wood. This witness admitted that he took part in trying to have a guardian appointed for appellant some nine years ago. He further testified: "I then testified that Mr. Coburn was incompetent. The result was that he was proven not incompetent. * * * So far as Mr. Loren Coburn's ability to get about is concerned, he is about as active and spry now as he was eight or nine years ago. He appears to be around. I only see him occasionally you know, I notice no material difference so far as his being able to get about is concerned; only he goes a little lame more than he used to, bent over. * * * As to his habits of living, Mr. Coburn, I don't know that he dissipates. I don't think that he uses intoxicating liquors. * * * He does not use tobacco in any form. I think he leads a regular life so far as that is concerned. He has no bad habits of any kind that he needs the appointment of a guardian for."

This presents the substance of all the evidence offered by petitioner as to mental incompetency. There is nothing to show that appellant is incapable of taking care of himself. There is but the mere opinion of a few witnesses as to appellant being incompetent to take care of his property, and these opinions are worthless because not based upon any facts or reasons. On the other hand, appellant presented the evidence of many of his neighbors as to his mental and physical competency. We have not space to give even a synopsis of that testimony, but that of James Moffitt, the cashier of the First National Bank of San Francisco, is a sample. Mr. Moffitt testified: "I know Loren Coburn of Pescadero; have known him seven or eight years. He is a patron of our bank. He has been such for approximately that time, a little more or less. I have known him in connection with the bank during that time, during which time I have frequently met him in business. * * * I don't know his age exactly. I suppose generally he must be well over the 70-year term, and he always struck me as a man of remarkable physical strength. I have had business relations with him concerning his affairs and his relations to the bank, and have had an opportunity during those business operations of forming an opinion as to whether he was mentally competent. My opinion with reference to his competency or otherwise, as the management of his own affairs is, that he is absolutely competent. I think he is as well competent to manage his own affairs and look after his side of the bargain as any one I have come in contact with in the bank for the last 10 or 15 years; that is, that he can take care of his side of the bargain."

Dr. Robertson, a physician of standing and an alienist of experience, carefully examined appellant, and testified as to his health, both mental and physical, as follows: "Mr. Coburn, so far as I could judge, is an absolutely healthy man. * * * I could hardly believe that a man 82 years old could have the apparent physical vigor that this man does. For instance, upon handing him a paper to read, I found he didn't use glasses at all. I am barely turned 50, and yet I find glasses an absolute necessity. I find his hearing in good condition. I found his heart in normal position and condition. I found no evidence of any change of circulation in the brain such as we expect to find in a man over 50. As a matter of fact, in nothing that I examined, in no statement that he made to me, did I find anything other than a normal individual, either mentally or physically. * * * Mr. Coburn's whole life has been one of money, the acquisition of money, the handling of money and distribution of money, all in the world that he thinks of apparently—his one ambition in life is to acquire money, to hold property, and to fight for what he believes is right. He has a keen sense of justice apparently, at least justice so far as it relates to him and other people. He told me, for instance, if he was deprived of his rights, and had to go to any guardian, and wanted a four-bid meal, and he handed him two bits, and told him to get a dinner with that—the old man held out his hands in horror, expressing absolute disgust."

The appellant took the stand in his own behalf, and there is nothing in his long examination that even tends to show mental incompetency. No one could read the testimony without being impressed with his keen grasp of business details. Part of his testimony is as follows: "I pay my bills. I deal altogether in cash. No long tails about it. If I go to a man in Pescadero and get anything from the grocery, $2.50, 'here is your change, give me a receipt for it.' And if I have men working for me, I propose to pay them off every month, so as not to have any back arrangements, and, if there is any entanglement or anything, we have to refer back only one month. I haven't got no partners. I ain't in any stock because I have got all the stock in my corporation myself. * * * Well I go to bed from 8 to 9 o'clock. I have no chance—no use for this off to theaters and gambling places, and taking a drink and having a great time. I never do anything of that kind. When I get through my work at night, I go into my house. I have a fireplace, and build a fire, sit down, warm my feet, rest myself up, and about 8 or 9 o'clock I go to bed. Sometimes it overruns that, when I have something quite particular to attend to, and I don't get to bed until 10 or 8 or 9; but as a general rule I go to bed about half past 8 or 9, and get up in the morning from 6 to 7, and when I am up around I have something to attend to, and the folks that know me they know that I am out around attending to business." His description of meeting Azro Coburn at the Jefferson Hotel in San Francisco is as follows: "He wanted me to go up and see him. I went up there and saw him a few minutes, and he commenced to talk about my property, and I thought that was queer about his talking about my property. I thought he had better take care of his own property at home, and I was competent to take care of my own property—to come about 3,000 miles to take care of my property. I said, 'What is the matter with you?' 'Well', he said, 'I will tell you, you are in litigation over some timber land here.' 'Well,' I said, 'what of it?' 'Well,' he said, 'don't you think you had better seek a compromise and settle up?' 'Well,' I said, 'I haven't got nothing to compromise.' 'Well,' he said, 'I think you had better. They may beat you,' and all that. I said: 'I don't know how they are going to beat me. They have no cause of action.'"

We are fully aware that an appellate court will not reverse a finding if there is a substantial conflict in the evidence; but the evidence, in order to raise a conflict, must be such as to present a fair and reasonable ground for a difference of opinion. The finding or verdict must have meritorious support in the evidence. A few general statements without substantial reasons are not sufficient to raise a conflict. Smith v. Belshaw, 89 Cal. 427, 26 Pac. 834; Field v. Shorb, 99 Cal. 662, 34 Pac. 504. In the latter case it was sought to have a gift of personal property set aside at the suit of an administrator, on the ground that the decedent, at the time of making the transfer, was of unsound mind, and the jury found that the mind of the decedent was sound up to within three days of the making of the transfer, and from that time on was unsound. The court held that the finding of the jury as to unsoundness of mind at the date of the transfer was without sufficient support in the evidence, and therefore set the verdict aside.

The court erred in allowing several witnesses to testify, under the objections and exceptions of appellant, as to their opinions as to "the ability of appellant to manage his property," and "as to whether or not in their opinions he was likely to be imposed upon by designing parties." The opinions of the witnesses upon these questions and as to these matters were clearly inadmissible. The Code provides (Code Civ. Proc. § 1870, subd. 10) that evidence may be given upon the trial of the following facts: "The opinion of a subscribing witness to a writing, the validity of which is in dispute, respecting the mental sanity of the signer, and the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason for the opinion being given." And in such case the reasons upon which the opinion is based must be given, and the opinion itself can have no weight other than that which the reason brings to its support. Estate of Dolbeer, 149 Cal. 227, 86 Pac. 695.

The opinion as to the mental sanity of a person is one thing. His opinion as to whether or not he is competent to properly attend to his business, or whether he is likely to be imposed upon, is quite another and different thing. Shapter v. Pillar, 28 Colo. 209, 63 Pac. 302. It was there said: "Applying these rules, it is manifest that the opinions of the witnesses regarding the incapability of the plaintiff in error to manage and control his own business affairs should have been excluded. Those who had seen and conversed with him could properly give their opinion on the question of his insanity; but the vital one, i. e., the degree of his mental incapacity in that account, and the extent to which he may have been incapacitated thereby from managing his business, the jury should have determined from all the evidence on the subject. It was not a question which required peculiar skill or knowledge to comprehend. It was one which men of ordinary, average intelligence, after being acquainted with the hallucinations, if any, of plaintiff in error, his acts and thoughts prompted thereby, could ascertain for themselves, based upon their own experience and observations."

In the Estate of Taylor, 92 Cal. 564, 28 Pac. 603, it was held that the opinion of a witness as to the capacity of a testator to make a will was not admissible; the court holding that such opinion was quite different from an opinion as to mental sanity.

The orders are reversed.

HALL, J. I concur in the judgment, but am unable to agree with what is said in the opinion of the presiding justice as to the insufficiency of the evidence to support the finding that appellant "is incapable of taking care of himself and managing his property." The evidence upon this point is not as satisfactory as it might be, and if the members of this court were sitting as trial judges it is quite possible or even probable that we would not have come to the same conclusion as to the ultimate facts as that arrived at by the trial court; but this is not the test applied in this court upon an appeal. If the findings attacked are supported by any substantial evidence, the findings of the trial court are conclusive upon this court.

I agree with what the presiding justice has said in regard to the action of the trial court in allowing witnesses to give their opinions as to whether or not appellant had the ability to manage his property. By this testimony witnesses were allowed, in effect, to give their opinions upon the general merits of the case and as to the question directly in issue. This may not be done. Wilson v. Reedy, 33 Minn. 503, 24 N. W. 191; McDonald v. State, 127 N. Y. 18, 27 N. E. 358; Blum v. Manhattan Ry. Co., 1 Misc. Rep. 119, 20 N. Y. Supp. 722; Davis v. Fuller, 12 Vt. 178, 36 Am. Dec. 334; Marcy v. Sun Mut. Ins. Co., 11 La. Ann. 748; Hoener v. Kock, 84 Ill. 408; Muldowney v. Ill. Cent. Ry. Co., 39 Iowa, 615; White v. Bailey, 10 Mich. 155.

KERRIGAN, J. I concur in what is said by Justice HALL.

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11 Cal. App. 622

MacLEOD v. MORAN. (Civ. 644.)

(Court of Appeal, Third District, California. Oct. 29, 1909.)

1. APPEAL AND ERROR (§ 1099*)—DETERMINATION—LAW OF CASE—DECISION OF FORMER APPEAL.

A decision of the Supreme Court on a former appeal as to the effect of a trust deed is binding upon the appellate court on a subsequent appeal of the case to it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4373; Dec. Dig. § 1099.*]

2. PARTIES (§ 80*)—NONJOINDER—PURPOSE—MANNER OF RAISING OBJECTION—DEMURRER.

Under Code Civ. Proc. § 430, permitting a defendant to demur to the complaint when it shows upon its face a defect in parties plaintiff, defendant should have objected to the nonjoinder of the husband, in an action by a married woman, by demurrer to the complaint, and not by motion to make the husband a party.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 123; Dec. Dig. § 80.*]

3. HUSBAND AND WIFE (§ 221*)—ACTIONS BY WIFE—JOINDER OF HUSBAND.

Under Code Civ. Proc. § 370, requiring the husband to be joined with a married woman when she is a party, except when the action concerns her right or claim to the homestead property the wife could sue alone in an action to quiet title to property claimed as a homestead, and she need not establish a valid homestead right before suing.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 802; Dec. Dig. § 221.*]

4. HOMESTEAD (§ 38*)—SELECTION BY WIFE—VALUE OF PROPERTY.

Civ. Code, § 1260, permits homesteads to be selected, not to exceed $5,000 in value by any head of a family, or not to exceed $1,000 in value by any other person. Section 1262 provides that, to select a homestead, the husband, or other head of a family, or, in case he has not made such selection, the wife, must execute and acknowledge a declaration of a homestead; and section 1263 requires that the declaration show that the one making it is the head of a family, or, when made by the wife, that her husband has not made such declaration, and that she makes it for their joint benefit. *Held* that, where the husband as head of a family has not selected a homestead, the wife may, for their joint benefit, make the same selection that he could have made, and hence could select property of the value of $5,000.

[Ed. Note.—For other cases, see Homestead, Dec. Dig. § 38.*]

5. EVIDENCE (§ 448*)—PAROL EVIDENCE—EXPLAINING DEED—UNAMBIGUOUS DEED.

Code Civ. Proc. § 1856, authorizing other evidence of the circumstances under which a deed was made as defined in section 1860, or to explain an intrinsic ambiguity, and section 1860, permitting the circumstances under which an instrument, including a deed, was made to be shown to assist the judge in its proper construction, are not applicable to the construction of a trust deed where it was unambiguous, so that parol evidence to explain or contradict it would not be admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2068; Dec. Dig. § 448.*]

Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Action by Emma J. MacLeod against Joe Moran. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

See, also, 153 Cal. 97, 94 Pac. 604.

R. L. Beardslee and O. B. Parkinson, for appellant. J. A. Plummer, for respondent.

HART, J. The purpose of this action is to obtain a decree canceling and annulling certain deeds, together with the records thereof, purporting to convey certain real property situated in the county of San Joaquin, and to quiet plaintiff's title to said property. Plaintiff was given judgment, and this appeal is brought here by the defendant from said judgment and the order denying his motion for a new trial.

This is the second trial of the cause, the judgment rendered and entered at the first trial having been reversed on appeal by the Supreme Court and the cause returned to the court below for retrial. McLeod v. Moran, 153 Cal. 97, 94 Pac. 604. In the language of the opinion of the Supreme Court on that appeal, written by Mr. Justice Angellotti, we present the facts as follows: "The real property involved was community property, having been acquired by plaintiff's husband, A. K. MacLeod, after their marriage and by their joint efforts, and was their family home. It was regularly selected as a homestead by plaintiff on May 3, 1902. In January, 1904, the deed of trust was executed and acknowledged by plaintiff and her husband, and recorded in the office of the county recorder. By this instrument, the husband and wife purported to grant, bargain, sell, etc., the land in question to M. L. Sims and C. L. Flack in trust, as security for the payment of $450 with interest to one Mary E. Sims. The trust deed was in the form ordinarily used for such instruments when given as security for the payment of a debt, authorizing the trustees, among other things, to sell the property at public auction in the event of default in the payment of principal or interest, to execute and deliver a deed on such sale, and to appropriate such portion of the proceeds of sale as was necessary to the payment of the debt and costs. It was provided therein that if the makers of the deed paid at maturity all sums secured thereby, the trustees 'shall reconvey all the estate in the premises aforesaid to them by this instrument granted unto the said A. K. MacLeod, or his assigns, at his request and cost.' Immediately following the description by metes and bounds of the property conveyed was the following: 'And also all the estate, interest, claim and demand, as well in law as in equity, which the said parties of the first part may have or may hereafter acquire of, in and to the said premises, with the appurtenances, hereby expressly abandoning all right of homestead in and to said premises.' On March 23, 1904, there was executed and acknowledged by the trustees and recorded a reconveyance of the property to said A. K. MacLeod, it being recited therein that all the indebtedness secured by the deed of trust had been paid. On the same day said A. K. MacLeod executed and delivered a deed of conveyance purporting to convey the property to one Edward Studivan, but plaintiff did not join therein. Subsequently Studivan executed and delivered to defendant Joe Moran a quitclaim deed of the property."

The only point involved and decided in the first appeal was whether the trust deed referred to constituted an abandonment of the homestead regularly selected by plaintiff prior to the execution of said trust deed in accordance with the terms of the several sections of the Civil Code relating to the subject of the selection and abandonment of homesteads. The court held that the effect of said trust deed "amounted to nothing more than an express abandonment to the trustees, for the purposes of the trust, of all claim of homestead," and that upon the payment of the debt, to secure which the trust deed was executed, the trustors were restored to all the estate with which the property was impressed at the time of the execution of said deed. The decision of the point by the Supreme Court adversely to the contention of appellant with regard to the effect of the provisions of the trust deed upon the homestead declared and recorded by plaintiff before the execution of said deed, necessarily eliminates that question as a subject of discussion here. But there are some additional points presented on this appeal.

1. It is claimed that the court erred to the prejudice of the defendant in refusing to grant his motion to restore A. K. MacLeod, husband of plaintiff, as a party defendant to the action. It appears that, at the first trial, MacLeod was made a defendant, but that the court dismissed the action as to him. There is nothing in the pleadings showing that MacLeod was and is a necessary party defendant. But counsel for the defendant make the point here that the motion should have been granted because the plaintiff, as they contend, is without authority to sue without joining her husband as plaintiff. The complaint discloses the relationship between the plaintiff and MacLeod to be that of husband and wife, and if appellant desired to make the point here contended for in the court below he should have done so by demurrer. Code Civ. Proc. § 430. Assuming, however, that he could accomplish the same object by a motion, he failed to proceed properly, for he only asked that MacLeod be made a defendant. But the point is untenable in any event. Section 370 of the Code of Civil Procedure provides that "when a married woman is a party, her husband must be joined with her, except: (1) When the action concerns her separate property, or her right or claim to the homestead property, she may sue alone."

The contention of the appellant is that this is not an action involving a right or claim to the homestead; but that it is "an action to determine whether or not the property is impressed with a valid homestead." The suggested distinction is one without a difference, so far as plaintiff's right to sue alone is concerned. The action here is one to quiet plaintiff's homestead title to the property involved. The mere fact that the defendant tendered an issue challenging the validity of plaintiff's claim to a homestead title does not render the action any the less one concerning her "right or claim to homestead property." But counsel go so far as to declare that before the wife can sue alone it must first be "established that there is or was a valid homestead." There is nothing in the language of section 370 of the Code of Civil Procedure which furnishes the slightest ground for such a construction. Manifestly, it is essential, in an action of this character by the wife, that it be shown that the land involved is covered by a valid declaration of homestead, otherwise a cause of action is not stated. But in such case, while a demurrer to the complaint for want of sufficient facts would be sustained, it could not be doubted that the wife was authorized to sue alone, it appearing that the action concerned her right or claim to homestead property. The right of the wife to a homestead is given to her by the provisions of the Civil Code, while section 370 of the Code of Civil Procedure invests her with the right to sue alone in an action involving or concerning her homestead right or claim. In other words, the right to a homestead resides in her whether she exercises the right or not, but if she does exercise it, or, attempting to do so, fails because of the omission to observe some of the requirements and formalities prescribed by law and essential to a valid accomplishment of that purpose, she is, nevertheless, entitled to sue alone in an action concerning her right or claim to homestead property. As before stated, her complaint might be bad because of a failure to state a cause of action, but that fact cannot take from her or impair her right, given by the statute, to sue alone in such action. These views are not in conflict, but we think fully harmonize, with the cases in this state. See Tappendorff v. Moranda, 134 Cal. 421, 66 Pac. 491; Hart v. Church, 126 Cal. 471, 58 Pac. 910, 59 Pac. 296, 77 Am. St. Rep. 195; Prey v. Stanley, 110 Cal. 423, 42 Pac. 908; Mauldin v. Cox, 67 Cal. 390, 7 Pac. 804. But the complaint here states a cause of action, entitling plaintiff to the relief prayed for in the absence of a countershowing sufficient to overcome its claims.

2. Appellant makes the point that the homestead is invalid for the reason that it appears on the face of the declaration that the property sought to be so impressed exceeds in value the sum of $1,000. The point arises on the ruling of the court excluding as evidence the declaration of homestead, which was offered by appellant to show the value of the homestead to be in excess of $1,000. Section 1260 of the Civil Code provides: "Homesteads may be selected and claimed: (1) Of not exceeding five thousand dollars in value by any head of a family; (2) of not exceeding one thousand dollars in value by any other person." The value of the property involved here, as designated in the declaration of homestead, is $1,500. The argument is that the wife is not the "head of a family" within the meaning of that phrase as used by the code section; hence she was not authorized to cover property exceeding the sum of $1,000 in value with a homestead. The homestead declaration filed by the plaintiff states, as is required by the law, that the declaration is made "for the joint benefit of myself and husband," further declaring that plaintiff's husband has not made a declaration of homestead. We have been pointed to no case which holds that the wife, in exercising her homestead rights under such circumstances, is limited by the law to the appropriation for that purpose of property not exceeding in value the sum of $1,000. And we think that no such conclusion can be deduced from a reasonable construction of the code sections appertaining to the subject of homesteads.

Section 1262 of the Civil Code reads: "In order to select a homestead, the husband or other head of a family, or in case the husband has not made such selection, the wife must execute and acknowledge, in the same manner as a grant of real property is acknowledged, a declaration of homestead, and file the same for record."

Section 1263 of said Code provides that it must appear from the declaration of homestead that the person making it is the head of a family, or, when the declaration is made by the wife, it must contain a statement "showing that her husband has not made such declaration, and that she therefore makes the declaration for their joint benefit."

The language of the foregoing sections is not so obscure as to render their meaning doubtful or to becloud the evident object the Legislature had in view when enacting them. Section 1262, it seems to us, is very clear upon the proposition that the Legislature intended by said section to provide for the wife and children against the contingency which would arise by reason of the neglect or refusal of the husband, as the head of the family, to take advantage of the homestead laws, which were enacted as well for the benefit of the wife and children as of the husband. The distinction made by the Legislature between the two classes of persons entitled to homestead exemption is, it is very clear, based upon the fact that upon those of the one class there are others depending for support and maintenance, while those of the other class have no such responsibilities. But, aside from the reasons which give rise to homestead laws and to the division of those entitled to the benefits thereof into two classes, it may again be suggested that the language of section 1262 could hardly be made plainer, upon the proposition that it was the intention of the Legislature that where the husband, as the head of the family, has not made "such selection" the wife herself may make the very same selection. This obviously correct construction of said section is strengthened, if, indeed, the construction needs fortification, by the provision of section 1263, that where the wife makes the selection the declaration must contain a statement "showing that her husband has not made such declaration, and that she, therefore, makes the declaration for their joint benefit." In other words, the section in effect provides that, the husband having neglected or refused to make the selection which he was entitled to make as the head of the family, his wife may make the identical selection for him for their joint benefit. No reason can be suggested why the Legislature, in authorizing the wife to make a homestead selection where the husband fails or refuses to do so, intended to confine her, in the exercise of the right, to a homestead to which those only would be entitled who select, not for the protection of a family, but for their own individual benefit.

The case of Reid v. Englehart, 126 Cal. 527, 58 Pac. 1063, 77 Am. St. Rep. 206, cited by appellant in support of his position, does not hold that the homestead selected by the wife in lieu of a selection by the husband, where the latter fails to make such selection, must be limited in value to $1,000, nor is there even any intimation in the opinion in that case that such is the law. The declaration of homestead was there declared to be void because it did not appear on the face thereof that all the essential formalities and conditions had been complied with in the attempted exercise of the right to select a homestead. There was no statement in said declaration indicating or showing that the party filing it was the "head of a family."

The court, among other things, said: "Although it is stated that the claimant is married, it does not appear whether the person who made this statement is husband or wife. * * * If 'R. M. Reid' be the wife, the declaration is defective in not showing that her husband had not previously made the declaration. If that be the name of the husband, the declaration is defective in not 'showing' that he is the head of a family." The foregoing is the substance of all that is decided in that case, and if any inference may be drawn from the language as to the opinion of the court upon the question of the value of the homestead which the wife is entitled to select in the place of her husband, who has neglected or refused to make a selection, it is that the homestead thus selected may be of the value of $5,000. There is no claim here that all the essential requirements of the statute, apart from value, have not been observed. Nor could any such claim be sustained, for the declaration, as seen, shows that the plaintiff is a married woman; that her husband has not made a selection, and that her selection is made for the joint benefit of herself and husband. The ruling of the court against the admission of the declaration of homestead for the purpose stated was not erroneous.

3. It is next urged that the court erred by its refusal to permit the defendant to amend his answer during the course of the trial. The substance of the proposed amendments was (adopting the language of counsel for the appellant used in their brief) "that said plaintiff and her said husband then and there agree (at the time of the execution and delivery of the trust deed) in and by such instrument and the provisions therein contained, did intend to forever abandon said homestead." The manifest object of the proposed amendments was to open the door for the introduction of parol proof of the intention of the plaintiff and her husband with respect to the effect of the trust deed upon their homestead. In fact, counsel offered to prove that the party from whom was borrowed the money to secure repayment of which the deed was made and delivered, declared at the time of the execution of the instrument that she would not make the loan unless plaintiff and her husband abandoned for all time the homestead, and that, thereupon, the latter did declare their intention of so doing and executed said deed with that intention.

In support of their contention upon the point under consideration, counsel invoke sections 1856 and 1860 of the Code of Civil Procedure and certain sections of the Civil Code involving rules for the construction and interpretation of written instruments and contracts. These sections of the Codes have no application here. The deed of trust is unambiguous, and speaks plainly for itself. Besides, the opinion of the Supreme Court in this cause (McLeod v. Moran, 153 Cal. 97, 94 Pac. 604, supra) conclusively answers the contention. There, as we have shown, the court very clearly construes the effect of the instrument upon the homestead rights of the plaintiff, and holds that the deed of trust affected the homestead only to the extent that it expressly abandoned "all right of homestead in and to said premises" to the trustees, for the purposes of the trust, and that the purposes of the trust having been accomplished and the title of the trustees having ceased, upon the payment of the debt to secure which the trust was created, the whole title was thus left "in the grantor in whom it was vested at the execution of the trust deed." The court's ruling disallowing the proposed amendments to the answer was proper, as were also its rulings excluding testimony offered for the purpose of showing that, contemporaneously with the execution of the trust deed, the plaintiff declared, orally, to the party with whom she negotiated the loan, that, by the trust deed, she intended to forever abandon the homestead on the premises in dispute. Of course, the party from whom the money was borrowed naturally desired that the title to the entire estate should be conveyed to the trustees so that her security for the return of her money would in no degree be impaired, and this is exactly what they received under the deed. In other words, as to the trustees, the homestead was abandoned, and this was all that was required and effected for the purposes of the trust.

We have noticed all the points presented on this appeal, and are unable to discover any tenable reason for interfering with the conclusions reached upon the legal propositions involved by the trial court.

The judgment and order appealed from are accordingly affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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11 Cal. App. 643

BERGEVIN et al. v. WOOD, Judge of the Superior Court, et al. (Civ. 675.)

(Court of Appeal, Third District, California. Nov. 1, 1909.)

1. Certiorari (§ 28*) — Grounds — Judicial Proceedings—Want of Jurisdiction.

If it appeared on the hearing of a motion to dismiss an appeal to the superior court that no sufficient appeal bond was filed, as required by statute, the court would have no jurisdiction of the appeal, and should dismiss it; and its refusal to do so would be reviewable by a writ of review, under Code Civ. Proc. § 1074, providing that review thereunder cannot extend further than to determine whether an inferior court has regularly pursued its authority.

[Ed. Note.—For other cases, see Certiorari, Dec. Dig. § 28.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. CERTIORARI (§ 28*) — GROUNDS — WANT OF JURISDICTION — CONCLUSIVENESS OF PROCEEDINGS.

The inferior court's determination of its jurisdiction is only binding on review by writ of review, where it is based upon disputed facts, or a natural inference from the acts of the parties and proceedings taken.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 41; Dec. Dig. § 28.*]

3. APPEAL AND ERROR (§ 377*)—APPEAL BOND—SUFFICIENCY—SEVERAL APPELLANTS.

An undertaking on appeal to the superior court by a corporation and an individual defendant recited that, in consideration of the appeal and a stay of proceedings, the surety acknowledged itself bound in a certain sum, and promised, on the part of said appellant, that said appellant would pay the amount of any judgment and all costs recovered against him in the superior court. *Held*, that the surety only bound itself to answer for a judgment against the individual appellant so that the appeal was properly dismissed as to the corporation.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 377.*]

4. PRINCIPAL AND SURETY (§ 59*)—CONSTRUCTION OF CONTRACT—STRICT CONSTRUCTION.

Sureties may rely upon the strict terms of their obligation.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 103; Dec. Dig. § 59.*]

5. BONDS (§ 50*) — STATUTORY BONDS — CONSTRUCTION.

The meaning of an appeal bond should be determined from its language, and not by the application of Code Civ. Proc. § 17, relating to the meaning of words used in the Code.

[Ed. Note.—For other cases, see Bonds, Dec. Dig. § 50.*]

6. APPEAL AND ERROR (§ 391*)—APPEAL BOND—NEW UNDERTAKING.

Appellant could not file a new appeal bond in the superior court, after the appeal had been dismissed, because of the insufficiency of the appeal bond filed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2077, 2088; Dec. Dig. § 391.*]

7. CERTIORARI (§ 69*)—PURPOSE OF WRIT.

Even if a writ of review could be used as a mandate, the appellate court could not thereby direct the lower court to act beyond its jurisdiction.

[Ed. Note.—For other cases, see Certiorari, Dec. Dig. § 69.*]

Application for writ of review by A. M. Bergevin and another against Fred V. Wood, as Judge of the Superior Court of the County of Amador, and said Superior Court. Writ denied.

M. C. Hassett, for petitioners. Wm. J. McGee, for respondents.

BURNETT, J. This is an application for a writ of review occasioned by the dismissal of the appeal of the said A. M. Bergevin & Co. from a certain judgment of the justice court of township No. 1 in said Amador county. The order of dismissal was based upon the ground of the insufficiency of the bond on appeal.

It is not claimed that the proceedings of the superior court up to the time of said dismissal were in any respect irregular, but the contention is that the court, in holding that the bond was insufficient, exceeded its jurisdiction, or, in other words, did not "regularly pursue" its authority within the meaning of section 1074 of the Code of Civil Procedure, providing that: "The review upon this writ cannot be extended further than to determine whether the inferior tribunal, board or officer has regularly pursued the authority of such tribunal, board or officer." What constitutes a departure by a court from the regular pursuit of its authority is often difficult to determine, although the decisions of our Supreme Court would seem to leave no doubt as to what should be the conclusion here.

In Buckley v. Superior Court, 96 Cal. 120, 31 Pac. 8, it is said: "It will be noticed that the foundation of the writ is essentially and necessarily an excess of jurisdiction; for no act of tribunal, board, or officer exercising judicial functions, done or made within its jurisdiction, can ever be the subject of attack by writ of review. In the matter now before us it is apparent that the court had jurisdiction of the subject-matter and of the persons; all the parties were before the court; the appeal was regularly taken; and we are at a loss to understand why the court had not the same jurisdiction to hear a motion to dismiss the appeal as it had to proceed to a trial of the cause upon its merits. If it had jurisdiction to hear the motion, and as to that matter there can be no question, then its ruling upon the motion was simply an exercise of that jurisdiction, and, however erroneous such ruling might be, it would only be an error of law in no manner subject to review by an original proceeding in this court. In this case the court had jurisdiction to hear the matter, and it would be an absurdity to say that upon the submission of the matter the court had jurisdiction to deny the motion to dismiss the appeal, but no jurisdiction to grant it. As was said in Central Pacific R. R. Co. v. Placer County, 46 Cal. 670: 'It has been settled by a long series of decisions in this state that a writ of certiorari brings up for review only the question whether the inferior officer, court, or tribunal has exceeded its jurisdiction, and cannot be used as a mere writ of error for the correction of mistakes, either in law or fact, committed by the inferior tribunal within the limits of its jurisdiction.'" The doctrine of the Buckley Case is undoubtedly liable to be pressed so far as to virtually destroy the operation of the writ of review in relation to the proceedings of the superior court. It seems to be held there that said court has the power to determine its own jurisdiction, at least in cases of appeal from the justice court. If so in a case where an appeal from the justice court is pending in the superior court, and a motion is regularly made to dismiss the appeal. and it appears on the hearing of the motion that no undertaking whatever has been given, since the court has the power to hold—erroneously, it may be admitted—that no undertaking is required, or contrary to the fact that a sufficient one has been furnished, it would be no excess of jurisdiction for the court to deny the motion to dismiss the appeal. But seemingly there is a marked distinction between the jurisdiction to hear a motion to dismiss an appeal and the jurisdiction to try the cause. If the motion is regularly made to dismiss, no doubt the court has jurisdiction to determine it; but, if it should appear upon the hearing of the motion that the court has no jurisdiction to try the cause, it is difficult to understand how it would have any authority to deny the motion and retain the case for trial.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Here there is no possible doubt that the superior court had authority to hear the motion, but its jurisdiction to try the case depends upon the question whether there was an undertaking on appeal. If there was no such undertaking as the statute provides, it had no jurisdiction of the case, and therefore in the lawful exercise of its authority the only course to pursue was to dismiss the appeal. If there was such an undertaking, it not only had complete jurisdiction of the cause, but it could not divest itself of said jurisdiction by dismissing the appeal. If the court has the power to determine its jurisdiction, it would follow that whether there is or is not an undertaking, the court may have jurisdiction either to try or not to try the cause. The truth is, undoubtedly, that where it is implied or expressly declared that the court determines its own jurisdiction beyond the reach of the writ of review, it must be accepted with the qualification that, where it is based upon disputed facts, or upon a rational inference from the acts of the parties and the proceedings taken, the court's determination of its jurisdiction is binding upon a reviewing tribunal in a proceeding of this kind.

In the case at bar, the court dismissed the appeal for the reason stated that the surety (the American Surety Company of New York) had bound itself to answer for only one of the appellants; "that as a surety was entitled to stand upon the precise terms of his contract, to hold that the surety company was liable for both defendants was to read something into the contract that had not been assented to by the surety." It appears also by the return of respondent that counsel for appellants at the argument of the motion to dismiss the appeal, expressed a grave doubt as to the sufficiency of the undertaking. This doubt is amply justified by the language used, which, as far as necessary to quote, is as follows: "Whereas, the said defendants are dissatisfied with the said judgment and are desirous of appealing therefrom to the superior court of the county of Amador, and pending such appeal, claim a stay of proceedings and are desirous of staying the execution of the said judgment so rendered as aforesaid; now, therefore, in consideration of the premises, of such appeal and of such stay of proceedings and execution, all as aforesaid, we, the undersigned American Surety Company of New York * * * as surety so hereby undertake and acknowledge ourselves bound in the sum of five hundred and thirty-four dollars (being twice the amount of the said judgment including costs) and promise on the part of said appellant that the said appellant will pay the amount of the said judgment so appealed from and all costs, if the appeal is withdrawn or dismissed, or the amount of any judgment and all costs that may be recovered against him in the action in the said superior court." It cannot be said to be an unwarranted construction of the foregoing instrument to hold that the surety bound itself to answer for a judgment against appellant Bergevin and not against Bergevin & Co. At least, the undertaking is so uncertain in that respect that the court did not exceed its jurisdiction in dismissing the appeal as to the appellant company.

In Commercial Bank v. Wells, 5 Cal. App. 474, 90 Pac. 981, the appeal was from the judgment and from an order denying a new trial. As stated by the court: "The only undertaking filed was conditioned to 'pay all costs and damages which may be awarded on the appeal or on a dismissal thereof not exceeding three hundred dollars.' It is not possible to determine which appeal is referred to in the undertaking. 'It is so ambiguous that it must be regarded as if none had been filed.' People v. Center, 61 Cal. 191; Home & Loan Association v. Wilkins, 71 Cal. 626, 12 Pac. 799." This conclusion was reached notwithstanding that the time had elapsed within which one of the appeals should have been taken. In McAulay v. Tahoe Ice Co., 3 Cal. App. 642, 86 Pac. 912, it was held, as stated in the syllabus, that: "Where the notice of appeal properly designated the Supreme Court as having sole jurisdiction, * * * the undertaking on appeal should have conformed thereto; and, where it misdescribed this court as the one to which the appeal was taken as 'the appellate court for the third district of the state of California,' it was ineffectual for any purpose, and the appeal must be dismissed"—the court basing its decision on the familiar doctrine that the sureties may rely upon the strict terms of their obligation. Brandt on Suretyship and Guaranty, § 106. It is apparent here that, according to the strict terms of the undertaking, the surety would not be liable for a judgment against one of the appellants. And indeed, on account of the uncertainty in said terms, it is at least doubtful whether the undertaking is sufficient as to either appellant.

In the case of Zane v. De Onativia, 135 Cal. 440, 67 Pac. 685, it is held that where an appeal is taken by only one party, and the undertaking thereon purports on its face to be given on appeal taken by several appellants, such undertaking is insufficient, and the appeal will be dismissed. It is said: "In this case only the defendant Lillie gave notice of appeal. The undertaking in terms is security for the appeal of the defendants. The sureties undertake upon the part of the appellants (when there is but one appellant) that the appellants will pay all costs and damages which may be awarded against the defendants on said appeal, when costs and damages could only be awarded against the one appealing defendant. Standing upon the strict letter of their contract, the sureties could never be liable for anything upon this undertaking." If that decision is right—and we do not question it—there can be no doubt that the court below was justified in dismissing the appeal of Bergevin & Co. The significance of the undertaking is to be determined from the language used, and not by the application of section 17 of the Code of Civil Procedure in reference to the meaning of words used in the Code.

We can see nothing in the cases cited by petitioners militating against the views herein expressed. Of these we notice Jones v. Superior Court, 151 Cal. 589, 91 Pac. 505, and Pacific Window Glass Co. v. Smith, 8 Cal. App. 762, 97 Pac. 898. In the former it was simply held that the expression "all costs" used in the undertaking was broad enough to cover the costs on appeal. The court said: "It is quite evident that it was intended to be an undertaking on appeal, as well as for a stay, and the penal sum is more than twice the amount of the judgment and the hundred dollars in addition." It may be remarked that it might be plausibly contended here that there is no undertaking to pay the costs on appeal, as it purports to be an undertaking for a stay, and the penal sum is only twice the amount of the judgment, and does not include the $100 for costs on appeal, but we deem it unnecessary to decide that point, although it is determined in McConky v. Superior Court, 56 Cal. 83, that when there is an undertaking for a stay, there must also be an undertaking for costs on appeal. In Pacific Window Glass Co. v. Smith, supra, the pivotal question was, as stated by the court and conceded by counsel, the intent and purpose with which a certain deposit in lieu of a bond was made by the petitioners with the justice of the peace. It was properly held that it was clearly their purpose to guarantee the payment of the costs of appeal.

Petitioner contends also that the court below should have allowed a new undertaking to be filed, and that upon this application an order to that effect should be made. We are bound, however, by the statement of respondent that no application was made to file said undertaking until after the appeal was dismissed. This was manifestly too late. Zane v. De Onativia, supra. Section 954 of the Code of Civil Procedure makes provision for the filing of a sufficient undertaking in the Supreme Court or the District Court of Appeal before the hearing of the motion to dismiss, where the undertaking already given is insufficient. There seems to be no similar provision in reference to appeals from the justice court, but it is at least too late for the superior court to allow an additional undertaking to be filed after the appeal is dismissed. The court would be without jurisdiction to make such an order. And if this application could subserve the purpose of a writ of mandate this court would have no authority to direct the lower court to do something in excess of its jurisdiction.

We think it cannot be held that the superior court exceeded its jurisdiction in dismissing the said appeal, and the order to show cause is discharged and the writ denied.

We concur: CHIPMAN, P. J.; HART, J.

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11 Cal. App. 599

PEOPLE v. HOGAN et al. (Civ. 180.)

(Court of Appeal, First District, California. Oct. 29, 1909.)

1. WITNESSES (§ 388*)—IMPEACHMENT—INCONSISTENT STATEMENTS.

One complaining of the exclusion of evidence of a statement made by a state's witness, inconsistent with his testimony, must show that the statement was the same one to which the attention of the witness had been called.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 388.*]

2. WITNESSES (§ 388*)—IMPEACHMENT—INCONSISTENT STATEMENTS—FOUNDATION.

A witness may not be impeached by proof that he made statements inconsistent with his testimony, unless the statements were first related to him, and the circumstances of the time, place, and persons present stated.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1233; Dec. Dig. § 388.*]

3. CRIMINAL LAW (§ 670*)—TRIAL—EVIDENCE ADMISSIBLE IN PART—OFFER OF EVIDENCE.

Where an offer is made to prove several things grouped together, and the court refuses to hear the proof, the ruling will be sustained if the proof of any one of the things was inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1595; Dec. Dig. § 670.*]

Appeal from Superior Court, City and County of San Francisco; Carroll Cook, Judge.

William Hogan and others were convicted of robbery, and they appeal. Affirmed.

A. A. Friedlander, Jno. Koch, and Frank J. Murphy, for appellants. U. S. Webb, Atty. Gen., for the People.

COOPER, P. J. The defendants were jointly accused by the information of the crime of robbery. Defendant Hogan was also charged with two prior convictions of petty larceny, each under an alias; defendant Con-well with a prior conviction of petty larceny, and also with a prior conviction of burglary, each under an alias; defendant McLaughlin with a prior conviction of robbery; and defendant Purcell with a prior conviction of grand larceny, and also with a prior conviction of burglary under an alias. They each pleaded guilty to the prior convictions as charged, but not guilty to the charge of robbery as set forth in the information. They were each found guilty, and this appeal is from the judgment and the orders denying each of their motions for a new trial.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The sufficiency of the evidence to support the verdict is not attacked. No error is claimed as to the instructions in any respect. The only question raised is as to the ruling of the court on certain questions asked for the purpose of impeaching the prosecuting witness Felphes as to certain statements which it is claimed he made at other times contrary to his statement as a witness while on the stand. Felphes testified on behalf of the prosecution fully as to the circumstances and facts connected with the robbery. In cross-examination no question was asked him as to any statement made by him at any other time or place inconsistent with the testimony he had given. When the attorney for defendant offered evidence as to statements claimed to be inconsistent with the testimony of Felphes, the objection of the district attorney was sustained upon the ground that no proper foundation had been laid by calling the witness' attention to the circumstances of time, place, and persons present, as required by the Code. The defendants' attorney then called Felphes, not for the purpose of further cross-examination, but as his own witness; and, upon direct examination, as defendants' own witness, Felphes testified that after he returned to the house where he lived after he had been assaulted and robbed, he did not make "any loud statement in the hallway," and did not say, "I have been robbed in Oakland," nor "tried to wake up Mr. Andros"; nor "in a loud tone of voice ask for a doctor," nor "ask for a policeman." No questions were asked as to the persons present, nor as to any person present, nor was the time fixed in any other way than the question concerning when the witness returned to the house after the assault. One Skurs was then called by the defendants' counsel, and asked: "Did you hear Felphes make the statement on that morning, 'I have been robbed in Oakland' ?" The court sustained the objection of the district attorney to this question on the ground that the defendant could not be allowed to impeach his own witness, and that no proper foundation had been laid, and that the question was incompetent, irrelevant, and immaterial. While the court might well have permitted the question in the spirit of liberality which should characterize the trial of one accused of crime, still in our opinion the ruling of the court was not erroneous. When we examine the record closely, we find that there is nothing to show that the statement sought to be proven was the same statement to which the attention of Felphes had been called. The only time referred to was "on that morning," and no place was fixed. It was incumbent on defendants, if they claim error as to the ruling, to show that the statement was the same one to which the attention of Felphes had been called. The matter is certainly not of such serious importance that we can be called upon to presume that the question related to the time to which Felphes referred when he spoke about making no statement in the house after having been assaulted.

No other ruling is assigned as error as to any question tending to impeach Felphes. The attorney for defendants stated that he desired to show, after the complaining witness arrived home on the night of the robbery, he "made several statements." Upon being asked by the court what he wished to show, the defendants' attorney said: "We desire to show by these witnesses that when this complaining witness arrived at his home at 11 o'clock that night, and not at 1 o'clock, as testified to by him, but at 11 o'clock, he rapped on the door of this man Andros, and he cried out, 'I have been robbed in Oakland,' and Andros replied, 'Where, on Pacific street?' and he said: 'No, in Oakland'—and that Andros said to him, 'Go away from my door, and don't bother me,' and then he tried another door, and he said to another man at the other door, 'My friend took me to Oakland and left me, and I got robbed in Oakland,' and this was not heard by one, but by various different witnesses. One witness Barrett we have made efforts to find, but could not find him." The court informed counsel for defendants that he would be compelled, under the rules of evidence, to sustain the objection of the district attorney to the offered evidence, for the reason, as stated by the court, that the witness was defendants' own witness, and that he would not be allowed to impeach his own witness.

Without basing our ruling upon the reason given by the court, we may support the ruling for other reasons. The offer included many matters to which the attention of Felphes had not been called. We look in vain for anything in the record showing that Felphes had had his attention called to rapping on the door of Andros' room, or to the reply of Andros, or to any statement of Andros, or to even the name of Andros; nor is there anything to show that the attention of Felphes was called to trying "another door," or to saying anything about "another man at the other door." It is not necessary to base our conclusion upon the ground that Felphes was called by defendants as their own witness. He could not in any event be impeached by showing that he had made at other times statements inconsistent with the testimony he had just given, unless the statements were first related to him, and the circumstances of time, place, and persons present stated. Not only is this true, but where an offer is made to prove several things grouped together, and the court refuses to hear the proof, the ruling must be sustained if the proof of any one of the things was inadmissible. An offer to prove, instead of calling the witness, is at best a very loose and unsatisfactory method of introducing evidence, and certainly, when the offer consists of several propositions, we must sustain the ruling if correct as to any one of the propositions. Bostwick v. Mahoney, 73 Cal. 238, 14 Pac. 832.

It is fundamental that a party relying upon the exclusion of evidence as constituting error, upon which he asks to have the case reversed, must clearly show and point out the offered evidence, and that it was competent and material.

The judgment and orders are affirmed.

We concur: KERRIGAN, J.; HALL, J.

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11 Cal. App. 632

WATERBURY v. TEMESCAL WATER CO. et al. (Civ. 699.)

(Court of Appeal, Second District, California. Oct. 29, 1909.)

1. CORPORATIONS (§ 282*)—ELECTION OF DIRECTORS—QUALIFICATIONS.

Where the by-laws of a corporation provided that directors shall serve for one year from the "date of their election" and that a stockholder having less than 10 shares shall hold the office of director, a stockholder holding only 8 shares at time of his election as director could not oust the director declared elected in his stead, though he acquired 3 shares the day after the election, and this is the more so where, by Civ. Code, § 308, it is provided that immediately after their election the directors must organize by the election of president, etc., and there is nothing to show that they did not so organize on the day of the election, since there was no intervening time between his election and the beginning of his term within which he could qualify.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1191; Dec. Dig. § 282.*]

2. CORPORATIONS (§ 55*)—BY-LAWS—CONFLICT WITH STATUTE—ELIGIBILITY OF DIRECTORS.

Under Civ. Code, § 305, providing that corporate powers must be exercised by a board of not less than three directors, to be elected from among the "holders of stock," or, where there is no capital stock, then from the "members" of such corporation, and that directors of all other corporations must be "members" thereof, the requirements of a by-law of a corporation not for profit that its directors must hold a designated number of shares of stock is not in conflict with section 305, in that that section made "members" of such corporations eligible without regard to the stock, since, when construed with section 303, relating to qualifications and duties of directors, and section 301, providing that every corporation, regardless of its character, must adopt by-laws, it is apparent that the by-laws must determine the eligibility.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 152; Dec. Dig. § 55.*]

3. APPEAL AND ERROR (§ 598*)—TRANSCRIPT—SENDING UP ORIGINAL FILES.

Code Civ. Proc. § 953a, providing that any person desiring to appeal may, in lieu of preparing and settling a bill of exceptions, do certain things in preparing a "transcript" to be used on appeal (which transcript need not be printed), and after the judge has certified the transcript, the same shall be and become a portion of the judgment roll, and may be considered on appeal in lieu of the bill of exceptions now provided for by law, does not authorize the clerk to send up his original files in the action, consisting of pleadings, findings, judgment, etc., made a part of the judgment roll by law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2639-2644; Dec. Dig. § 598.*]

Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Action by G. W. Waterbury against the Temescal Water Company and others. From a judgment for defendant on a demurrer to the complaint, plaintiff appeals. Affirmed.

G. R. Freeman, for appellant. Purington & Adair, for respondents.

TAGGART, J. This is a proceeding under section 315 of the Civil Code to test the validity of an election of directors by the defendant corporation. Judgment was for the defendant upon a demurrer to the complaint. The appeal is from the judgment, and the record before us appears to consist of the original papers filed in the proceeding in the superior court, made up into, and certified to be, the judgment roll in the action, together with the original notice of appeal, which bears no acknowledgment of service. We, therefore, presume that the appeal is intended to be one taken from the judgment by the alternative method, and shall consider the questions presented upon this assumption, no objection being made by the respondents.

At the regular annual meeting of the stockholders of the defendant corporation, held on December 1, 1908, for the purpose of electing seven directors in accordance with the by-laws thereof, plaintiff received the highest number of votes cast for any person, and was therefore one of the seven receiving the highest number of votes. The board of election, however, after announcing the vote as stated, further reported that plaintiff was not qualified under the by-laws to act as a director, and declared seven other persons to be duly elected such directors. The disqualification of plaintiff was based upon the following provision of the by-laws: "Qualification:—No stockholder shall hold the office of director of this corporation unless he is a bona fide holder of at least ten shares of the capital stock of this corporation"—and the further showing that plaintiff was the owner of but 8 shares of stock of the company at the time of the election. On December 2, 1908, plaintiff became the owner of

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3½ other and additional shares of the capital stock of the Temescal Water Company, and had them transferred to him upon the books of the corporation. It is then alleged that on December 2, 1908, there not being a quorum of the board of directors present, those present adjourned to December 7, 1908; that plaintiff presented himself, as a director ready and willing to act, to the directors in attendance at the meeting on December 2, 1908, and again on December 7, 1908, on which latter date the persons acting as a board of directors refused to recognize him as such. The minutes of the meeting on the last-mentioned date contain a recital that the meeting was held pursuant to adjournment of December 2, 1908, for the purpose of organizing. The minutes, however, do not show any election of officers to have taken place.

Appellant contends that by the acquisition of the additional shares of stock on December 2, 1908, he qualified prior to the meeting of the directors to organize, and therefore that he was the holder of the requisite number of shares of capital stock at the time of the organization of the board, and entitled to be declared elected, although admittedly he was not such holder at the time of the election. This contention cannot be sustained, as the by-laws provide that the directors "shall serve for one year from the date of their election and until their successors are elected," etc. There was then no intervening time between the election and the beginning of the term within which plaintiff could have qualified, and in this regard the case differs from those in which a distinction is drawn between eligibility for election and the qualification to hold the office. The plaintiff was not qualified to fill the office at the time the term began, and it cannot well be contended that by qualifying later he could oust the member who was qualified at the time of the election. Again, as section 308 of the Civil Code provides: "Immediately after their election, the directors must organize by the election of a president," etc., and as there is nothing in the complaint and petition to negative their having complied with the law in this respect, unless it be the recital from the minutes of December 7, 1908, above referred to, we may assume, until it be shown otherwise, that the organization of the board took place at the time provided by law, which was prior to the time the plaintiff claims to have become a bona fide holder of 10 shares of stock.

Appellant also contends that the Temescal Water Company, as disclosed by the purposes of its organization set out in the complaint and petition, is not a corporation for profit, and therefore the provision of the by-laws requiring a director to be the holder of a certain number of shares of capital stock is in conflict with the statute. Civ. Code, § 305. Accepting the first proposition that the corporation is not one for profit, because the water rights and other property it is authorized to acquire are to be devoted exclusively to furnishing water to its own stockholders, and to them within a limited area, and the expenses of operating and distributing the water is to be met by assessment on the stock (McFadden v. Los Angeles, 74 Cal. 571, 16 Pac. 397; McDermont v. Anaheim, 124 Cal. 114, 56 Pac. 779; Hildreth v. Montecito, 139 Cal. 22, 72 Pac. 395), we do not think it necessarily follows that the corporation may not by its by-laws provide a qualification for its directors.

Section 305, Civ. Code, provides some of the qualifications necessary to holding the office of director in a corporation organized in this state, as follows: "A majority of the directors must be, in all cases, residents of this state. Directors of corporations for profit must be holders of stock therein to an amount to be fixed by the by-laws of the corporation. Directors of all other corporations must be members thereof." The initial clause of this section provides that the corporate powers must be exercised "by a board of not less than three directors to be elected from among the holders of stock; or where there is no capital stock, then from the members of such corporations," etc. The term "members" is apparently used in the section to designate the members of corporations having no capital stock; and, if there were no other provision in the Code relating to this matter, it might be argued that corporations having capital stock, but which are not organized or operated for profit, are not provided for. The general provisions relating to the matters which may be provided for in the by-laws of a corporation are contained in section 303, Civ. Code, and among the matters authorized to be provided are "(4) The qualifications and duties of directors," etc., and by section 301 every corporation, regardless of its character, must adopt by-laws. It is apparent then that the by-laws of the corporation must control in the determination of plaintiff's rights. Not having the qualifications provided by the by-laws to act as a director at the time his term of office began, he is not entitled to the relief sought in this proceeding.

If, as is hereinabove suggested, the record before us consists of the original judgment roll and notice of appeal in this proceeding, the clerk of the superior court of Riverside county is the legal custodian of such papers, and they should have remained on file in his office. On account of the fact that the language of the statute providing for the sending up of the record on an alternative appeal has been somewhat misconstrued in this respect, and no rule placing a construction upon the statute has been adopted by the Supreme Court, we have acted upon the record as it was presented, but think it our duty to call the attention of the trial court to the language used in the sections of the Code relating to the alternative method of appeal. Section 953a, Code Civ. Proc., provides that any person desiring to appeal "may in lieu of preparing and settling a bill of exceptions," pursuant to section 650, do certain things in preparing a transcript to be used on the appeal. After the judge has certified the transcript which has been made, it is provided that the same shall "be and become a portion of the judgment roll and may be considered on appeal in lieu of the bill of exceptions now provided for by law." The transcript so allowed and certified becomes a part of the judgment roll only in the same sense that a bill of exceptions was made a part thereof by section 670, Code Civ. Proc.; that is, to serve as part of the record on appeal under section 950. (Since the amendment of section 670 in 1907 bills of exception are no longer made a part of the judgment roll.)

There is no express authority for the appellant being relieved from printing his transcript on appeal in any case except one in which the transcript has been settled and allowed by the trial court in accordance with section 953a. This is true whether it consists of a judgment roll only, or a record made up under the alternative method in lieu of a bill of exceptions; and, while the statute is open to the construction that the original of such a transcript—that is, the record prepared in accordance with sections 953a and 953b—may be sent up to the appellate court, it was clearly not intended to authorize the clerk of the trial court to send up his original files in the action, consisting of the pleadings, findings, judgment, and other papers made a part of the judgment roll by section 670. To do this would not only deprive the office of the papers and records which the law makes it the duty of the clerk of the superior court to preserve, but would render him unable to enter up the remittitur of this court sent down upon this proceeding. Section 958, Code Civ. Proc. If the papers on file in this court be the original records of the superior court, the clerk of that court is granted leave to withdraw the same, and within 20 days from the date of filing of this decision is directed to file with the clerk of this court a duly certified copy of such records in lieu of the originals so withdrawn.

Judgment affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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11 Cal. App. 650

BUCHER v. ALLEN. (Civ. 653.)

(Court of Appeal, Second District, California. Nov. 2, 1909.)

1. Fraudulent Conveyances (§ 299*)—Sales—Change of Possession—Evidence.

On an issue as to the validity of a sale of hotel fixtures and personal property, under Civ. Code, § 3440, requiring a change of possession of personal property sold to be valid against creditors of the seller, evidence *held* to sustain a finding that the sale was not accompanied by immediate delivery, and followed by actual and continuous possession by the buyer.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Dec. Dig. § 299.*]

2. Fraudulent Conveyances (§ 299*)—Sale of Goods—Change of Possession—Evidence.

Under Civ. Code, § 3440, providing that there must be a change of possession of personal property sold to be valid against creditors of the seller, the employment by the vendee of the vendor after the sale is some evidence that there has been no actual change of possession.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Dec. Dig. § 299.*]

Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Action by Joseph Bucher against W. D. F. Allen. From a judgment for defendant, plaintiff appeals. Affirmed.

C. C. Haskell, for appellant. Byron Waters, for respondent.

ALLEN, P. J. Appeal by plaintiff upon bill of exceptions from judgment rendered against him and in favor of defendant.

The case is this: On December 24, 1906, one Hicks and wife owned certain real property in the city of San Bernardino, Cal., upon which was a house used as a lodging house. Hicks and wife sold the real property and the furniture and fixtures of the lodging house to plaintiff, who paid the full consideration therefor. The lodging house had been operated before the sale by the wife of Hicks, who was indebted to parties in San Bernardino. These creditors instituted a suit against Mrs. Hicks, and, on December 27, 1906, levied an attachment upon the lodging house, furniture, and fixtures. This writ was executed by defendant, a constable, and the personal property on that date reduced to possession by him. In order to recover possession from defendant this action in claim and delivery was brought by plaintiff. The right of possession to the personal property hinges upon the validity of its sale as affecting creditors of Mrs. Hicks. The court finds that such sale was not accompanied by immediate delivery, and followed by actual and continuous possession, as required by section 3440, Civ. Code. This finding appellant attacks as having no support in the evidence.

An examination of the record discloses that plaintiff testified that he took possession of the personal property through one Von Boven as his agent on the 24th of December, while Mrs. Hicks testified: "I offered the keys on the 24th to Mr. Bucher, and he asked me to look after the house for him in his interest until I went out on the 29th; and on the 26th I was called to Los Angeles on business, and I handed the keys to Charles Von Boven in the presence of Mr. Waldon, and told him to take care of these rooms and take care of the house for Mr. Bucher. * * * I delivered the keys to Mr. Von Boven for the reason that Mr. Bucher told me that Von Boven was in his employ, and that I should deliver the keys to him if I went away from the house." Von Boven testified that when he was handed the keys by Mrs. Hicks she said to him, "I may be back to-morrow." The evidence as to the change of possession was conflicting. It was a question of fact for the trial court to determine. We cannot say that there is no evidence in support of the finding of the court. Our Supreme Court in Goldstein v. Nunan, 66 Cal. 544, 6 Pac. 451, has said that the employment by the vendee of one of the vendors after the sale tended to prove that there had been no actual change of possession. There was, then, evidence introduced which tended to show that the vendor continued in possession, and the requirements of the section of the Code above referred to were unsatisfied. Without reference to other testimony, which was to the effect that Von Boven disclaimed any agency on behalf of plaintiff, and insisted that he was acting, while in charge of the property, for Mrs. Hicks, we think it cannot be said that the conclusion of the trial court is manifestly without sufficient support in the evidence. The judgment being thus supported by sufficient findings, we are relieved from the necessity of considering other questions presented in the record which relate to the construction which should be given to that portion of section 3440 requiring public recordation of intended sales in certain instances.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Judgment affirmed.

We concur: SHAW, J.; TAGGART, J.

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11 Cal. App. 638

FRISBIE v. ROSENBERG BROS. & CO.

(Civ. 631.)

(Court of Appeal, Third District, California. Nov. 1, 1909.)

1. SALES (§ 181*)—COMPLIANCE WITH CONTRACT—EVIDENCE.

Evidence in an action for refusal of defendant to comply with his contract of purchase of plaintiff's crop of pears to be cured by plaintiff *held* sufficient to sustain findings that plaintiff tendered the entire crop purchased, and that the pears were properly cured.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 181.*]

2. SALES (§ 332*)—REFUSAL OF PURCHASER TO ACCEPT—RESALE.

A seller complies with his duty, under Civ. Code, § 3353, as to estimating damages, where, 13 days after the buyer refuses to accept, he sells the articles to another at the place of delivery at the highest price attainable.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 915; Dec. Dig. § 332.*]

3. SALES (§ 384*)—BREACH OF CONTRACT BY BUYER—DAMAGES—PLEADING AND PROOF.

Defendant, under his contract of purchase, being required to accept only 16½ tons of dried fruit, though having an option on more, and all allegations in the complaint as to shrinkage between the time defendant refused to accept and the time plaintiff resold, being confined to the 16½ tons, this alone prevented recovery for shrinkage on any amount in excess of the 16½ tons.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 384.*]

4. WITNESSES (§ 269*)—CROSS-EXAMINATION—SCOPE.

A witness having merely testified that he purchased fruit of plaintiff at a certain price, and that this was the highest price attainable at the time and place, and not having been asked on direct examination as to any subsequent transaction concerning it, refusal to allow him to be asked on cross-examination as to when, where, and for how much he resold the fruit was not error, no statement as to what was expected to be shown by the question having been made.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 269.*]

5. APPEAL AND ERROR (§ 1057*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Any error in exclusion of evidence to show that the price obtained was the market price, or to discredit the witness who testified it was the market price, was harmless; it being admitted such price was obtained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4197, 4198; Dec. Dig. § 1057.*]

Appeal from Superior Court, Shasta County; Charles M. Head, Judge.

Action by S. H. Frisbie against Rosenberg Bros. & Co. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

A. H. Hewitt and W. D. Tillotson, for appellant. T. W. H. Shanahan, for respondent.

BURNETT, J. The action is for damages for defendant's refusal to comply with its agreement to pay for certain dried fruit sold to it by plaintiff. On September 4, 1906, the parties entered into a written contract providing that "Rosenberg Bros. & Co. have this day bought of S. H. Frisbie and said seller has this day sold to said buyer the entire crop of pears estimated at fifteen tons now growing and grown on the orchard situate—Anderson—of which orchard ——— is the owner and of which said crop seller declares that he is owner and represents that he is duly authorized to sell the whole thereof. Prices and seller's estimate of quantity as follows, to wit: About 15 tons pears a 8c per lb. * * * It is expressly understood and agreed that buyer is not obliged to accept fruit in excess of amount approximated above by more than ten per cent., but may do so at his own option. Seller hereby agrees to cure said entire crop properly and to have said entire crop ready for delivery and to deliver the same at Anderson. * * * Seller hereby guarantees that all of the fruit hereinabove specified shall be choice, well cured, original condition, and free from damage. * * * Buyer hereby agrees to pay for said fruit upon completion of delivery."

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Plaintiff claims to have performed all of the conditions required of him by said contract, and on October 10th to have notified defendant that he was ready and desired forthwith to deliver 33,000 pounds of cured pears under said contract. Defendant refused to accept any part of them, and plaintiff held them subject to defendant's order till October 25th. It is alleged "that at said time the said dried pears were losing weight through shrinkage, and additional costs of insurance and keeping the same were necessarily being incurred." It is further alleged that plaintiff sold them on October 25th for 6 cents per pound, the highest market price obtainable, and that he was damaged by defendant's refusal to carry out its contract in the sum of $925. Plaintiff recovered judgment in the sum of $921.

In support of its appeal from the judgment and order denying its motion for a new trial, appellant mainly relies upon two grounds: "First, plaintiff did not cure and deliver or offer to deliver his entire crop of pears; and, second, the pears that he did offer to deliver were not properly cured." We are not required, probably, to do more than to say that the findings of the court as to these material matters are amply supported by the evidence, but as appellant appears to be serious in these contentions, and that our declaration may be shown not to be arbitrary, some of the testimony upon each of these points is presented.

1. The plaintiff testified: "Mr. Luyster went with me that day and examined all of those pears before we signed the contract. * * * On the trees in the orchard and the orchard which I had leased there was a little over a hundred tons I am sure, all of which I was the sole owner of. The 110 tons of pears on the trees, in the boxes and windrows and on the ground were the pears I had in mind and intended to convey under the contract. They were all the pears I owned on that day. I didn't sell a pear of this lot green. I dried every one of them. The amount I secured from that lot—eighteen and one-half tons were what they turned out to be. When the pears were dried I took them to the Earl Fruit Company's packing shed. That is the lot of pears I notified Rosenberg Bros. & Company that I was ready to deliver and make a tender of; and is the same lot I afterwards sold to the Sanitary Fruit Company." He is corroborated by Mr. Luyster, who testified that when he entered into the contract he had in mind the entire crop of pears of Mr. Frisbie. The evidence, indeed, shows without any conflict that the entire crop purchased was tendered by plaintiff.

2. While there is evidence to the contrary on the part of appellant, yet six witnesses testified for respondent that the pears were up to the standard fixed by the contract. The character of their testimony may be illustrated by the following statement of Earl Downing, an experienced fruit man: "The seventeen tons of cured fruit, the S. H. Frisbie fruit, in the Earl warehouse, which were inspected between the 12th and 15th days of October, 1906, I would call properly cured, well cured, choice, in original condition, free from damage, dried pears or cured pears." There are a few additional considerations inviting brief attention.

As to the contention of appellant that there is no allegation of shrinkage, the portion of the complaint heretofore set out is a sufficient answer, if indeed such an allegation were necessary. Appellant must have forgotten that in its amended answer this language is used: "And it denies that said dried pears were losing weight through shrinkage, or that they did lose weight by shrinkage." As appellant, on October 12th, refused to accept the pears, it was the duty of respondent to dispose of them in accordance with section 3353 of the Civil Code, providing that, "In estimating damages, the value of property to a seller thereof is deemed to be the price which he could have obtained therefor in the market nearest to the place at which it should have been accepted by the buyer, and at such time after the breach of the contract as would have sufficed, with reasonable diligence, for the seller to effect a resale." They were sold at Anderson, the place where they were to be delivered, 13 days after appellant rejected them, and there is testimony of witnesses that they were sold for the highest price obtainable therefor. Respondent seems thus to have done all that the statute requires as to the disposition of the property.

Appellant complains because the court charged defendant with shrinkage on 36,264 pounds, whereas, under the contract, there was no obligation to accept more than 33,000 pounds. Respondent's answer to this contention is that he "resold the fruit all of which appellant had an option on for the best obtainable price at the nearest market. Appellant would not exercise its option by taking the entire crop nor would it examine or take the part or any portion of the part it was obligated to take, 33,000 pounds, when the same was ready for delivery. If appellant had accepted the 33,000 pounds on October 12, 1906, and no more, there would have been no shrinkage for which appellant would have been liable, and respondent would have been free of the option on the 'entire crop' and free to dispose of the balance. As it was, respondent was held by appellant for the 'entire crop,' none of which it would accept." Respondent's argument seems plausible, but there is no allegation in the complaint as to this element of damage—the allegation of shrinkage being confined to the 33,000 pounds. Hence the finding as to the excess of 3,264 pounds is outside of the issues. Besides, the evidence would hardly justify the conclusion that more than 16½ tons of the fruit was of good quality. No allowance could properly be made for the shrinkage of this excess, which the evidence does not satisfactorily show was of any value. The result is that the judgment should be reduced by the small amount of $23.50. This appears from the finding itself. It is only a matter of simple calculation, and the error does not require a new trial.

The only other point suggested by appellant is that the court erred in sustaining an objection to questions asked on cross-examination of Mr. Stice as to when and where he sold the fruit and what price he received. He purchased the fruit from plaintiff, and had testified that 6 cents per pound was the highest price obtainable at Anderson at that time. If he obtained a higher price at a different place and at a different time it would have no tendency to discredit his testimony as to the price at Anderson. It does appear that he shipped the fruit, but to what point is not disclosed. Since the witness had not been asked in the direct examination as to any subsequent transaction concerning the fruit, appellant, in the absence of any statement as to what was expected to be shown by the questions, cannot complain of the ruling of the court. Indeed, if error was thereby committed by the court, it was absolutely without prejudice, in view of the admission of appellant in its brief that "defendant does not contend that the price for which the pears were so sold was not the full market value of the same." If Stice paid the full market value of the pears it is, of course, entirely immaterial where he sold them or what price he received.

Twenty-three dollars and fifty cents should be subtracted from the amount of the judgment, leaving a balance of $897.62, and, as thus modified, the judgment and the order denying the motion for a new trial are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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11 Cal. App. 589

HOOVER v. WASSON et al. (Civ. 613.)

(Court of Appeal, Third District, California. Oct. 27, 1909.)

1. Fraudulent Conveyances (§ 298*) — Fraudulent Intent—Evidence.

Evidence *held* to show that a conveyance made for a valuable consideration was not made with intent to defraud the grantor's creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 892–895; Dec. Dig. § 298.*]

2. Fraudulent Conveyances (§ 91*)—Consideration—Past Indebtedness Barred by Limitations—Effect.

The fact that the consideration for a conveyance alleged to be fraudulent as against creditors was a note barred by limitations was only a circumstance which might or might not prove fraud, according to its effect as influenced by other facts, and whether the fact was important as showing fraud must depend largely on the other circumstances characterizing the transaction.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 235; Dec. Dig. § 91.*]

3. Contracts (§ 76*)—Consideration—Debt Barred by Limitations—Moral Obligation.

A debt barred by limitations does not release the debtor of the moral duty of paying it, the statutory bar affecting the remedy only; and hence such a debt may constitute a valuable consideration for a contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 362; Dec. Dig. § 76.*]

4. New Trial (§ 64*) — Insufficiency of Findings—Effect.

A new trial on the ground of the failure of the court to find on a material issue may be denied, where on the evidence the finding must have been adverse to the moving party.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 129; Dec. Dig. § 64.*]

Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

Action by Reuben Hoover against Joseph Wasson and another. From a judgment for defendant John L. Wasson, who appeared and answered, plaintiff appeals. Affirmed.

John A. Wall, for appellant. J. W. P. Laird and Rowan Irwin, for respondent.

HART, J. This is a suit to quiet title to certain timber land situate in Mariposa county to which plaintiff claims title under and by virtue of a sheriff's deed; said land having been sold by that officer to plaintiff at a pretended sale under an execution issued upon a judgment for the sum of $1,676.88, rendered and entered by the superior court of Tulare county in favor of said plaintiff and against the defendant, Joseph Wasson. The defendant John L. Wasson answered the complaint herein, specifically denying the material averments thereof, and particularly that Joseph L. Wasson was, at the time of the levy of said execution and the sale thereunder, the owner of the land as to which title is sought to be quieted, and alleging title to and ownership of said land in himself. Joseph Wasson made no reply to the complaint and, as to him judgment by default was entered. The court below awarded judgment to John L. Wasson that he is the owner of the land described in the complaint, and that the plaintiff "has no right, title, or interest in or to said land," etc. The appeal here is by the plaintiff from the judgment and the order denying his motion for a new trial.

The appellant contends that the evidence does not support certain findings of fact, and upon this contention insists that the judgment and order should be reversed. It appears from the evidence that on the 15th day of January, 1902, a written agreement was executed by the plaintiff and the defendant Joseph Wasson, whereby the first-named agreed to sell, and said Wasson agreed to purchase, for the sum of $8,000 a certain tract of land situated in the county of Tulare. The agreement stipulated that Wasson was to pay the principal sum in installments as follows: Fifteen hundred dollars on the day on which the agreement was executed; $500 on or before the 1st day of January, 1905, and $1,000 on each succeeding 1st day of January until the principal, together with interest on the deferred payments, at the rate of 7 per cent. per annum, was fully paid. The title to the land was to remain in plaintiff until the principal and all interest accruing thereon was paid. The land described in the agreement was devoted by Wasson to orange growing, to which, it is admitted, it is peculiarly adapted. Joseph Wasson was, at the time of the making of said contract, the owner of the land involved in this litigation. On the 30th day of April, 1904, Joseph Wasson conveyed, by deed, said land to his brother, the respondent herein, and said deed was recorded in the office of the county recorder of Mariposa county on the 2d day of May, 1904. The plaintiff, in the year 1905, instituted an action against the defendant Joseph Wasson for the purpose of recovering the sum of $500, the first installment of principal due on the contract between himself and said Joseph for the sale and purchase of the orange land, together with unpaid interest. In this action plaintiff obtained a judgment, on the 12th day of June, 1905, for the sum of $1,676.88. As before stated, execution was issued on said judgment, and the same sought to be levied on the land in dispute here, which, as seen, had been conveyed in the year 1904 by Joseph Wasson to his brother, the respondent. The land was, as seen, sold under said execution and purchased at said sale by the plaintiff himself.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The good faith of the transaction between the Wassons by which the respondent became the owner of the land in controversy is challenged by the complaint. It is therein alleged that the conveyance of the land by Joseph to his brother, the respondent, resulted from a transaction conceived in fraud and was executed by said Joseph "with a view to conceal his said property from plaintiff and to hinder, delay, and defraud plaintiff in his collection of his said demand now included in the judgment heretofore described"; but we observe no reason for doubting that the evidence sufficiently supports the finding of the trial court against that claim. In the first place, it may be noted, the conveyance of the land concerned here was executed in the year 1904, approximately a year before there was anything due the plaintiff from Joseph Wasson under the terms of their contract. It appears that, at the time of the execution of said deed by Joseph, the note which was the consideration moving Joseph to so convey said property was "outlawed," or, in other words, action thereon was barred by the statute of limitations. It further appears that in the year 1904 Joseph Wasson sold the orange crop gathered from the land which constituted the subject of the contract between himself and plaintiff for the sum of $1,000. In the month of December of that year plaintiff went to the "orange ranch" and made a demand on Joseph for the money then due under their contract. After some discussion of the matter, in the course of which Wasson declared that he desired to make some improvements on the land, the plaintiff was accompanied by Wasson to the Porterville Bank, where plaintiff was paid by Wasson on account of their contract the sum of $150. The bulk of the money remaining of the $1,000 received for the orange crop was used by Joseph, with the consent of plaintiff, in constructing flumes on and otherwise improving the land for orange growing purposes. The plaintiff testified: "A short time after the improvements were completed, I then sued him (Joseph) for the moneys that became due on the 1st day of January, 1905. I afterwards received possession of all the orange land with the improvements thereon and have since sold the same." Plaintiff admitted that the first time he ever talked with the respondent John L. Wasson about the land in controversy was during the harvest time of the year 1905—more than a year after the deed had been made by Joseph Wasson to John L. Wasson, conveying to the last named said land.

The respondent explained the transaction by which his brother conveyed to him the land in controversy as follows: "When he let go of the ranch down there, which I sold him, the man who bought the place assumed the mortgage on the ranch and gave this timber land in payment. After I came back from Los Angeles a few years later, Joe told me that when he sold the timber land he would pay me the balance due. We talked over either buying the ranch and his selling to get my money out of it, at different times. In the fall of 1903 I was talking about buying the timber land from him, and so Joe and I and my boy drove from where we lived in Delano up into Mariposa county, distance of 200 miles or so, to look at the timber land. After we looked the timber land over, I at that time told him I would take the timber land for what he owed me, and he said that he would deed it to me when he got back. It was agreed between us then that he was to go before some attorney or notary when he got back and make out a deed to me. That was in the fall of 1903, and ran along then until April 30, 1904, when Joe had this deed made out and had the same sent over and recorded, as he had agreed with me to do. * * * I did not tell him (plaintiff) to go to my brother Joe, and tell Joe that I said for him to sign the deed, and that I would sign it afterwards. * * * Joe did not have anything left after he gave me the deed to the timber land, excepting the orange contract on the land of Mr. Hoover. I was perfectly willing to give the timber land to Hoover on condition that the debt owing him by my brother Joe be reduced and I have an interest in the orange grove. I did not have any contract or understanding with my brother Joe wherein or whereby I was to hold the land in trust. There was no arrangement, secret or otherwise, by which Joe was to have any interest in this timber land, either directly or indirectly, after he deeded the same to me. * * * I bought that timber land for myself, and, when he gave me the deed, I gave him back his note and canceled his indebtedness to me for the deed, and I did not know at that time anything about the business relation between Joe and Mr. Hoover except in a general way. I did know that Joe bought this orange land from Mr. Hoover, and naturally was trying to improve the same; but as to how much he owed Hoover, or when the payment was due, or how much Joe was behind, if any, I did not know." Joseph Wasson corroborated his brother as to the good faith of the transaction resulting in the conveyance of the timber land by him to the respondent.

We think that it must be clearly manifest, from the brief résumé of the evidence which we have here presented, that the assailed findings are sustained by the proofs. These findings are, briefly: That defendant Joseph Wasson was not the owner of the land in dispute subsequently to April 30, 1904; that the deed from Joseph to John L. Wasson, dated April 30, 1904, was for a valuable consideration and not made either on the part of Joseph Wasson or the grantee "to delay or defraud plaintiff in the collection of his demand included in the judgment secured by appellant against Joseph Wasson"; that said conveyance was not voluntary, sham, or fictitious, but was for a valuable consideration; that the respondent "has not held, and does not now hold, said lands in secret trust, but holds said lands by virtue of said conveyance in his own right and as the owner in fact"; that appellant did not become the owner of the lands by his sheriff's deed, and has no interest in or to the same; and that said conveyance "from Joseph to John L. Wasson was and is not fraudulent and void and does not operate as a cloud on the title of appellant."

Counsel for the appellant undertakes to make much of the fact that plaintiff's testimony, wherein he stated that Joseph Wasson said to him, referring to the land concerned here, that he (Joseph) "only made him (respondent) a deed to put it out of my name. I own it all the same. I thought it would be a good thing to fall back on when I get through with the orange grove"—stands in the record without contradiction. While it is true that the record does not disclose a specific denial on the part of Joseph Wasson that he made the statement to which plaintiff testified, the record nevertheless shows that Joseph testified: "At the time I made the deed to my brother, I had no thought or idea of cheating or defrauding Hoover or anybody else. There was no understanding or agreement between me and my brother by which I was to have any interest in this timber land after I sold it to my brother. There was no understanding at that time, or is there now any understanding between us, secret or otherwise, whereby I am to receive one cent out of this timber land, nor any one else to receive any benefit out of the same for me or on my behalf." Thus it will be seen that, whether Joseph made the statement attributed to him by plaintiff or not, he testified to facts from which alone the trial court would have been justified in finding that the transaction involving the conveyance of the land to respondent was honest and executed in the best of faith and with no design to fraudulently interfere with any of plaintiff's rights; but, as before stated, the testimony of John L. Wasson bearing upon the question of the good faith and honesty of the transaction coincides in all important particulars with the testimony of Joseph, and there is therefore ample support of the challenged findings.

Considerable stress is laid upon the fact by appellant that the right to maintain an action on the promissory note which was surrendered and the indebtedness evidenced thereby canceled by respondent as the consideration for the conveyance of the timber land was barred by the statute at the time of such transfer; but that fact, as were all the other facts and circumstances in the case, was for the court, as the trier of the questions of fact, to consider and weigh in the determination of the ultimate fact. Whether such a circumstance is important as tending to show fraud or lack of good faith in a transaction must depend largely on other circumstances characterizing such transaction. It is not the contention, nor could it be, that the fact that the note was "outlawed" when the transfer of the timber land was made by Joseph to his brother constituted, in itself, evidence of fraud. At best it could only be a circumstance which might or might not tend to prove fraud, according to its effect as influenced by other proven facts and circumstances. The fact that a debt may be barred by the statute of limitations can affect the remedy only; but in no degree can it release the debtor of the moral duty of paying it, and it will therefore support a contract as consideration. "Although the note was barred by the statute of limitations, it constituted a good and valuable consideration." Chabot v. Tucker, 39 Cal. 434; Mull v. Van Trees, 50 Cal. 547; Sullivan v. Sullivan, 99 Cal. 188, 33 Pac. 862; Womack v. Womack, 8 Tex. 397, 58 Am. Dec. 123. In Hart v. Church, 126 Cal. 480, 58 Pac. 913, 77 Am. St. Rep. 195, it is said: "It is well settled in this state that the extinguishment or security of a pre-existing debt constitutes a valuable consideration for the sale or assignment of property"—citing Frey v. Clifford, 44 Cal. 335. But counsel for appellant himself concedes it to be the rule "that the extinguishment of an honest indebtedness is a good consideration for a transfer, even though the debt (the action) is barred by the statute of limitations," and it is therefore unnecessary to follow this discussion further.

It is pointed out by the appellant that there is no specific finding of a delivery of the deed from Joseph to the respondent. Both Joseph and John L. Wasson testified that the deed was delivered to the latter about two weeks after the execution of the instrument, and there was no contradiction of or attempt to contradict the testimony thus given upon this point. In Gates v. McLean, 70 Cal. 46, 11 Pac. 491, it is said: "It has been repeatedly held that, even when the court has omitted to find upon a material issue, a new trial may be denied if on the evidence the finding must have been adverse to the party asking the new trial." The evidence here would justify no other finding upon the question of delivery than one adverse to plaintiff.

As there is no other point presented here but the question whether the evidence sustains the findings of the court, we can perceive no reason for giving extended attention to the discussion in respondent's brief of the alleged bad faith of appellant with regard to the contract between himself and Joseph Wasson. We may, however, express the conviction, founded upon the evidence as disclosed before us, that the plaintiff, having been paid by Joseph Wasson the sum of over $1,600 under their contract, and having recovered back the land which he had agreed to sell Joseph for $8,000, after Joseph had expended three years' time, much labor, and considerable money in its improvement, thus putting it in a condition in which it became a profitable producer of oranges, has no ground, in equity, on which to base the complaint that injustice to him will follow the judgment against him in this action.

The judgment and the order appealed from are, for the reasons herein set forth, affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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11 Cal. App. 460

JOHN BRICKELL CO. v. SUTRO et al.

(Civ. 685.)

(Court of Appeal, First District, California. Oct. 4, 1909.)

1. MORTGAGES (§ 581*) — FORECLOSURE — ATTORNEY'S FEE CHARGE AGAINST PROPERTY.

Where, on foreclosure of a mortgage, it appears that neither the mortgage nor the notes secured thereby provided for payment of an attorney's fee, and it is not alleged that such a fee, was ever agreed to, it is error to allow it and make it a charge against the property.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1669; Dec. Dig. § 581.*]

2. MORTGAGES (§ 200*) — FORECLOSURE — DEDUCTION OF TAXES FROM DEBT.

On foreclosure there was no error in refusing to allow any deduction from the debt on account of taxes levied against the property, as by Const. art. 13, § 4, it is only the tax "levied upon the security" that the owner may pay and have deducted from the amount of the security.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 526–531; Dec. Dig. § 200.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the John Brickell Company against Edgar Emanuel Sutro and others. From a judgment for plaintiff and from an order denying a new trial, defendant Henrietta L. B. Sutro appeals. The order is affirmed, and the judgment is modified and affirmed.

J. C. McKinstry, for appellant. J. C. Bates, for respondent.

HALL, J. Plaintiff brought this action to foreclose a mortgage executed by Edgar Emanuel Sutro. The defendant Henrietta L. B. Sutro is the wife of said Edgar, and is interested in the property involved by reason of being a grantee of an undivided portion thereof under a conveyance executed by said Edgar subsequent to the execution of the mortgage. Edgar Emanuel Sutro defaulted, and judgment was taken against him by default. Henrietta L. B. Sutro appeared and answered, and after trial a judgment of foreclosure was entered. She moved for a new trial, and the motion was denied. She took separate appeals from the judgment and order; but both are presented to this court in one transcript.

Respondent insists that the appeal from the judgment should be dismissed because the notice of appeal was never served on Edgar Emanuel Sutro, appellant's codefendant. It is sufficient to say upon this point that under sections 941a and 941b of the Code of Civil Procedure, enacted in 1907, such service is not required. The appeals were taken in 1908, and fully complied with said sections, the latter of which provides that the notice of appeal must be filed with the clerk of the trial court and "need not be served upon any of the parties to the action or the proceeding, or their representatives or attorneys." This court therefore has jurisdiction to entertain the appeal.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The court allowed to plaintiff as and for its attorney fee in the foreclosure suit the sum of $2,500, and made the same a charge and lien against the property mortgaged. There is nothing in the complaint to support this part of the judgment. The instrument set up as a mortgage is in form an absolute conveyance, described in the complaint as an indenture of assignment. It is alleged in the complaint that this assignment, "though absolute in form on its face, was intended and agreed by and between them to be held as security for the payment of said promissory note, and any and all other sums of money to be thereafter loaned to defendant Edgar Emanuel Sutro by said John S. Brickell and evidenced by the promissory notes of said defendant Edgar Emanuel Sutro." The various notes sued on are set forth in the complaint, and none of them provide for the payment of any attorney's fee. The indenture of assignment is also made part of the complaint, and makes no provision for the payment of any attorney's fee on foreclosure, and it is nowhere alleged in the complaint that it was ever in any manner agreed that the mortgagor should upon foreclosure be liable for an attorney's fee, or that the property should be charged with a lien therefor. The only reference to an attorney's fee upon foreclosure in the complaint is a statement in the complaint as originally filed "that the sum of $2,500 is a reasonable sum to be allowed as attorney fee in this action for the services of plaintiff's attorney." This allegation upon motion was by the court stricken out. The court erred both in allowing an attorney's fee and in making the same a charge against the mortgaged property. Irvine v. Perry, 119 Cal. 357, 51 Pac. 544, 949, and cases there cited.

The only other error relied upon by appellant concerns the action of the court in refusing to allow any credit upon the amount found due, because of taxes assessed against the property mortgaged and paid by the estate of Adolph Sutro. These taxes were not assessed against the mortgage or the mortgagee's interest. The whole tax was levied against the property mortgaged without any deductions on account of the mortgage. The mortgage was not assessed at all. In such a case it has been decided that the owner is not entitled to deduct any such tax from the mortgage debt. "It is only the tax 'levied upon the security' that the owner may pay and have the amount deducted from the amount of the security (Const. art. 13, § 4); and, as there was no assessment of the security, the defendant was not authorized to have this payment deducted." Hibernia S. & L. Society v. Behnke, 121 Cal. 339, 53 Pac. 812. The court therefore did not err in refusing to allow any deduction from the mortgage debt on account of taxes levied against the property but not against the security.

The order denying the motion for a new trial is affirmed, and the cause remanded, with directions to the trial court to modify the judgment by striking therefrom the amount allowed for attorney's fees. In all other respects the judgment is affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

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11 Cal. App. 460

JOHN BRICKELL CO. v. SUTRO et al.

(S. F. 5,288 [Civ. 685].)

(Supreme Court of California. Dec. 2, 1909.)

APPEAL AND ERROR (§ 1119*)—RELIEF TO PARTY NOT APPEALING.

A defendant who does not appeal is entitled to no relief or advantage from the appeal of his codefendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4415, 4416; Dec. Dig. § 1119.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; J M. Seawell, Judge.

Action by the John Brickell Company against E. E. Sutro and others. Judgment for plaintiff was modified and affirmed by the District Court of Appeal (105 Pac. 948), and defendant named petitioned for transfer to the Supreme Court for a rehearing. Petition denied.

J. C. McKinstry, for appellant. J. C. Bates, for respondent.

PER CURIAM. The petition for transfer to the Supreme Court for a rehearing is denied.

As Edgar Emanuel Sutro did not appeal, he is not entitled to any relief or advantage from the appeal of his codefendant, Henrietta L. B. Sutro. Hence the order of the District Court of Appeal directing a modification of the judgment by striking out the amount allowed as attorney's fees is to be understood as applying in favor of Henrietta L. B. Sutro alone, and not as affecting in any way the relief given to the plaintiff against Edgar Emanuel Sutro. The effect is that if his interest in the property sells for enough to pay the debt, interest, and costs, without the attorney's fee, her interest will be exonerated; her interest can be sold only for what remains of such debt, interest, and costs, without the attorney's fee, after applying on such debt, interest, and costs, the proceeds of his interest; and plaintiff will be entitled to a deficiency judgment against Edgar Emanuel Sutro for whatever may remain unsatisfied of the whole judgment, including the attorney's fees, after applying the proceeds of the interests of both defendants thereon in the manner stated.

156 Cal. 633

CHRISTENSEN v. CRAM. (S. F. 5,180.)

(Supreme Court of California. Dec. 3, 1909.)

1. SALES (§ 353*)—ACTION FOR PRICE—COMPLAINT—SUFFICIENCY.

A statement that one has sold to another personal property for a stated sum implies that the price has been agreed on and that the buyer has promised to pay it, and a complaint containing such statement avers in substance a promise by the buyer to pay to the seller the sum sued for.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1000; Dec. Dig. § 353.*]

2. PLEADING (§ 433*) — DEFECTS — AIDER BY VERDICT.

The defects in a complaint alleging that plaintiff sold to defendant personal property for a specified sum, and that a part of the price remained unpaid, arising from the fact that it is not direct in alleging a promise by defendant to pay the money sued for, is cured by the verdict.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1451–1477; Dec. Dig. § 433.*]

3. SALES (§ 353*)—ACTION FOR PRICE—COMPLAINT—"SOLD"—"SALE."

A complaint which alleges that plaintiff "sold" to defendant personal property for a specified sum, that defendant paid a part and that the balance was due, owing and unpaid, on account of the sale of the property, is an attempt to follow Code Civ. Proc. § 426, by stating the facts constituting the cause of action in ordinary language, and sufficiently alleges, after verdict, that the unpaid price was due by alleging a completed sale, for the word "sold" describes a completely executed transaction, though the word is often used to indicate an executory agreement only, and the word "sale" does not necessarily, and in all connections, mean that title must pass.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 995–1004; Dec. Dig. § 353.*

For other definitions, see Words and Phrases, vol. 7, pp. 6540–6542; vol. 8, p. 7801; vol. 7, pp. 6291–6306; vol. 8, p. 7793.]

4. SALES (§ 1*)—ELEMENTS.

To constitute a valid sale there must be parties competent to contract, mutual consent, a thing, the absolute or general property in which is transferred from the seller to the buyer, and a price in money paid or promised.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1, 3–5; Dec. Dig. § 1.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; John E. Richards, Judge.

Action by S. Christensen against Benjamin M. Cram. From a judgment for plaintiff, defendant appeals. Affirmed.

A. B. Weiler and A. B. Harris, for appellant. Jas. P. Sweeney, for respondent.

SHAW, J. The action is to recover $350 on contract. The appeal is from the judgment upon the judgment roll alone. The only question presented is the sufficiency of the complaint. The complaint was not verified, the answer was a general denial, there was a trial by the court upon the merits, and a finding that all the allegations of the complaint were true.

The first contention of the appellant is that the complaint does not aver any promise on the part of the defendant to pay the money sued for, nor any facts from which such promise would be implied by law. There is no express formal allegation of a promise, but it is alleged that the plaintiff sold to the defendant a horse and buggy for the sum of $550, that the defendant paid $200 on account thereof, and that there is still due, owing and unpaid on account of said sale of said horse and buggy to said plaintiff by said defendant, the sum of $350. When it is said that one has sold to another certain property for a stated sum of money, the statement implies that the price was agreed upon, and that the buyer promised to pay it. This would be the ordinary meaning of the language. The complaint, therefore, does, in substance, aver a promise by the defendant to pay to plaintiff the money sued for. The averment is defective in that it is not direct, but it is sufficiently certain to the ordinary mind. It is of the class of defects which should be considered as cured by the verdict and as not sufficiently prejudicial to the other party to warrant a reversal on appeal.

The next objection is that there is no allegation that the price was due or presently payable, at or before the time the action was begun. In support of this objection the argument is that, in the absence of a special agreement to the contrary, the price of goods sold is not payable until delivery is made, or until the title passes, and that no delivery is alleged, and it is not shown that the title passed. It is alleged that the plaintiff "sold" the property to defendant at the price named. The word "sold" is often used to indicate an executory agreement for the sale of property. Instances of such use are exhibited in Blackwood v. Cutting Packing Co., 76 Cal. 212, 18 Pac. 248, 9 Am. St. Rep. 199, Eaton v. Richeri, 83 Cal. 185, 23 Pac. 286, Pettinger v. Fast, 87 Cal. 461, 25 Pac. 680, and Shainwald v. Cady, 92 Cal. 83, 28 Pac. 101, cited by the appellant. For example, if by contract an agent is to receive a commission upon a sale of property, or when property is sold, a valid executory agreement of sale will answer the condition. "The word 'sale' does not necessarily, and in all connections, mean that a conveyance must be made, or that the title must pass." Eaton v. Richeri, supra. But on the other hand, when nothing appears in the context or circumstances to control it, the word primarily means a consummated sale; that is, a sale and delivery, or a passing of the title. In 1 Benjamin on Sales, § 1, that author says: "To constitute a valid sale there must be a concurrence of the following elements, viz.: (1) Parties competent to contract; (2) mutual consent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer; and (4) a price in money paid or promised." See, also, 1 Mechem on Sales, § 1; 24 Am. & Eng. Ency. of Law, 1022. It is conceded that when the title passes, or when delivery is made, the price immediately becomes due. See, on this point, 2 Mechem on Sales, § 1406. There are decisions to the effect that, under the common-law system of pleading, a complaint in the form of a common count for the price of goods must aver that the goods were "sold and delivered," and that if the word "delivered" is omitted there is a fatal defect. Kilpatrick, etc., Co. v. Box, 13 Utah, 494, 45 Pac. 629; McEwen v. Morey, 60 Ill. 34. But in the case at bar there was no attempt to use the form known as the "common count," as established by the common law. The pleading is manifestly an attempt to follow the Code rule (Code Civ. Proc. § 426); that is, to state "the facts constituting the cause of action in ordinary and concise language." When this is done, the words used should be given their ordinary meaning, unless modified by the context. The context in this complaint certainly does not alter the usual meaning of the word "sold," but rather strengthens the conclusion that it was used to describe a completely executed transaction.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The decisions to the effect that the expression "due and owing," in a complaint to recover money, is a mere conclusion of law, and is not sufficient as an averment of a breach of a promise to pay money, are not decisive of the case. As we have seen, the complaint in effect states a promise to pay money then presently payable. The allegation as to the breach is that "there is still due, owing and unpaid on account of said sale," the sum of $350, and "that no part of the same has been paid." The breach of such a promise is the failure to pay, and this is sufficiently alleged by the clauses quoted. If a witness had testified on behalf of plaintiff, using the exact words of the complaint, such evidence would have been sufficient to support a judgment for the plaintiff upon a common count for goods sold and delivered. There is absolutely nothing in the record to show or indicate that the defendant was in any way misled by the lack of a fuller or more technical statement of the facts, or that he was not by the complaint fully informed with respect to the case to be presented against him. Upon this appeal from the judgment, upon the judgment roll alone, after an issue and trial upon the merits, we think the complaint should be held to be sufficient, although it is not to be commended as a model, and although, if a demurrer thereto had been sustained, we might not have been disposed to reverse such a ruling.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.; MELVIN, J.

(156 Cal. 681)

FAGAN v. LENTZ et al. (S. F. 5,185.)

(Supreme Court of California. Dec. 8, 1909.)

1. Appeal and Error (§ 301*) — Presentation of Errors in Trial Court—Motion for New Trial.

On appeal from an order denying a motion for a new trial, the reviewing court is limited in its review to the grounds on which such motion was based.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1743, 1744; Dec. Dig. § 301.*]

2. Appeal and Error (§ 1011*) — Review — Questions of Fact—Findings by Court.

The findings by the court involving questions as to preponderance and conflicting evidence are conclusive on review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3983; Dec. Dig. § 1011.*]

3. New Trial (§ 79*)—Findings—Sufficiency of Evidence.

A new trial will not be granted because of the insufficiency of the evidence to sustain a finding that is immaterial and could not have affected the judgment.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 165½; Dec. Dig. § 79.*]

4. Evidence (§ 151*) — Competency — Testimony of Witness as to His Own State of Mind.

In an action to cancel a deed of gift from a brother to a sister to enable the grantee to more easily settle a decedent's estate, in which both grantee and grantor are interested, it is proper to allow plaintiff to testify that in making the deed he relied on his sister's promise that, when the estate was settled, he would receive his share thereof.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 440; Dec. Dig. § 151.*]

5. Gifts (§ 48*)—Action for Cancellation—Evidence.

In an action to cancel a deed of gift from brother to sister to enable the grantee to more easily settle a decedent's estate, in which they were both interested, plaintiff may testify that he had no legal advice regarding the execution of the deed except that of the grantee's attorney.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 87–94; Dec. Dig. § 48.*]

6. Witnesses (§ 373*)—Examination—Foundation for Impeachment.

Where a witness for plaintiff gave no testimony showing ill will toward defendant, and no foundation was made for impeachment, he cannot be impeached by defendant showing such ill will.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1200; Dec. Dig. § 373.*]

7. Evidence (§ 222*)—Admissions Made After Receipt of Conveyance.

In an action to cancel a deed from brother to sister, it was alleged that the deed was made to enable the grantee to more easily settle a decedent's estate, in which both were interested, and that the grantor's interest was to be reconveyed after such settlement, and that grantee refused to make such reconveyance. On cross-examination defendant was asked whether, on a specified date, she was questioned as to whether she would have reconveyed the property to plaintiff if "he had asked you, and offered to pay his proportion of the debts and expenses," and if she answered: "I might if he paid his proportion. Of course, if he paid his proportion, I would"—and witness admitted making the statements. *Held*, that the court properly admitted the evidence on the express theory that the words "of course" might be taken as a recognition by defendant "that there was some other reason that would make it proper for her" to make the conveyance, and that the statement tended to show an admission in plaintiff's favor.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 794; Dec. Dig. § 222.*]

8. Appeal and Error (§ 232*)—Reservation of Grounds of Review.

Appellant is confined on review to the objections to evidence made by him on the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1430; Dec. Dig. § 232.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; Jas. M. Seawell, Judge.

Action by Thomas H. Fagan against Ellen T. Lentz and Charles W. Lentz. Plaintiff had judgment, and defendants appeal from an order denying their motion for a new trial. Affirmed.

James M. Hanley, for appellants. Wm. S. Barnes, H. H. McCloskey, and C. S. Farquar, for respondent.

ANGELLOTTI, J. This action is one in equity to obtain a reconveyance of certain real property conveyed by plaintiff to Ellen T. Fagan, now defendant Ellen T. Lentz. Plaintiff had judgment, and defendants appeal from an order denying their motion for a new trial.

The real property in suit consists of undivided interests in two lots of land in the city and county of San Francisco; one being a lot on Jones street of considerable value, and the other being a lot on Sanchez street. On July 18, 1905, the Jones street lot was owned by plaintiff, Ellen T. Fagan and Mary J. Fagan, sisters of plaintiff, and one R. S. Browne, each owning an undivided one-fourth, and the Sanchez street lot was owned by plaintiff, Ellen T. Fagan, Mary J. Fagan, and Margaret A. Williams, all sisters of plaintiff, each owning an undivided one-fourth. On the last-named day, said Mary J. Fagan died intestate, leaving as sole heirs at law the plaintiff, Ellen T. Fagan, and Margaret A. Williams, by reason of which plaintiff succeeded to an additional undivided one-twelfth in each of said lots, making his undivided interest in each lot one-third. At the request of plaintiff and her surviving sister, Ellen T. Fagan was appointed administratrix of the estate of Mary J. Fagan; letters of administration issuing August 14, 1905. On July 29, 1905, Margaret A. Williams executed to Ellen T. Fagan a deed, purporting on its face to be a deed of gift, conveying all her right, title, and interest in the two lots, and all her right, title, and interest in and to the estate of said Mary J. Fagan and her distributive share thereunder. On August 24, 1905, plaintiff executed a similar deed to Ellen T. Fagan. No valuable consideration was given for either of these deeds. On January 17, 1906, a decree of distribution was duly made in the matter of the estate of Mary J. Fagan, whereby, by reason of said deeds, all of the interest of Mary J. Fagan in said lots was distributed to Ellen T. Fagan. Subsequent to April 18, 1906, and prior to June 12, 1906, Ellen T. Fagan and defendant Charles W. Lentz intermarried. On June 12, 1906, said Ellen executed to her husband a grant, bargain, and sale deed purporting to convey to him all her interest in both lots. This deed expressed a consideration of $10; but the trial court found upon evidence that is entirely satisfactory that the transfer was made and accepted wholly without consideration and not in good faith and for the purpose of preventing plaintiff from recovering any part of said property. R. S. Browne, who was one of the co-owners of the Jones street lot, and who claimed a specific portion thereof by reason of a certain deed made by Ellen T. Fagan after the conveyance to her by plaintiff, was a party defendant in this action; but the rights of his grantee have been secured by an agreement entered into by the parties to this action, and he has not appealed from the judgment or order denying a new trial. This action was commenced July 6, 1906.

The facts upon which plaintiff bases his action, as shown by the allegations of his complaint, are substantially as follows: About the time of the death of his sister Mary, and for a long time thereafter, including the date of the execution of the deed of gift by him to defendant Ellen, plaintiff, a man of 52 years of age, was sick, being confined to the house, and for a great portion of the time to his bed, and was weak both physically and mentally. This condition continued until about April 18, 1906. He at all times relied implicitly upon and had full faith and confidence in his sister Ellen, a woman of the age of about 44 years. So relying, and because of his supposed inability to act efficiently by reason of his sickness, he consented that she should act as administratrix of the estate of Mary, and waived his right to act in that capacity. Ellen had the two deeds of gift to herself, one from plaintiff and one from Margaret, prepared, and brought the deed from plaintiff to him for execution, soliciting him to execute the same for the expressed reason that it would simplify the settlement of the estate of Mary, hasten such settlement, and lessen the expense in such settlement, and promising that when such settlement was had plaintiff would get back his interest in said property, meaning thereby that she would then convey his share in the property to him. It was substantially alleged that it was then the secret design of Ellen to hold this property and not to reconvey to plaintiff; but the trial court found against these allegations, and to the effect that it was then her intention to reconvey to the plaintiff his interest immediately upon the settlement of Mary's estate, but that some time after the execution of the deed she abandoned such intention and refused to reconvey. At this time plaintiff had no property other than his interest in these lots, and he has not acquired any property since then. Plaintiff believed the statements made by Ellen to be true and relied upon the same, and so believing and relying signed and delivered the deed of gift, conveying to her "every dollar's worth of property that he possessed." On June 12, 1906, as has been said, Ellen conveyed the property to her husband, and both she and her husband repudiated plaintiff's claim as to the understanding upon which the property was conveyed to Ellen; their claim being, as set forth in their answer, that the deed of gift was executed and delivered by plaintiff as his free act and deed and while he was in full possession of his mental faculties, and by reason of the further fact that the property was so much involved in debt and so tangled with litigation that plaintiff desired Ellen to take the property and dispose of it for her own use and better maintenance and support.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The findings of the trial court were in accord with the allegations of the complaint, except in the one respect already noted, viz., as to the intention of defendant Ellen at the time of the making of the deed of gift.

The theory of counsel for plaintiff is that, notwithstanding the absence of any fraudulent intention on the part of Ellen at the time of the making and acceptance of such deed, the findings establish that the relation of the parties to each other at that time was confidential in fact, that the confidence which plaintiff had in his sister was the inducement which led him to execute the deed to her, and that the betrayal of that confidence—the violation of the promise to reconvey—was a constructive fraud, giving rise to a constructive trust, and entitling the plaintiff to the relief awarded by the judgment, under the rule declared in Brison v. Brison, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189, and Id., 90 Cal. 323, 27 Pac. 186, and subsequent decisions following that case. We are not here concerned with any question of the correctness of that theory as applied to the facts shown by the findings, for the reason that there is no appeal from the judgment, but only an appeal from the order denying a motion for a new trial. It is unnecessary to cite authorities in support of the well-settled rule that, upon an appeal from an order denying a motion for a new trial, "the appellate court is limited in its review of the action of the trial court to the grounds upon which such a motion may be based (Code Civ. Proc. § 657)," and that questions relating to the sufficiency of the findings to support the judgment cannot be considered. See Great Western Gold Co. v. Chambers, 153 Cal. 307, 310, 95 Pac. 151. We have stated the facts alleged and found solely with a view to a better understanding of the merits of various contentions of defendants in regard to the question as to the sufficiency of the evidence to sustain certain findings and the correctness of certain rulings in the matter of the admission and exclusion of evidence.

Upon the question of the insufficiency of the evidence to sustain certain findings, learned counsel for defendants lay much stress on the well-settled rule that, in cases of this character, the presumption of absolute conveyance should prevail, unless the evidence to the contrary is entirely clear and convincing. As to this, the well-settled rule was stated in Wadleigh v. Phelps, 149 Cal. 627, 637, 87 Pac. 93, 98, as follows: "This, however, does not mean that the evidence in the record on appeal must be entirely plain and convincing to an appellate court. This question of fact, like other questions of fact, is one for the trial court, and while, as said in Sheehan v. Sullivan, 126 Cal. 189, 193, 58 Pac. 543, the appellate court will consider the question as to the sufficiency of the evidence in the light of that rule, it will not disturb the finding of the trial court to the effect that the deed is a mortgage, where there is substantial evidence warranting a clear and satisfactory conviction to that effect. All questions as to preponderance and conflict of evidence are for the trial court." See, also: Brison v. Brison, 90 Cal. 323, 334, 27 Pac. 186; Mahoney v. Bostwick, 96 Cal. 53, 30 Pac. 1020, 31 Am. St. Rep. 175; Sherman v. Sandell, 106 Cal. 373, 375, 39 Pac. 797; Couts v. Winston, 153 Cal. 686, 689, 96 Pac. 357. As was said in the last case cited: "If therefore the evidence offered by plaintiffs, taken by itself, was sufficiently clear, satisfactory, and convincing to satisfy the trial court, * * * the finding made thereon cannot be overthrown merely because numerous witnesses, whose character is not impeached, gave positive evidence to the contrary effect. * * * All questions as to preponderance and conflict of evidence are for the trial court." An examination of the record has satisfied us that there was substantial evidence warranting a clear and satisfactory conviction on the part of the trial court as to all the material matters embraced in such findings as are attacked on this appeal.

The claim that, admitting the truth of the evidence of plaintiff as to the facts surrounding the execution of the deed of gift, such evidence makes out at most an understanding for the reconveyance only of such interest in the lots as plaintiff succeeded to as heir of Mary J. Fagan, and not for the interest owned by him prior to the death of Mary, is without merit. There is nothing in the evidence warranting any inference of different understandings as to the different interests. Whatever promise was made by Ellen related to the whole of the property that she was acquiring by the deed. Defendant Ellen did not in terms say that she would reconvey the property to plaintiff after the estate was settled, but she did say, according to plaintiff's evidence, what was equivalent thereto, and the trial court was fully warranted in finding, as it did, that by the words used by her "she purposely intended to convey to plaintiff, and did convey to him, the idea, and that the same was a promise on her part, that immediately upon the settlement of said estate she would reconvey to him all the interest and title he conveyed to her by said deed of August 24, 1905." The evidence of plaintiff, if satisfactory to the trial court, was entirely sufficient under the circumstances of the case to warrant the findings as to the reasons for the execution by plaintiff of his deed by him to Ellen, and the manner in which and the promise upon which she obtained such execution. There was nothing improbable or absurd in the story told by him as to the reasons expressed by Ellen and accepted by him why such a conveyance was desirable. The interest of Mary J. Fagan was an undivided interest in lots in which plaintiff and his surviving sisters already held undivided interests, a stranger threatening partition proceedings held another undivided interest, and the more valuable lot was somewhat heavily incumbered by mortgage and tax liens. It is not difficult to believe that all of the Fagan heirs may have understood, especially when so advised by an attorney, that the settlement of these matters might be simplified by placing their title in the name of one of them. The evidence of plaintiff is corroborated by other evidence, and under all the circumstances of the case appears to us to be much more satisfactory than the theory advanced by defendants. It is difficult to conceive it to be true, as claimed by them, that this plaintiff, circumstanced as he was, had any intention of giving absolutely to Ellen, who had property of her own and stood in no need of assistance, this valuable property constituting all that he had in the world.

We are of the opinion that the evidence was sufficient to warrant the inference by the trial court that plaintiff was "weak mentally" on the 24th day of August, 1905, the day of the execution of the deed. He had then been confined to the house by sickness for a considerable time, was apparently very nervous and somewhat discouraged, and showed by his conduct considerable indecision. The finding does not import insanity or idiocy, but simply a weakness of mental capacity rendering him the more likely to be influenced by the statements of those around him. Assuming that there was no evidence to show that defendant Charles W. Lentz visited plaintiff prior to the execution of the deed of August 24, 1905, or was present at the time of its execution, we regard the finding in this particular as immaterial. A new trial will not be granted because of the insufficiency of the evidence to sustain a finding that is immaterial and that could not have affected the judgment. The same is true upon the question whether Ellen was present at the time of the interview between the attorney and plaintiff. The same is true as to the findings as to the exact value of the property conveyed. Admittedly it had a very substantial value of several thousand dollars. Exactly why plaintiff consented that Ellen should act as administratrix of the estate of Mary was also immaterial; it appearing by evidence sufficient to sustain the finding in that behalf that he did so relying implicitly upon her and believing that she could more expeditiously and efficiently handle the matter. The finding as to the intention of Ellen at the time of the execution of the deed of August 24, 1905, to reconvey upon the settlement of the estate, and the finding as to the transfer by her to her husband, and the reasons therefor, are sufficiently sustained by evidence.

What we have said practically disposes of all objections made to the findings on the ground of insufficiency of evidence. It was, of course, entirely proper to allow the plaintiff to testify that in making the deed of gift he relied upon "Ellen's promise that, when the estate was settled, he would get his share back." It was essential to his case that he had made the deed relying on and having confidence in his sister's promises, and his statement to that effect was competent evidence, the weight of which was a question for the trial court in the light of all the other circumstances. There was no error in allowing the plaintiff to testify that he had no legal advice regarding the execution of the deed of gift prior to its execution, except the advice given him by Ellen's attorney. The objection to the question asked Ellen on cross-examination, as to what her sister Mrs. Williams told her with reference to her reasons for transferring her interest in the property, was properly overruled. It was proper cross-examination concerning a matter fully gone into by her on her direct examination.

Mrs. Minnie Tucker was a witness for plaintiff, but was not questioned and did not give any testimony as to her feelings toward either of the defendants, or as to the making of any statement tending to show hostility or bias. On the direct examination of defendant Charles W. Lentz, he was asked whether Mrs. Tucker did not, after some difficulty between her husband and himself, shake her hand and fist at him and say, "I will give you all the court you want, before I get through with you." An objection to this question was sustained. It is settled in this state that the same foundation as must be laid for introducing prior contradictory statements of a witness is equally necessary to the introduction of evidence of declarations showing hostility or ill feeling on the part of the witness; in other words, that, before such evidence of hostile statements by the witness can be introduced, the witness so sought to be attacked must be asked as to the making of such statements. Baker v. Joseph, 16 Cal. 173, 177; Silvey v. Hodgdon, 48 Cal. 185. See, also, note to Allen v.

State, 73 Am. Dec. 775; 2 Wigmore on Evidence, § 953. The ruling of the trial court sustaining the objection to the question asked Mr. Lentz relative to Mrs. Tucker was in accord with this rule.

It is urged that the court erred in sustaining an objection to a question asked Mr. Lentz as to whether Mr. Tucker, the husband of Minnie Tucker, who was not a witness, had some trouble with him. This question was answered in the affirmative by Lentz before any objection was interposed, and while, in response to the objection, the court said the question was improper, the objection was not formally sustained and the answer was not stricken out. If we assume that this amounted to an exclusion of the evidence, and that the court committed error in excluding it, we think nevertheless that it was of such slight importance that it should not be held to have prejudicially affected defendants' cause.

On her cross-examination Mrs. Lentz was asked whether on February 23, 1907, or about that time (which was subsequent to her conveyance of the property to her husband), she was not questioned as follows, referring to the reconveying of the property to plaintiff, "Would you have done it if he had asked you and offered to pay his proportion of the debts and expenses?" and answered: "I might if he paid his proportion. Of course, if he paid his proportion, I would." The question was objected to on the ground that it was "incompetent, irrelevant, and immaterial, in this, that the issue * * * is whether * * * the plaintiff * * * did, or did not, on the 24th day of August, deed the property in question, not what she may now say, or what she might have done provided any conditions existed. It is what she would legally be compelled by law to do; and upon the further ground that it is not cross-examination, and the proper foundation has not been laid." The court overruled the objection upon the expressed theory that the presence of the words "of course" might be taken as a recognition by the witness "that there was some other thing that would make it proper for her" to make the reconveyance, and that the statement was therefore proper evidence tending to show an admission by her in favor of plaintiffs' claim. The witness thereupon answered that she made the statement attributed to her. We are of the opinion that the views of the court as to the precise objection made were correct, and that the objection was untenable. It is claimed on this appeal that the testimony as to this statement was objectionable for the reason that "it is well settled that the declaration of a grantor made after the execution of his conveyance cannot be received to disparage his deed." No such objection was made or intimated in the trial court. Counsel for defendants say that where evidence objected to is absolutely irrelevant and incompetent for any purpose, and the objection to it cannot be removed, a general objection of incompetency and irrelevancy is sufficient; but there was no such general objection. Although the objection used the words "incompetent, irrelevant, and immaterial," those words were carefully limited to the precise objection already discussed, which was substantially that the question was speculative and called simply for the present opinion of the witness as to "what she might have done" under certain circumstances. No objection, general or special, embracing the contention now presented, having been made in the trial court, the point cannot be made on this appeal. It is therefore unnecessary for us to consider whether the rule invoked by defendants as to declarations of a grantor after conveyance is available in favor of a grantee occupying the position of defendant Charles W. Lentz, who is found to have received his deed without consideration and not in good faith and for the purpose of preventing plaintiff from recovering any part of his property.

There is no other matter requiring notice. The order denying a new trial is affirmed.

We concur: SHAW, J.; MELVIN, J.; LORIGAN, J.; SLOSS, J.; HENSHAW, J.

156 Cal. 651

STEWART v. STEWART. (L. A. 2,444.)

(Supreme Court of California. Dec. 7, 1909.)

1. Appeal and Error (§ 867*)—Questions for Review—Sufficiency of Pleading.

Upon an appeal from an order granting or denying a new trial, only such matters can be considered as are made grounds upon which the trial court is authorized to grant or deny the motion, and neither the sufficiency of a pleading nor the action of the trial court upon a demurrer thereto, or upon a motion to strike can be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3476–3486; Dec. Dig. § 867.*]

2. Appeal and Error (§ 119*) — Decisions Reviewable—Denial of Application for Costs.

An order denying plaintiff's application for costs in a suit for divorce is appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 823–829; Dec. Dig. § 119.*]

3. Divorce (§ 223*)—Proceedings—Alimony —Costs.

The awarding of costs to a wife in an action for divorce rests in the sound discretion of the trial court, and, before any payment is ordered, the wife must show the necessity of the award; and, where she seeks, in addition to counsel fees which were allowed, an allowance to enable her to summon 25 or 30 witnesses and take the depositions of 17 others, it was not error to deny the motion, where it did not appear that the testimony was material, and her counsel declined to state what the character of the testimony was that he expected to procure, Civ. Code, § 137, providing for the payment of costs for the prosecution or defense of an action for divorce where the same is necessary.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 645; Dec. Dig. § 223.*]

4. DIVORCE (§ 139½*)—DISMISSAL OF ACTION.

Under Code Civ. Proc. § 581, providing that an action may be dismissed when plaintiff abandons it or fails to prove a sufficient case for the jury, an action for divorce is properly dismissed upon refusal of plaintiff to offer any testimony in support of her complaint.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 469; Dec. Dig. § 139½.*]

5. DIVORCE (§ 223*)—APPEAL—COSTS.

A wife, who has been defeated in an action for divorce, has no absolute right to prosecute an appeal at the expense of her husband, and whether the husband shall be required to pay the wife's expenses of appeal is a matter in the discretion of the trial court; and, if the court is satisfied that the proposed appeal is not undertaken in good faith, or with reasonable belief that it has a merit, the application should be denied.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 645; Dec. Dig. § 223.*]

Department 1. Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Gertrude E. Stewart brought an action for divorce against Elmore Stewart, and defendant filed a cross-complaint, upon which an interlocutory decree of divorce in favor of the cross-complainant was granted. Plaintiff appealed from an order denying a motion for new trial, and also from an order denying a motion for attorney's fees and costs on appeal. Orders affirmed.

L. E. Dadmun, for appellant. Wadham & Pritchard, for respondent.

SLOSS, J. Action for divorce. The complaint, filed by the wife, was based on the ground of extreme cruelty. The husband answered, denying the charges, and filed a cross-complaint in which he set up three grounds for divorce—extreme cruelty, desertion, and adultery. Upon the trial the court found in favor of the charge of adultery, and granted an interlocutory decree of divorce in favor of the husband as cross-complainant. The wife's motion for a new trial was denied, and she appeals from the order denying her said motion. She also appeals from a subsequent order denying her motion for attorney's fees and costs on appeal. There is no appeal from the judgment.

The appellant seeks, on her appeal from the order denying a new trial, to have reviewed the action of the court below in overruling her demurrer to the cross-complaint. It is urged that the charge of adultery is not sufficiently specific in its designation of the person with whom the act was claimed to have been committed. We do not agree with this contention, but, even if we did, the point would not be available to appellant on an appeal from an order denying a new trial. "Upon an appeal from an order granting a new trial only such matters can be considered as are made grounds upon which the superior court is authorized to grant or deny the motion. Neither the sufficiency of a pleading nor the action of the superior court upon a demurrer thereto, or upon a motion to strike out the pleading or any portion thereof, can be considered." Green v. Duvergey, 146 Cal. 379, 384, 80 Pac. 234; Crescent, etc., Co. v. United Upholsterers' Union, 153 Cal. 433, 95 Pac. 871, and cases cited.

It appears that when the cause was called for trial, the plaintiff, through her attorney, objected to proceeding on the ground that she was without means to obtain witnesses, by reason of the refusal of the court, before the time of trial, to grant her applications for orders directing the defendant to furnish her with the necessary money with which to subpœna witnesses. The objection was overruled, and the plaintiff then made the point that the issues arising on the cross-complaint and the answer thereto should first be tried. The court ruled in favor of this contention, whereupon plaintiff objected to going to trial on the cross-complaint, on the ground that she was unable to make her defense for the same reasons as those which prevented her making out a case under her complaint. This objection was also overruled. Exceptions to both rulings were noted. The cross-complainant offered evidence in support of the charge of adultery, and the plaintiff and another witness testified in opposition. The court stated that it thought the defendant entitled to a divorce on the ground of adultery. The defendant abandoned the other grounds of his cross-complaint, and the court called upon plaintiff's counsel to proceed with his case on the original complaint. This he declined to do, standing upon the objections theretofore made. Although the plaintiff was present, and that fact emphasized by the court, the attorney refused to call her or to proceed. Thereupon the court, on motion of the defendant, dismissed plaintiff's action, and granted the defendant judgment on the third cause of action (i. e., adultery), set up in his cross-complaint.

The evidence in support of the defendant's cross-complaint is not set forth, and its sufficiency to sustain the finding is not questioned. The appellant relies for reversal upon the action of the court in refusing to postpone the trial upon her statement that she was unable, by reason of prior rulings of the court, to procure witnesses. This contention involves, necessarily, an inquiry into the correctness of those prior rulings. The orders denying the plaintiff's applications for costs were themselves appealable orders (Sharon v. Sharon, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709; White v. White, 86 Cal. 212, 24 Pac. 1030), and it is argued by respondent that the remedy for any error committed in making them was by direct appeal rather than by motion for new trial. The soundness of this position need not be passed upon at this time. Assuming, for the purposes of the present case, that the refusal to grant costs may be reviewed on this appeal from the order denying a new trial, we are satisfied that the record does not disclose error in such refusal. The proceedings on the applications for costs are set forth in a separate bill of exceptions. It appears that the first motion was for $1,000 additional attorney's fees, $500 costs, and $75 per month as maintenance and support. Affidavits of the parties were offered, and the court ordered that the defendant pay the plaintiff $100 as attorney's fees. The application for maintenance was denied, and it was ordered that "no allowance for costs at this time be granted." The denial of costs was not final, and the plaintiff subsequently renewed her motion, basing it, apparently, upon the affidavit first filed. This affidavit, made by the plaintiff herself, averred that she had a meritorious cause of action and a like defense to the cross-complaint; that she was without means; that she had given to her attorney a list of names of witnesses whose testimony would be necessary to enable her to prosecute her action and defend against that of her husband; that it would be necessary to take the depositions of certain other persons, and that without the said witnesses and depositions she could not safely go to trial. Her inability to pay the necessary expense and the financial resources of the defendant were set forth. The affidavit names 21 persons, "and some 5 or 6 other witnesses," as those whose testimony would be needed in addition to some 17 other persons whose depositions it would be necessary to take. The motion, upon its renewal, was denied for the reasons that "it did not appear what the testimony was that plaintiff's counsel desired to obtain, nor did it appear that any of the testimony sought to be obtained was material to any of the issues to be tried in the case, and for the further reason that plaintiff's counsel, upon being requested to do so, declined to advise the court or opposing counsel as to the character of the testimony which he expected to procure, or as to what facts any of said witnesses would testify to." These considerations fully justified the action of the court. The awarding of alimony or costs to the wife in an action for divorce is not a matter of right, but is one resting in the sound discretion of the trial court. White v. White, 73 Cal. 105, 14 Pac. 393; Langan v. Langan, 91 Cal. 654, 27 Pac. 1092. Where the marriage relation is admitted or shown by preponderating evidence (Hite v. Hite, 124 Cal. 389, 57 Pac. 227, 45 L. R. A. 793, 71 Am. St. Rep. 82), liberality in providing for the needs of the wife, both with regard to her support and the expenses of the litigation, will be exercised. But, before any payment is claimed, the wife must show the necessity of the award. White v. White, 86 Cal. 212, 24 Pac. 1030; Loveren v. Loveren, 100 Cal. 493, 35 Pac. 87. Here the plaintiff sought, in addition to counsel fees, which were allowed, an allowance to enable her to summon some 25 or 30 witnesses and to take the depositions of 17 others. Before she could call upon the defendant to pay the large expense involved, she was bound to show that such expense was "necessary to enable her to prosecute or defend the action." Civ. Code, § 137. Even after being called upon to state what these witnesses, or any of them, could establish, she declined to make any statement which might enlighten the court upon the question of the necessity of having these witnesses, or of her good faith in declaring that they were required. The court was not compelled to accept her conclusion that she needed these witnesses, and committed no abuse of discretion in refusing to make an award in the absence of a showing of the purposes for which they were to be called. No claim was made that such disclosure would have been prejudicial to her rights. It follows that the court acted properly in compelling the parties to go to trial, and in dismissing plaintiff's case upon her refusal to offer any testimony in support of her complaint. Code Civ. Proc. § 581.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Of the appeal from the order refusing to require defendant to pay plaintiff's expenses of appeal, it is sufficient to say that this, too, is a matter resting in the sound discretion of the trial court (Gay v. Gay, 146 Cal. 237, 79 Pac. 885), and that no abuse of discretion is shown. There is no absolute right in the defeated wife to prosecute an appeal at the expense of her husband. Where the trial court is satisfied, from the record before it, that the proposed appeal is not undertaken in good faith, or with reasonable belief that it has merit (Gay v. Gay, supra), the application should be denied. The record in this case fully justified an adverse finding on these points.

The orders appealed from are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

156 Cal. 636

RUDD v. BYRNES. (S. F. 4,957.)

(Supreme Court of California. Dec. 3, 1909.)

1. Limitation of Actions (§ 184*)—Pleading —Amendment to Plead Statute.

Refusal of leave to amend an answer to plead the bar of the statute is not an abuse of discretion, unless it is made to appear that the amendment will be in furtherance of justice, which is not done by a mere showing that defendant's counsel overlooked an amendment of the statute reducing the time for commencing such an action; liberality in allowing amendments being exercised only in furtherance of justice.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 693; Dec. Dig. § 184.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. Weapons (§ 18*)—Injury from Negligent Use—Contributory Negligence.

Where plaintiff, defendant, and L. went hunting for deer, on the banks of a river thickly grown with brush, through which were deer crossings along which deer, when chased by dogs, would come into the water, and after it was agreed that they should station themselves at three crossings, defendant 200 yards above, and plaintiff 200 yards below L., plaintiff crossed the river, and, instead of going below L., went above him and opposite to defendant, and defendant, seeing the movement of brush caused by plaintiff, fired, thinking it was a deer, the question of contributory negligence was for the jury.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. § 34; Dec. Dig. § 18.*]

3. Negligence (§ 136*)—Question for Court.

The question of negligence is for the jury only where the facts are undisputed, and but one inference can be drawn from them.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277–353; Dec. Dig. § 136.*]

4. Weapons (§ 18*)—Negligent Discharge.

One who, seeing an object moving in the brush, shoots without taking time to discover what it is, on the assumption that it is a deer, when it is a man, is guilty of negligence.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. § 34; Dec. Dig. § 18.*]

5. Weapons (§ 18*)—Negligent Shooting—Custom.

The custom of hunters along coast rivers is not admissible on the question of negligence of one who, seeing bushes moving, shot on the assumption of its being caused by a deer.

[Ed. Note.—For other cases, see Weapons, Dec. Dig. § 18.*]

6. Weapons (§ 18*)—Negligent Shooting—Contributory Negligence—Knowledge of Custom.

Even if failure of plaintiff, while hunting, to comply with a custom, was competent on the question of contributory negligence, he having been shot by a fellow hunter, mistaking him for a deer, his knowledge of the custom at the time would have to be shown.

[Ed. Note.—For other cases, see Weapons, Dec. Dig. § 18.*]

7. Appeal and Error (§ 1057*)—Harmless Error—Exclusion of Evidence.

Exclusion of evidence of a custom on the question of plaintiff's contributory negligence was immaterial; he having admitted making an agreement, which went fully as far as the custom.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194–4199; Dec. Dig. § 1057.*]

8. Evidence (§ 222*)—Declarations.

Evidence of plaintiff's statement that his injury resulted from his own fault, being the declaration of a party against his interest, was admissible under Code Civ. Proc. § 1870, subd. 2.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 768–808; Dec. Dig. § 222.*]

9. Appeal and Error (§ 1057*)—Harmless Error—Exclusion of Evidence.

The facts being fully shown by plaintiff's own testimony, exclusion of his declaration that his injury resulted from his own fault, his mere conclusion on the issue for the jury, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194–4199; Dec. Dig. § 1057.*]

In Bank. Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by Paul Rudd against Ralph Byrnes. Judgment for plaintiff. Defendant appeals. Reversed.

McNab & Hirsch, for appellant. Robert Duncan, for respondent.

SLOSS, J. The plaintiff, having been wounded by a bullet fired from defendant's rifle, brought this action to recover damages, alleging that his injuries were due to defendant's negligence. A trial before a jury resulted in a verdict in favor of plaintiff for $500. The defendant appeals from the judgment entered upon the verdict, and from an order denying his motion for a new trial.

The action was commenced in December, 1906, about 14 months after the shooting. The defendant filed an answer, in which he denied the allegations of the complaint, and affirmatively pleaded facts intended to constitute a defense of contributory negligence. On the day set for the trial of the cause, he moved the court for leave to amend his answer by setting up the additional defense that the action was barred by subdivision 3 of section 340 of the Code of Civil Procedure. The application was denied, and this ruling is assigned as error. This court, very early in its history, established the rule that the refusal of leave to plead the bar of the statute of limitations by way of amendment to an answer already filed will not be regarded as an abuse of discretion, unless it is made to appear that the amendment will be in furtherance of justice. Cook v. Spears, 2 Cal. 409, 56 Am. Dec. 348; Stuart v. Lander, 16 Cal. 372, 76 Am. Dec. 538. The principle underlying these decisions, viz., that, while great liberality should be exercised in allowing amendments to pleadings, that liberality should only be displayed in furtherance of justice, has often received recognition here. Daley v. Russ, 86 Cal. 118, 24 Pac. 867; Bank of Woodland v. Heron, 122 Cal. 107, 54 Pac. 537, and cases cited. The bill of exceptions asserts, as the only reason for defendant's failure to rely on this plea in his original answer, the inadvertence of counsel in failing to note that the amendment of 1905 (St. 1905, p. 231, c. 258, § 2) to section 340 had reduced the time allowed for the commencement of actions of this character to one year. The fact that counsel had been guilty of this oversight had no tendency to show that permission to plead the statute would aid in producing a just result.

The main question arises on the instructions of the court, whereby it declared that plaintiff was entitled to a verdict, and that the only question for the jury was the amount of damages. Instructions requested by defendant, submitting to the jury the issue of contributory negligence, were refused. It appeared from plaintiff's testimony that on October 10, 1905, he, in company with the defendant and one Lima, went out along the

Big river in Mendocino county to hunt deer. On the north bank of the river they parted company. Byrnes and Lima remained on the north side. The plaintiff, Rudd, crossed the stream, taking a dog with him. The dog started along a ridge and down through the brush into a flat across the river from Byrnes. Rudd thought the dog was after a deer, and ran in after. When he came out on the flat opposite Byrnes, he heard a shot and was struck by a bullet. There was no question of the fact that Byrnes fired this shot. His own testimony was that he saw an object moving in the brush, and fired at it, thinking it to be a deer. The testimony relating to the issue of contributory negligence, as relied on by defendant, differed in some particulars from the allegations of the answer. Since, however, the point of variance does not appear to have been made in the court below, and the differences have no important bearing on the points to be discussed, it will be sufficient to state the substance of the showing made by the witnesses. There was evidence which would have warranted the jury in finding that the banks of the river were thickly grown with brush; that along the river there were deer crossings "where deer come down when chased by dogs and run into water." It was testified that the three hunters had agreed that they were, respectively, to station themselves at three crossings; Byrnes' station being about 200 yards above, and Rudd's about the same distance below, that of Lima. When Byrnes fired he was at the point at which, under the agreement, he should have been. Rudd, instead of going down the river, as agreed, went up, and was opposite Byrnes' station when shot. We think the defendant was entitled to have the jury consider this evidence and determine from it whether Rudd had been guilty of negligence contributing directly and proximately to his injuries. That the defendant's conduct was negligent may well be conceded. "As firearms are extraordinarily dangerous, a person who handles such a weapon is bound to use extraordinary care to prevent injury to others, and is held to strict accountability for a want of such care." 12 Am. & Eng. Ency. of Law (2d Ed.) 518; Bahel v. Manning, 112 Mich. 24, 70 N. W. 327, 36 L. R. A. 523, 67 Am. St. Rep. 381; Judd v. Ballard, 66 Vt. 668, 30 Atl. 96; Moebus v. Becker, 46 N. J. Law, 41; Morgan v. Cox, 22 Mo. 373, 66 Am. Dec. 623. One who causes injury to another by discharging a firearm must, in order to excuse himself from liability, show that he was absolutely without fault. 12 Am. & Eng. Ency. of Law (2d Ed.) 519; Bahel v. Manning, supra; Morgan v. Cox, supra; Tally v. Ayers, 3 Sneed (Tenn.) 677; Wright v. Clark, 50 Vt. 130, 28 Am. Rep. 496. While the question of negligence is ordinarily one to be determined by the jury, yet where the facts are undisputed, and no inference but that of negligence can be drawn from them, the court may determine that negligence is shown as matter of law. Studer v. S. P. Co., 121 Cal. 400, 53 Pac. 942, 66 Am. St. Rep. 39; Nagle v. Cal. S. R. Co., 88 Cal. 86, 25 Pac. 1106. It is plain, from defendant's own story, that he did not, in this instance, exercise the care required of one handling firearms. He saw an object moving in the underbrush, and fired at it without taking time to discover whether it was a deer, as he supposed it to be, or a human being. There can be no room for doubt that, in so doing, he acted without that regard for the safety of others which is to be expected of one handling dangerous implements or substances.

But the fact that defendant was negligent does not preclude the possibility that plaintiff may have been likewise guilty of negligence contributing to the injury. In Magar v. Hammond, 171 N. Y. 377, 64 N. E. 150, 59 L. R. A. 315, the owner of a fish preserve had employed a night watchman, who was in the habit of discharging firearms into the air to frighten off poachers. Plaintiff entered the premises on a dark night for the purpose of poaching, and was injured by a bullet fired by the watchman in the direction of the noise made by plaintiff. In an action against the owner and the watchman, the plaintiff had judgment for damages. On appeal it was held that the trial court had erred in refusing to charge that, if the plaintiff knew that the watchman was in the habit of discharging a gun, and went there after receiving such information, he could not recover, even if the defendants were negligent. "The defendants," said the court, "were entitled to have the jury instructed that, if the plaintiff voluntarily exposed himself to a known danger, he could not recover for the act of the watchman, though this act, in defense of the master's property, was without due care." In McCleary v. Frantz, 160 Pa. 535, 28 Atl. 929, where plaintiff and defendant were members of a hunting party, and the defendant, shooting at a rabbit, hit plaintiff, the court said the case was one "for the exclusive consideration of the jury on the questions of negligence and contributory negligence." Other decisions treating the contributory negligence of plaintiff as a material subject of inquiry in cases of this character are: Whitten v. Hartin, 163 Mass. 39, 39 N. E. 412; Bahel v. Manning, supra; Winans v. Randolph, 169 Pa. 606, 32 Atl. 622. There is nothing to the contrary in Glueck v. Scheld, 125 Cal. 288, 57 Pac. 1003. All that was there decided was that, under the peculiar facts shown, the jury had a right to find that the alleged negligence of plaintiff did not contribute to his injury. In short, the rules of law governing actions for injuries caused by the discharge of firearms are not different from the rules governing actions for any injuries claimed to have been inflicted by the negligence of the defendant. By reason of the dangerous nature of such weapons, a person handling them is held to a high degree of care. If he has not used the degree of care appropriate to the circumstances, and injury result, he will be liable to the person injured, if the latter was without fault. If, however, the individual injured was himself acting without due care for his own safety, and his carelessness directly contributed to or caused the injury, he will be remediless.

As we have said, the question of negligence is ordinarily one for the jury, and this applies as well to contributory negligence as to that claimed to inhere to the conduct of defendant. The facts here shown were certainly not such as to preclude an inference that plaintiff had been guilty of negligence contributing directly to his injury. Whether or not there had been an agreement by which plaintiff was to station himself at a point several hundred yards away from defendant; whether plaintiff had departed from that agreement; whether such departure displayed a want of the care that would be exercised by a reasonably prudent person in plaintiff's position; and whether such departure was, in whole or in part, the proximate cause of plaintiff's injuries—were all questions which might, under the evidence, have been answered favorably to defendant's contention. They should therefore have been submitted to the jury. It certainly cannot be said, as matter of law, that the presence of plaintiff in the brush, opposite the point where, as he knew, Byrnes had taken his stand for the purpose of shooting a deer which might come through the brush, was not negligent. Nor, in view of Byrnes' testimony that he was led to fire by movements seen in the brush, can it be said, as matter of law, that there was no causal connection between Rudd's actions and his being wounded by the shot.

For the purposes of a new trial, which is made necessary by what we have said, the other points made by appellant may be briefly mentioned. We think the court did not err in rejecting evidence of the custom of hunters along coast rivers. The standard of care required of persons under given circumstances is not to be established by proof that others have been in the habit of acting in a certain manner. Pulsifer v. Berry, 87 Me. 405, 32 Atl. 986. The failure of plaintiff to comply with a custom, departure from which would put him in danger, might be relevant on the issue of contributory negligence, if it appeared that the custom was known to him at the time of the transaction. No attempt was made to show such knowledge here. Furthermore, the excluded evidence could have no weight in this case, where the plaintiff admitted having made an express agreement which went fully as far as the alleged custom.

The court should have allowed evidence of plaintiff's statements to the effect that the injury resulted from his own fault. They were declarations of a party, against his interest. Code Civ. Proc. § 1870, subd. 2. But here the facts were fully shown by plaintiff's own testimony, and the exclusion of his mere conclusion on the issue which was finally to be determined by the jury could not have been prejudicial to appellant.

The judgment and the order denying a new trial are reversed.

We concur: ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

156 Cal. 667

HENRY et ux. v. CONTINENTAL BUILDING & LOAN ASS'N. (S. F. 5,132.)

(Supreme Court of California. Dec. 8, 1909.)

1. Building and Loan Associations (§ 41*)—Contracts—Fraud—Evidence.

In a suit against a building and loan association to cancel plaintiffs' obligations, evidence *held* not to sustain a finding that plaintiffs were induced to execute them by fraudulent representations that their stock would be matured at the end of seven years, and that the obligations would then be satisfied.

[Ed. Note.—For other cases, see Building and Loan Associations, Dec. Dig. § 41.*]

2. Building and Loan Associations (§ 8*)—Authority of Agent—Representations.

Where printed circulars issued by defendant building and loan association, from which plaintiffs claimed to have gained their impression that the stock issued by defendant would mature and all their obligations under their contracts cease at the end of seven years, explicitly declared that local agents were without authority to make and conclude terms with prospective investors and borrowers on the amount to be loaned or the time the loan was to run, false representations by a local agent inducing plaintiffs to sign a note and mortgage to the association were not material.

[Ed. Note.—For other cases, see Building and Loan Associations, Dec. Dig. § 8.*]

3. Building and Loan Associations (§ 8*)—False Representations—Expression of Opinion.

Statements contained in the prospectuses of a building and loan association indicating that the stock would mature and plaintiffs' debt be extinguished at the end of seven years were merely speculative, or an expression of opinion of the association's officers, and could not be made the basis of alleged fraudulent representations.

[Ed. Note.—For other cases, see Building and Loan Associations, Dec. Dig. § 8.*]

4. Building and Loan Associations (§ 12*)—Borrowing Members—Stock—Maturity—Agreement.

A borrowing member of a building and loan association cannot avail himself of an agreement as to the number of payments which will mature his stock, when such agreement is not contained in his bond and mortgage.

[Ed. Note.—For other cases, see Building and Loan Associations, Dec. Dig. § 12.*]

5. Building and Loan Associations (§ 8*)—Statements by Officers or Agents—Estoppel.

Oral or printed statements by the officers or agents of a building and loan association as to the number of payments necessary to mature stock in contradiction of the plain language of a member's contract, whether relied on by the member or not, cannot be made the basis of an estoppel against the association.

[Ed. Note.—For other cases, see Building and Loan Associations, Dec. Dig. § 8.*]

6. BUILDING AND LOAN ASSOCIATIONS (§ 34*) — BORROWING MEMBERS — RELATION TO AGENT.

A borrowing member of a building and loan association occupies to it the dual relation of borrower and stockholder, and hence is not entitled to have payments made on his stock account credited as payments on the debt under the rule that payments on account of collaterals are not payments on the debt they secure.

[Ed. Note.—For other cases, see Building and Loan Associations, Dec. Dig. § 34.*]

7. FRAUD (§ 11*)—FALSE REPRESENTATIONS—OPINIONS BASED ON FACTS KNOWN TO BE FALSE.

One inducing another to contract in reliance on estimates or opinions professedly based on alleged facts known to the person stating them to be nonexistent cannot escape responsibility on a plea that he was merely declaring an opinion.

[Ed. Note.—For other cases, see Fraud, Dec. Dig. § 11.*]

In Bank. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Suit by Simon W. Henry and wife against the Continental Building & Loan Association. Decree for complainants, and, from an order denying defendant's motion for a new trial, it appeals. Reversed.

Gavin McNab and Everts & Ewing, for appellant. N. C. Coldwell, for respondents.

PER CURIAM. The appeal in this case was taken to the District Court of Appeal in and for the Third Appellate District. There the order appealed from was reversed. The opinion, prepared by Hart, J., reads in part as follows:

"The appellant, as its name implies, is a building and loan association, organized as a corporation under the laws of this state. The respondents became members of the association by buying a certain number of shares of stock therein, and thereafter borrowed two certain sums of money, to wit, $800 and $300, respectively, giving to appellant their two several promissory notes evidencing the two amounts so borrowed, and as security for the payment of said notes executed a mortgage on certain real estate situated in the city of Fresno, and, further, pledged as collateral the shares of stock referred to. The first of these notes in point of the time of their execution is for the larger amount, and bears date of February 1, 1898, and the other February 15, 1898. Both, as before stated, are secured by a mortgage on certain real estate of the respondents, and, as additional security, eight shares of the stock of the association are pledged on the larger note and three on the smaller. The respondents brought this action to compel the defendant to deliver up for cancellation said promissory notes, to compel satisfaction of record of the mortgages given to secure the same and for damages. The complaint contains two counts and sets out in detail the history of the transactions, alleging, among other things, that the respondents were induced to execute the notes and mortgages through the misrepresentation and fraud of the appellant, and that the respondents have paid in full the principal sums and interest accruing thereon of said notes. The defendant, by answer, specifically denies all the vital averments of the complaint, and by way of cross-complaint seeks affirmative relief in the nature of a decree foreclosing said mortgages and for a sale thereunder of the property to satisfy a total balance alleged to be due it from plaintiffs in the sum of $548.42. The plaintiffs, answering the cross-complaint, repeat the allegations of their complaint, alleging fraud, etc., thus meeting by avoidance the claim of the defendant to the right to a foreclosure of the mortgages and a sale of the mortgaged and pledged property. Upon the issues tendered by the cross-complaint and answer thereto the cause was tried, resulting in a judgment for the plaintiffs as prayed for in their complaint. This appeal is from the order denying the defendant a new trial.

"It is agreed between counsel for the respective parties that the law and the facts involved in both causes of action stated in the cross-complaint are practically the same, and that consequently whatever may be the conclusion reached in the one cause will necessarily be the conclusion arrived at in the other. We shall therefore confine the discussion principally to one of the causes of action only. The vital question presented is: Does the evidence support the finding that the plaintiffs (defendants in cross-complaint) were induced to execute the note and mortgage through such misrepresentation and fraud upon the part of the corporation as to entitle them to the relief asked for by them? The finding of the court upon the question of fraud is as follows: 'That, when the plaintiffs executed and delivered the promissory note and mortgage aforesaid, the defendant, through its authorized agents and officers, falsely and deceitfully represented to plaintiff that at the expiration of seven years from that date, upon the payment, during said period, of about $1,142.40, that the total indebtedness of plaintiffs to defendant, on said note and mortgage, would be paid and liquidated in full, and that it would then redeliver said note to him, and also fully discharge and satisfy said mortgage. And said defendant also then and there, through its authorized agents and officers, falsely and deceitfully represented to plaintiff that the payment of the amounts specified in said promissory note and mortgage, together with the dividends and accumulations which said eight shares of the capital stock of the defendant corporation, then pledged with the defendant by the plaintiffs, would earn in said seven years, would, at the expiration of said seven years, fully pay and liquidate all indebtedness, under said note and mortgage, whereas, in truth and in fact, its agents and officers then and there knew that said shares of capital stock could not, and would not, within said seven years earn dividends and accumulations sufficient, together with the said monthly payments, to fully pay and liquidate said indebtedness, and said agents and officers of the defendant corporation thus falsely and deceitfully induced plaintiffs to execute and deliver to it said note and mortgage. That the plaintiffs relied upon said false and deceitful representations in making said note and mortgage, and had no means of then knowing that the same were false and deceitful.'

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"The evidence which it is contended supports the foregoing finding may be briefly stated as follows: One F. J. Haber in February, 1898, was the local agent of the appellant in the city of Fresno. The negotiations for the loan were conducted through him. Prior to the execution of the first note and mortgage, the plaintiff, Simon Henry, had a conversation with Haber relative to the desired loan and the conditions upon which the same could be secured from appellant. Haber gave Henry some printed literature (called prospectuses) outlining in detail the plan upon which the appellant conducted its business. These prospectuses, among other statements, contained the following: 'If you are able by working one hour more per day, or by setting at work some grown-up child, or by practicing some self-denial, or by living a little more economically, to put aside a small amount per month, we want to have a little personal talk with you about the ways and means of home-getting. The small amounts set aside month after month, for about seven years will give you, at the end of that time, a home of your own, or a sufficient sum which could not otherwise be obtained to start you in a business of your own, and thus lay the foundation of your fortune and independence.' In addition to the foregoing, the prospectuses contained tables illustrating the result of investments made with the corporation, showing in each instance that upon the basis of a loan of $1,000 the monthly payment for 84 months (seven years) of interest and premium on the loan together with a certain installment on the value of the shares of stock required to be purchased by the borrower as a prerequisite to securing such loan the borrower would square himself with appellant, and thus become the owner of his house free from all incumbrances so far as appellant was concerned.

"After reading these circulars and securing such information from Haber as he was able to give them, the plaintiffs first purchased eight shares of stock in the corporation, valued at $100 per share, and then borrowed the sum of $800, executing their joint promissory note therefor, mortgaging their home in the city of Fresno and pledging their shares of stock in the corporation to secure the payment of the same.

"The note reads as follows: 'San Francisco, Cal., Feb. 1, 1898. Seven years after date, for value received, we promise to pay to the Continental Building and Loan Association (a corporation duly organized under the laws of the state of California) or its order, at its office in the city and county of San Francisco, state of California, the sum of eight hundred dollars in gold coin of the United States of America, with interest thereon, in like gold coin from date hereof until paid, at the rate of six (6) per cent. per annum, interest payable monthly in advance on the 1st day of each and every month; and if said interest is not paid as it becomes due it shall become part of the principal, and thereafter, until paid, bear interest at the rate of two (2) per cent. per month, and in case said monthly interest or any part thereof, is not paid within one (1) month after it becomes due and payable, or in case the monthly installments due upon 8 shares of the capital stock of said corporation, pledged as security for the payment of this note, or any part thereof, are not paid when the same becomes due and payable, or in case the monthly premium due on said loan amounting to the sum of $4.80 per month for each and every month during said term of seven (7) years payable monthly in advance on the 1st day of each month, is not paid when due, then the whole of said principal sum of eight hundred dollars, and the interest thereon, shall become forthwith due and payable at the option of the holder hereof, and notice of the exercise of such option is hereby waived. This note is secured by a mortgage bearing even date herewith and the pledge by said mortgagors of 8 shares of the capital stock of said mortgagee, being certificate No. 13431.' The note, it will be noticed, very clearly states the conditions of the transaction. The mortgage likewise contains all the conditions upon which the loan was made.

"The evidence further shows and the court found that the plaintiff had paid to the corporation up to the time of the institution of this suit on the $800 transaction, for all purposes, the total sum of $1,136.80. It also appears that the dividends earned by the stock amounted approximately to $105. The first-mentioned sum includes all the payments made by the plaintiffs on the transaction—that is, all payments on account of the stock, of the premium and of the interest. I am of the opinion that the finding upon the question of fraud is not justified by the evidence. In the first place, it is to be said that the printed circulars, issued and published by the appellant, and from which the respondents claim to have gathered the impression that the stock would mature and all their obligations under their contracts cease by the end of seven years, explicitly declared that local agents were without authority to make and conclude terms with prospective investors and borrowers upon the amount to be loaned or the time during which such loan should run. Therefore, if, as appellant contends, there be a finding that the local agent of the defendant made false representations to the plaintiffs by which they were induced to sign the note and mortgage, the same may be disregarded as immaterial, and therefore altogether insufficient of itself to support the judgment. In the second place, I think the statements and tables contained in the prospectuses indicating that the stock would mature and the debt of the plaintiff thereupon become extinguished at the end of seven years must be construed to amount to nothing more than speculation or as involving a mere expression of opinion of the officers of the appellant upon the proposition. As the maturity of the stock must obviously depend to some extent upon its earnings, I cannot see how anything more than an approximation as to time could be made, and this proposition must be plainly apparent to one who gives the plan upon which building and loan associations conduct their business operations thoughtful consideration. The statement in the circular was to the effect that, assuming that the investor and borrower faithfully performed the terms of his contract, the stock would mature and all obligations under the contract cease in about seven years. The tables were manifestly intended as illustrations or exemplifications of the methods and results of the business operations of appellant, and, at most, involved only an opinion as to the period of time during which it was necessary that the relations between the parties should exist before the extinguishment of the obligations of the contract. In this view, it is plain that a finding of fraud could not be predicated of evidence showing such statements. Johnson v. Johnson, 134 Cal. 662, 66 Pac. 847. There is nothing in either the note or the mortgage (except that which may be inferred from the fact that the note is made to run for seven years—undoubtedly based upon an approximation) specifically providing that a certain, definite number of payments would result in the maturity of the stock. And 'a borrowing member cannot avail himself of an agreement as to the number of payments which will mature stock, when that agreement is not embodied in his bond and mortgage.' Noah v. American Building Ass'n, 31 Ind. App. 504, 68 N. E. 615. Nor is the association bound by a mere expression of opinion. Hammerslough v. Kansas City Bldg., etc., Ass'n, 79 Mo. 80; Gary v. Verity, 101 Mo. App. 586, 74 S. W. 161; 6 Ency. of Law, 122; Baltimore Bldg., etc., Ass'n v. Powhattan Imp. Co., 87 Md. 59, 39 Atl. 274. In Johnson v. Johnson, supra, it is said: 'An assertion of that which is not true in order to constitute a fraudulent representation cannot be held to include the opinion of the person, however erroneous it may be or however positively stated.' See, also, Lee v. McClelland, 120 Cal. 147, 52 Pac. 300; Lloyd v. Kehl, 132 Cal. 107, 64 Pac. 125; Colton v. Stanford, 82 Cal. 398, 23 Pac. 16, 16 Am. St. Rep. 137; Oppenheimer v. Clunie, 142 Cal. 317, 75 Pac. 899.

"But, conceding that the language of the circulars involved an unqualified declaration of a fact and was reasonably susceptible of the interpretation which the respondents undertake to give it, and that they could well have conceived an understanding of its import which they claim to have received from it, the fact remains that the note and the mortgage, constituting the contract to whose terms they bound themselves, contain in detail in clear and unambiguous language the terms, conditions, and obligations which they assumed. The plaintiff, Simon Henry, testified that he read the mortgage before signing it, and presumably he understood its terms and conditions and well knew the full scope of the contract to which he made himself a party. It is, I think, well settled that oral or printed statements made by officers or agents of a building and loan association in contradiction of the plain language of the contract, whether relied upon by the person to whom made or not, cannot be made the basis of an estoppel. Noah v. Loan Association, 31 Ind. App. 504, 68 N. E. 615; McNamara v. Oakland, etc., Ass'n, 131 Cal. 337, 63 Pac. 670.

"There is as suggested, no obscurity in the language of either the note or mortgage. The latter, among other things, plainly provides that 60 cents per share shall be paid each month and 'until the said shares are fully paid by the said payments and the dividends and accumulations on said shares.' I am unable to comprehend how a person, capable of transacting business for himself, could well misapprehend this language. In fact, the language of both the note and mortgage prescribing the conditions and explaining the methods by which the business between the parties was to be conducted is so clear that even the plaintiffs must have understood that nothing more than an approximation could be made as to the length of time which would probably be required for the stock to mature and the debt to be liquidated.

"Under the law, no one can borrow money from a building and loan association without first becoming a stockholder therein. The investor and borrower, under the methods authorized by the law for carrying on the business of such concerns, must pay a certain installment each month on the value of the stock, a monthly premium for the privilege of securing the loan, and interest on the principal borrowed, payable in monthly installments, and all these payments must be made until the stock is fully paid for. The total sum found by the court to have been paid by the plaintiffs on the $800 transaction consisted not only of the interest on the note, but also the monthly payments on the premium and the monthly installments on the stock. In other words, the court below allowed as credits upon the note payments which the agreement into which plaintiffs entered expressly provided should be exclusively applied to the payment of the premium and to the extinguishment of the obligation arising by reason of the purchase of the eight shares of stock required to be bought as a prerequisite to the exercise by plaintiffs of the privilege of securing the $800 loan. Under the law of this state, the court erred in thus computing and crediting the payments made by respondents. McNamara v. Oakland, etc., Ass'n, supra; P. S. Savings & L. v. Green, 123 Fed. 47, 59 C. C. A. 167. In the first-mentioned case, somewhat similar in its facts to the case at bar, the Supreme Court with clearness explains the law applicable to building and loan concerns and their business operations as authorized by the statute. I make the following extended quotation therefrom:

"'Appellant contends that, if payment of the note could be enforced, he had the correlative right to offset his payments and his earnings, and that, if he is granted this right, it will appear from the evidence that the debt is paid. Appellant is mistaken as to the nature of the agreement into which he entered. He occupied the dual relation to the corporation of borrower and stockholder, each of which was distinct from the other. Under the scheme he could not be borrower without becoming a stockholder, but he could be a stockholder without being a borrower. * * * The mortgagor having ceased all payments and by suit having sought to compel the cancellation of his mortgage, the mortgagee is within its rights in asking a foreclosure of the mortgage and a decree for the sale of the shares, and presumably they will bring their cash value and plaintiff will have his credit therefor. That the relations of borrower and stockholder are separate and distinct in associations such as defendant's assignor seems to be well settled. Endlich on Bldg. & Loan Ass'ns (2d Ed.) §§ 123, 477. And it is general law that payments on account of collaterals are not payments on account of the debt they secure; the pledging of shares as collateral security for the payment of a debt is a recognition of the distinct standing of the member as a member and as a debtor. Endlich, § 477, and cases cited. * * * He paid interest on the note and installments on the shares for several years and must have known for what he was paying. * * * This was part of the plan for creating funds, in which the plaintiff shared with other members, into which he entered with his eyes open. He testified that he would not have signed the note had he understood that he was to receive but $960, and it appeared that the money was not in fact paid until after the note and mortgage were delivered. * * * He made so many payments voluntarily, after he must have known the full effect of his contract, that his testimony that he would not have signed the note had he known the facts, cannot avail him. * * * It was proved by a witness, conceded by both sides to be an expert accountant and familiar with the workings of defendant and other like corporations, that plaintiff's shares had not matured September 15, 1896, when the action was brought. But the witness said it could not be ascertained certainly in advance when the series would mature for the obvious reason that the earnings were an unknown quantity for the future. We cannot see that there is anything in the plan upon which defendant and its assignor were operating that would permit a shareholder who was a mortgagor to default in payments of interest and principal of his notes and installments on his shares, and still entitle him to claim the full benefit of all his payments whenever he chose to default. We cannot find, however, either in the statute or in the by-laws or in the contracts entered into any authority for equity to interpose so as to aid the unfortunate borrower in the situation of plaintiff.'

"So, in the case at bar, it is clear from the evidence that the stock of the respondents had not matured at the time of the commencement of this suit, and consequently the payments made on said stock could not, under the terms of the contract of the parties, be lumped with payments for other agreed purposes and the total sum thus produced made to extinguish the principal sum of the note. I have not taken the pains to make figures for the purpose of ascertaining whether the total amount which the appellant claims is still due it from the respondents on the two transactions is correct or not, but it is apparent, from a cursory examination of the figures presented in the record, that there is still an amount due on the two transactions approximating the total sum claimed by appellant. In any event, there being still something due from the respondents, the latter cannot claim the relief asked for.

"The findings of the court are founded entirely upon the issue of fraud, and it is upon this ground alone, as must be obvious from what has already been said, that the court held and found that there was nothing remaining due the appellant, as may be instanced by the following rather remarkably phrased finding: 'That plaintiffs and defendants in cross-complaint are not willing to pay defendant and cross-complainant such further sum as is just and equitable to satisfy said note and mortgage and to obtain discharge and satisfaction thereof, but, upon the contrary, plaintiffs and defendants in cross-complaint allege that said note and mortgage are utterly void and of noneffect, by reason of the fraud, trick, and device of the defendants and cross-complainant, as in these findings set out.' As I have declared, the evidence does not warrant the finding of fraud, and there is absolutely no support for the judgment. It is true that the payments which plaintiffs have made to appellant, if on a straight loan at six per cent. per annum, would be sufficient to extinguish their obligation. But the law, as we have seen (sections 633 to 648, inclusive, Civ. Code), authorizes the very system to which plaintiffs bound themselves by their agreement in their relations with the appellant. Under that system, it is to be observed, while the borrower (who must have shares of stock equal in value to the extent of his loan) in effect reduces the principal each month through the payment of the required monthly installments on his stock, he, nevertheless, continues to pay interest on the full principal of the note until his stock (practically principal) has been paid for. But the money so paid in by the stockholder is invested or loaned out by the concern, and thus the dividends to which the investor is entitled on his stock are acquired. I suppose that it may be said that paying for a home by the installment plan at a rate equal only to what the borrower would ordinarily be compelled to pay as rent for the use and occupation of the premises is an advantage which would not be offered by the ordinary lender of money; that is, by one loaning money as a straight loan at a straight rate of interest. But, if there be unfairness in the scheme as practiced by these associations in their dealings with their patrons, the fundamental cause of the difficulty lies with the law as the Legislature has promulgated it."

Within due time, the respondents applied to this court for an order that the cause be heard and determined here. In their application they state that the opinion filed in the appellate court correctly states the facts, so far as it does state the facts. They expressly "accept as unquestioned and undoubted law every principle announced by that court in support of its judgment." Under these circumstances, we may well rest our disposition of the matters considered in the appellate court on the grounds there stated, and we accordingly approve and adopt the foregoing portions of the opinion of that court.

It is, however, contended by the respondents that the Court of Appeal overlooked a material fact, alleged by respondents and found in their favor by the trial court. The plaintiffs' answer to the cross-complaint averred that in its circulars and prospectuses the defendant represented that "the history of the previous operations of said cross-complainant corporation showed that the dividends and accumulations on the shares o′ the capital stock of the said corporation so purchased would be sufficient, together with said monthly payment of 60 cents per share, to make full and complete payment for all of said shares of stock so purchased within said seven years from the date of said purchase." It was further alleged that the defendant knew that this representation was false. The court found specifically that the defendant made this statement with knowledge of its falsity. The rule that mere expressions of opinion cannot constitute actionable fraud is no doubt subject to some qualification. A party inducing another to contract in reliance upon estimates or opinions professedly based upon alleged facts known to the party stating them to be nonexistent will not be permitted to escape responsibility by the plea that he was merely declaring his opinion. A statement that the history of the defendant showed that its stock would mature in seven years is clearly a statement of fact, and, if falsely made and relied on, would furnish ground for relief to the party misled by it.

But the most careful scrutiny of the record fails to disclose any evidence to support the finding that any such representation was made by the appellant. The claim is that the alleged statement of the defendant is to be found in the circular or prospectus brought to the attention of the plaintiff. Some of the contents of this pamphlet are set forth in the opinion filed in the District Court of Appeal. As is there said, the tables illustrating the result of an investment amount to nothing more than "speculation or as involving a mere expression of opinion of the officers of the appellant upon the proposition." The circular contains only two statements which refer in any way to past history or experience. Under the head "Its System," it is stated that: "The system of this association is the result of years of experience and is practical, not theoretical." This is followed by other paragraphs devoted to the subjects of "State Supervision," "Features," "Explanatory" (showing in detail the plan of investment), "Rent or Home Purchase," "Agreement Between the Shareholder and the Association," "Withdrawals," etc. Obviously the sentence quoted does not purport to refer to any stated period or time of maturity of shares. It deals solely with the "System" of the association, a system which, under the law and as shown on the face of the contract of the respondents, precludes the idea of stock maturing in a fixed number of years. The language cannot be construed to mean any more than that the defendant's plan of operation is not a new or untried one.

The other statement relating to experience falls equally short of supporting the finding. In a part of the circular devoted, in the main, to general maxims extolling the practice of thrift and economy, it is said that: "Experience has shown that some system is necessary to induce the majority of persons to lay aside a part of their income. The most efficient system will combine regularity, safety, and profit. The experience of the past 50 years shows that no system of investment has been so safe and so profitable as that adopted by this association." We find in this language nothing calculated to convey the impression that the experience of the defendant had shown that its stock had matured or would mature in seven years. Furthermore, under any construction that may be given to it, the declaration that the defendant's system was the safest and most profitable mode of investment could not have been understood as derived from its own experience. The conclusion is, as the prospectus declares, based on 50 years' experience, while the circular itself shows that the defendant association had been in existence for a much shorter period.

The statement on motion for new trial properly challenges the sufficiency of the evidence to sustain the finding under discussion. For the reasons stated, it must be held that the finding is not supported, and that it furnishes no ground for reaching a conclusion different from that announced by the appellate court.

The order denying a new trial is reversed.

(156 Cal. 703)

FULKERSON et ux. v. STILES et al.

(L. A. 2,393.)

(Supreme Court of California. Dec. 9, 1909.)

1. Husband and Wife (§ 254*)—Community Property—Ownership.

Property acquired after marriage with community funds is community property, the ownership of which the law places in the husband.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 901; Dec. Dig. § 254.*]

2. Husband and Wife (§ 270*)—Conveyance to Married Woman—Presumptions.

Under Civ. Code, § 164, which declares that, when property is conveyed to a married woman by an instrument in writing, it is presumed to be her separate estate, an allegation in the complaint, in an action to quiet title in the husband to property purchased with community funds and conveyed to the wife, that although the title was taken in his wife's name, he did not intend to give it to her is an allegation of fact which negatives the presumption.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 979; Dec. Dig. § 270.*]

3. Judgment (§ 752*)—Lien—Nature.

A judgment plaintiff has a mere general lien upon the real property of the judgment defendant, and such lien is an incumbrance, but the original judgment plaintiff is not ordinarily an incumbrancer for a valuable consideration.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1311; Dec. Dig. § 752.*]

4. Husband and Wife (§ 131*)—"Incumbrancers in Good Faith and for a Valuable Consideration."

The phrase "incumbrancers in good faith and for a valuable consideration," as used in Civ. Code, § 164, providing that when property is conveyed to a married woman, it is presumed to vest in her as her separate estate, which presumption is conclusive in favor of a purchaser or incumbrancer in good faith, and for a valuable consideration, means persons who have taken or purchased a lien or the means of obtaining one, and who have parted with something of value in consideration thereof, and the payment of money or the parting with something of value is essential.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 131.*]

5. Husband and Wife (§ 131*)—Valuable Consideration — "Purchasers or Incumbrancers in Good Faith."

Though pre-existing debts are so far a valuable consideration that persons who release them or part with title to them are deemed to have parted with value, and to have given a valuable consideration so as to be protected as purchasers in good faith, where they did not release or transfer their debts, nor acquire them from third persons, the recovery of judgment thereon would not prejudice them, nor give them the status of "purchasers or incumbrancers in good faith" within the meaning of Civ. Code, § 164, which provides that when property is conveyed to a married woman, it is presumed to vest in her as her separate estate, which presumption is conclusive in favor of a purchaser or incumbrancer in good faith.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 131.*

For other definitions, see Words and Phrases, vol. 4, pp. 3117–3121; vol. 8, p. 7672.]

6. Husband and Wife (§ 254*) — Conveyance to Wife — Community Property — Gift—Intention.

Where property is purchased with community funds, and the conveyance made to the wife, where there was no intention that it was a gift to the wife, the conveyance to her would not invest it with that character.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 901; Dec. Dig. § 254.*]

7. Evidence (§ 151*)—Conveyance to Wife—Community Property — Gift — Evidence of Intention.

Where property was purchased with community funds, and the conveyance made to the wife, testimony of the husband and wife as to their intention with respect to the conveyance was competent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 440; Dec. Dig. § 151.*]

Department 1. Appeal from Superior Court, Ventura County; Felix W. Ewing, Judge.

Action by James F. Fulkerson and wife against Theresia Stiles and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

B. T. Williams and Don. G. Bowker, for appellants. Barnes & Selby, Edward M. Selby, and Clark & Farrand, for respondents.

SHAW, J. The defendants appeal from a judgment and from an order denying their motion for a new trial.

The complaint purports to state a cause of action in favor of James F. Fulkerson to quiet title to land claimed as community property, but standing in the name of Fannie L. Fulkerson, who is the wife of James. A general demurrer to the complaint was overruled, and this ruling is assigned as error. The complaint alleges that James F. Fulkerson is the owner of the land; that it was purchased by him in February, 1907, after his marriage with Fannie L. Fulkerson, that it was paid for with community funds; that the title thereto was taken in the name of his wife, but that he did not intend thereby to make a gift thereof to his wife, and did not in fact make such gift; and that the title was so placed "merely for the purpose of pleasing his wife." It appears from the complaint that the defendants held judgment liens against the property of the wife, upon one of which an execution had been issued, which, at the time the action was begun, had been levied upon the land in question. The defendants contend that the facts alleged, as above stated, show that the land was conveyed to the wife as a gift from the husband, and that it was her separate property. We do not think there is any ground for this contention. It is explicitly stated that James F. Fulkerson is the owner of the land. The fact that it was acquired after marriage with community funds makes it community property, the ownership of which the law places in the husband. The allegation that, although the title was taken in his wife's name, he did not intend to give it to her, is an allegation of fact which negatives the presumption that would otherwise arise under section 164 of the Civil Code that it was her separate estate.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Section 164, aforesaid, declares that when property is conveyed to a married woman by an instrument in writing, it is presumed to be vested in her as her separate estate, and that this presumption "is conclusive in favor of a purchaser or incumbrancer in good faith and for a valuable consideration." It is claimed that the complaint shows that the defendants are incumbrancers in good faith and for a valuable consideration, and hence that the land is, in their favor, conclusively presumed to be the separate property of Fannie L. Fulkerson and subject to their judgment liens against her. The amended complaint, upon that point, alleges that the defendants recovered judgments in the superior court of the county against both of the plaintiffs, which judgments stand unsatisfied, and which would constitute liens upon their property in the county subject to execution, and that an execution upon one of the judgments had been levied upon this land, that the land had been advertised for sale thereon, and that shortly after the action was begun, it had been sold on said execution to one of the judgment plaintiffs, but that before said sale said purchaser was given actual notice that the land was not the separate property of Fannie L. Fulkerson, but was the community property of plaintiffs. It was further stated that James F. Fulkerson, in the meantime, had been adjudged a bankrupt, and that he had been discharged from these debts by the United States court in bankruptcy. This discharge disposed of the judgments, so far as he was concerned.

A judgment plaintiff has a mere general lien upon the real property of the judgment defendant. Such lien is an incumbrance, but the original judgment plaintiff is not ordinarily an incumbrancer for a valuable consideration. Whether or not one who purchases such judgment for a valuable consideration, or one who has purchased the debt for a valuable consideration, and then recovers judgment upon it, would be an incumbrancer in good faith and for a valuable consideration and as such entitled to the protection of the conclusive presumption prescribed by section 164, would be an interesting question, if it arose. But there is nothing here to show anything more than that the defendants were merely general creditors who had recovered judgments upon debts originally accruing to them. Their judgments were rendered before the land was purchased and before the deed to Fannie L. Fulkerson was made. It is obvious therefore that they did not part with anything of value upon the faith of the conveyance to her. The phrase "incumbrancers in good faith and for a valuable consideration," means persons who have taken or purchased a lien, or perhaps merely the means of obtaining one, and who have parted with something of value in consideration thereof. The payment of the money, or the parting with something of value, is essential. Davis v. Ward, 109 Cal. 191, 41 Pac. 1010, 50 Am. St. Rep. 29; Wilhoit v. Lyons, 98 Cal. 413, 33 Pac. 325; Eversdon v. Mayhew, 65 Cal. 167, 3 Pac. 641; Kenniff v. Caulfield, 140 Cal. 45, 73 Pac. 803; California Ass'n v. Stelling, 141 Cal. 719, 75 Pac. 320. A preexisting debt is so far a valuable consideration that one who releases it, or parts with title to it, is, in this state, deemed to have parted with value, and to have given a valuable consideration so as to be entitled to protection as a purchaser in good faith. But the cases so holding do not aid the defendants. They did not release or transfer their debts, nor acquire them from third persons. The recovery of judgment thereon did not prejudice them and did not give them the status of bona fide purchasers or incumbrancers within the meaning of this law.

Appellants claim that the evidence does not support the finding that the land was not conveyed to the wife as a gift. The husband and wife each testified that there was no intention or purpose to make a gift to her, or to make the property her separate estate. The wife testified that she did not understand that the property was to be hers. There is no evidence to the contrary. Without such intention to make a gift, mere conveyance to her would not invest it with that character. Fanning v. Green, 104 Pac. 308. There are some rulings which are assigned as error upon the admission of this testimony and other testimony of like character. We think that the testimony of the plaintiffs as to their intention with respect to the conveyance to the wife was competent testimony. We find no error in the record.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

156 Cal. 643

MARSH v. LOTT. (L. A. 2,418.)

(Supreme Court of California. Dec. 7, 1909. Rehearing Denied Jan. 6, 1910.)

1. Pleading (§ 193*) — Pleading — Raising Defense by Demurrer.

In an action for specific performance, the defense of laches may be raised by demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 432; Dec. Dig. § 193.*]

2. Equity (§ 87*)—Laches.

When a statute of limitation applies to a suit in equity, mere delay in commencing the suit for a period less than the statute is never a reason for dismissal, unless there are other circumstances which, in conjunction with the mere lapse of time, render such an action inequitable, and there is no rule as to the lapse of time or the circumstances which will justify the application of the doctrine of laches, but each case must be determined by its own circumstances.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 242–244; Dec. Dig. § 87.*]

3. Specific Performance (§ 105*)—Laches.

Plaintiff purchased for 25 cents an option, extending for more than three months, for the purchase of property worth $100,000, and before its acceptance the vendor, by written notice served on plaintiff, repudiated the option, and again repudiated it when notice was given of acceptance, and a tender was attempted of the first installment of the purchase price, after which more than three years elapsed before the purchaser attempted to enforce the contract, during all of which time the vendor had been in possession of the property, which had increased in value during that period nearly one-half. *Held*, that the contract could not be enforced.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 328, 334; Dec. Dig. § 105.*]

4. Appeal and Error (§ 195*)—Grounds of Review—Preservation in Lower Court.

A refusal of the trial court to allow plaintiff to amend his amended complaint is not shown to be an abuse of discretion, where the record does not indicate that plaintiff asked leave to amend in any designated particular, or in any way specify the nature of the proposed amendment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1490; Dec. Dig. § 195.*]

5. Judgment (§ 744*) — Conclusiveness — Judgment on the Merits.

A judgment on the merits, denying specific performance, based on the finding of the invalidity of his alleged contract, precludes further litigation of that question between the parties.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1279; Dec. Dig. § 744.*]

6. Specific Performance (§ 128*)—Pleading—Damages.

Under Civ. Code, § 3306, providing that the damage for the breach of an agreement to convey land is the price paid and expenses in examining the title and preparing the necessary papers, with interest, and in case of bad faith the difference between the price and the value of the estate agreed to be conveyed "at the time of the breach" and the expenses incurred in preparing to enter on the land, where a complaint in an action for specific performance does not show that the value of the estate to be conveyed at the time of the breach was in excess of the agreed price, and there is no allegation showing any other damage, plaintiff will not be entitled to damages on his failure to show that he is entitled to specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 419; Dec. Dig. § 128.*]

Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Robert Marsh against M. A. Lott. A demurrer was sustained to the amended complaint without leave to amend, and plaintiff appealed. Affirmed.

Rehearing denied; Sloss and Melvin, JJ., dissenting.

See, also, 8 Cal. App. 384, 97 Pac. 163.

Frank James, for appellant. J. Wiseman Macdonald, for respondent.

ANGELLOTTI, J. This is an appeal from a judgment entered upon sustaining a demurrer to the amended complaint, without leave to amend. The action was one by the vendee for specific performance of an alleged contract for the sale of certain real estate in the city of Los Angeles.

The complaint shows the following facts: Plaintiff was engaged in the real estate business in his own name, and also in the business name of "Robert Marsh & Co." On February 25, 1905, defendant executed and delivered to him an option for the purchase of the land, the same being as follows:

"For and in consideration of the sum of twenty-five cents to me in hand paid, I hereby give Robt. Marsh & Co., an option to purchase, at any time up to and including June 1, 1905, with privilege of 30 days' extension, from date hereof, the following described property, to wit: South ½ of lot nine and all of lot 8, block 101, Bellevue Terrace tract, and all of the property owned by myself in above block, for the sum of one hundred thousand dollars, payable thirty thousand cash balance on or before four years 4½ per cent. net.

"I agree to furnish an unlimited certificate of title showing said property to be free from all incumbrance, and to convey the same in such condition by deed of grant, bargain, and sale, and pay regular commission. M. A. Lott [Seal.]

"Dated Feby. 25th, 1905.

"Property 90x165.

"Building 6 flats—2 cottages.

"Rents, $260.00."

On June 1, 1905, plaintiff notified defendant in writing that he accepted the privilege of 30 days' extension, and elected to so extend the option. On June 2, 1905, defendant notified plaintiff in writing that she declared the agreement terminated and withdrew the property from sale under said agreement, and she has ever since claimed that plaintiff has no right to purchase the property under said agreement. This claim has been made "in bad faith," and solely because the property has increased in value. On June 29, 1905, plaintiff "notified the defendant * * * of his election to purchase said real estate, and duly tendered to and offered to pay her * * * in gold coin of the United States of America, said cash payment of $30,000, but she refused the same, and ever since has refused and now refuses the same." Plaintiff is and at all times has been able, willing and ready to pay defendant said $30,000. On February 25, 1905, and on June 29, 1905, the fair market and reasonable value of the property was not in excess of $100,000. Such value has gradually increased. In January, 1906, it was $115,000. Since January, 1906, it has increased in value at the rate of about $1,000 per month, being on August 5, 1908, $147,000. Ever since February 25, 1905, defendant has been in possession of the property, either in person or by her tenants, receiving all the rents and income thereof, which are $260 a month. Plaintiff "is and always has been, ready, willing, and able to fulfill the" terms of said option agreement. On August 5, 1908, plaintiff again tendered defendant $30,000 cash, and also the further sum of $70,000 cash as and for the balance of the purchase price, and also the further sum of $12,362.08 as and for interest thereon, and demanded that she execute and deliver to him a deed of conveyance of the property, and also an "unlimited certificate of title showing the said premises free from all incumbrance," but defendant refused to execute and deliver said deed or deliver said certificate of title. In the complaint, plaintiff again tenders all of said money, and offers to pay any other amount for which he may be obligated by the option agreement. This action was not commenced until August 5, 1908.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The demurrer was based on numerous grounds, but for the purposes of this appeal it will be unnecessary to consider more than one. It was specially alleged therein as ground of demurrer that it appears by said complaint that the plaintiff has been guilty of laches, and that he is not entitled to any relief in equity. It is settled in this state that this defense may be raised by demurrer (Kleinclaus v. Dutard, 147 Cal. 245, 250, 81 Pac. 516; Bell v. Hudson, 73 Cal. 285, 289, 14 Pac. 791, 2 Am. St. Rep. 791); such defense being, in substance, as said in the latter case, that the bill does not show equity, or, in the language of our statute, that the complaint does not state facts sufficient to constitute a cause of action. The allegations of the complaint are clear and definite to the effect that on June 2, 1905, the defendant notified plaintiff in writing that she would not longer be bound by the option agreement, and has ever since claimed that plaintiff has not any right to purchase the property under said option agreement, and that she refused to accept the $30,000 when the same was tendered by him on June 29, 1905, and has ever since refused to accept it. Her absolute repudiation of the alleged agreement, and of any claim of plaintiff thereunder, at all times since June 2, 1905, could not be made to more clearly appear. So far as appears from the complaint, which is all we can look to in determining the question presented by the demurrer, plaintiff took no steps whatever to enforce any right possessed by him under the option agreement, notwithstanding the absolute repudiation thereof by defendant, until August 5, 1908, more than three years after such repudiation. Having made his tender of $30,000 on June 29, 1905, he rested, and until August 5, 1908, so far as any outward manifestation went, acquiesced in the position taken by defendant that the option agreement was at an end. At the last-named date, the property having increased in value since the refusal of his tender by $47,000, he concluded to attempt to enforce the alleged agreement, made a new tender of the full amount that he claimed would be due according to its terms, $112,362.98, and resorted to a court of equity for relief. It is apparent that he has been free all this time to rest on defendant's refusal to recognize the option agreement as further binding her and declining to purchase the property if for any reason he thought it advantageous to do so. This is the case made by the complaint.

It is undoubtedly true that when an express statute of limitation applies to a suit in equity, mere delay to commence the suit for a period less than that of the statute of limitations is never a reason for dismissing the proceeding. Lux v. Haggin, 69 Cal. 267, 4 Pac. 919, 10 Pac. 674. There must be other circumstances which, taken in conjunction with the mere lapse of time, render it inequitable to enter into the investigation or give the relief sought. There is no artificial rule as to the lapse of time or the circumstances which will justify the application of the doctrine of laches, and each case as it arises must necessarily be determined by its own circumstances. See Cahill v. Superior Court, 145 Cal. 46, 78 Pac. 467; Kleinclaus v. Dutard, supra. There is another material circumstance in the case at bar. For more than three years the plaintiff, so far as appearances went, quietly acquiesced in and assented to defendant's express refusal to consider the option as in any way binding. In his work on Specific Performance of Contracts, Mr. Pomeroy says: "Where one party, even without any just or sufficient reason for so doing, and as a mere act of arbitrary will, notifies the other that he shall not perform the contract—shall treat it as at an end—acquiescence by the party notified will cut off the latter's right of enforcement, and this acquiescence will be sufficiently shown by a delay in commencing a suit which would otherwise be too short to prejudice his rights." Sec. 412. The rule is stated in 26 American and English Encyclopedia of Law, at page 80, to be that where, after defendant's violation or express repudiation of his contract, the plaintiff delays to proceed for such a length of time as to constitute acquiescence in defendant's breach, or a presumption of abandonment of his right to specific performance, relief in equity will be denied. See, also, McDermid v. McGregor, 21 Minn. 111, 115; Harrigan v. Smith (N. J.) 40 Atl. 13; Gentry v. Rogers, 40 Ala. 442. Of course, notwithstanding the delay in moving to enforce the alleged contract, the circumstances may be such as to prevent any presumption of acquiescence or abandonment, as, for instance, where a vendee is in possession of the property under the alleged contract, and continues in such possession, claiming under the contract, notwithstanding the attempted repudiation. That the delay here shows such acquiescence seems to be very clear. A mere option, based upon the insignificant consideration of 25 cents, for the purchase of property worth $100,000, extending over a period of more than three months, and drawn in such a way as to give rise to the gravest questions as to its validity, is expressly repudiated by the vendor, by written notice served on the vendee, before there has been any acceptance by the vendee, and again when notice is given of acceptance and a tender is attempted to be made of the first installment of the purchase price. The vendee does absolutely nothing for more than three years from the refusal of such tender to indicate that he will oppose the claim of the vendor that the option is no longer binding, and it is only when, at the expiration of two years, the property has increased in value to the extent of $47,000, that he intimates any intention to oppose the claim of the vendor that the alleged option is not binding. It would be difficult to find a clearer case of apparent acquiescence than that shown by such circumstances, unexplained and unaffected by other circumstances. During this period of more than three years the plaintiff has been in no way obligated to make this purchase. In view of the great increase in the value of this property, it would be manifestly unfair and inequitable to allow him at this late day, after such acquiescence, to insist that the alleged option agreement shall now be enforced.

Learned counsel for plaintiff does not seriously contend that the absolute failure of plaintiff to take any step to enforce his alleged rights within three years after the repudiation of the contract would not, under the circumstances here stated, constitute laches barring the remedy of specific performance. He does insist, however, that either the court will take judicial notice of certain alleged facts stated by him in his brief, showing that the plaintiff did diligently proceed to enforce his claim, or that he should have been permitted to amend his complaint by inserting allegations showing such matters. The matter of which he desires us to take judicial notice is, as stated in his brief, a prior action brought by plaintiff against defendant to specifically enforce this option agreement. As to this, he substantially states in his brief the following: The action was tried in the superior court of Los Angeles county, and resulted in a judgment in favor of defendant. The plaintiff appealed to the Supreme Court. The appeal was transferred to the District Court of Appeal. That court affirmed the judgment of the superior court on June 20, 1908. This action was commenced within a reasonable time thereafter. No authority is cited for the proposition that we can take judicial notice of these matters in determining the sufficiency of the complaint in this action, and we know of no rule warranting it. As to the refusal to allow plaintiff to amend his amended complaint, there is nothing in the record to indicate that he asked leave in the superior court to amend in any designated particular, or in any way specified therein the nature of any proposed amendment. We do not see how, under such circumstances, we could hold that the superior court abused its discretion in denying leave to amend. See Kleinclaus v. Dutard, 147 Cal. 252, 81 Pac. 516, and cases there cited.

The reason for the failure of plaintiff to allege the former action for the purpose of avoiding the laches otherwise shown becomes apparent enough when we examine the opinion of the District Court of Appeal given June 20, 1908, in affirming the judgment against this plaintiff. See Marsh v. Lott, 8 Cal. App. 384, 97 Pac. 163. If by alleging the facts as to the former case he would have avoided the bar of laches, he would by the same facts have shown himself estopped by the judgment in that case to now seek specific performance of the option agreement. From the opinion it appears that such action was one by this plaintiff against this defendant for the specific enforcement of this very option, instituted after and because of the repudiation thereof by defendant and her refusal to comply in any way with its terms, which were alleged. Issues of fact were joined therein, and trial thereof had, resulting in a judgment on the merits in favor of the defendant. Manifestly, in view of the complete repudiation and disavowal of the alleged option by the defendant and the refusal to accept any tender thereunder, plaintiff was then entitled to some relief by way of specific performance if the option was binding on defendant, even if not then entitled to a deed. It cannot be held, therefore, that the former action was prematurely brought, and it was not decided on any such theory. The trial court found, not only that the consideration for the option was inadequate and insufficient, but also "that the said option contract was not just and reasonable to defendant." The District Court of Appeal, while disagreeing with the trial court on the question of the adequacy of consideration for the option, sustained the finding as to the contract not being just and reasonable, saying: "In our judgment the only construction of which the contract is susceptible renders it manifestly unjust and unreasonable as to the defendant." Under elementary principles the judgment on the merits denying plaintiff any relief by way of specific performance, based on this material finding of the invalidity of his alleged contract, precludes further litigation of that question between the parties. We have said this much on the question of estoppel, not for the purpose of justifying an affirmance of the refusal of the trial court to allow plaintiff to again amend his complaint, but simply to show that, had the complaint contained the allegations as to the prior action, it could not have availed plaintiff as against the defense of estoppel by judgment.

It is suggested that the complaint stated facts sufficient to entitle plaintiff to damages, even if it did not show him entitled to specific performance. We cannot so hold. Section 3306 of the Civil Code provides that the detriment caused by the breach of an agreement to convey an estate in real property is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon, but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, "at the time of the breach," and the expenses properly incurred in preparing to enter upon the land. There is absolutely nothing in the complaint tending to show the value of the estate to be conveyed at the time of the breach other than such allegations as tend to show that the fair market and reasonable value at that time did not exceed $100,000, which was the agreed price, and there is no allegation showing damage as to any other element prescribed in said section. It is therefore unnecessary to notice any other claim by plaintiff in response to this contention of defendant.

The judgment is affirmed.

We concur: SHAW, J.; SLOSS, J.

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156 Cal. 657

NEWLOVE v. MERCANTILE TRUST CO. OF SAN FRANCISCO. (L. A. 2,389.)

(Supreme Court of California. Dec. 7, 1909.)

1. WILLS (§ 602*) — CONSTRUCTION — ESTATES DEVISED — "CONDITION SUBSEQUENT" — EXECUTORY DEVISE.

Where a testator devised all his real estate to his sons equally, and provided that none of the property should be sold until 10 years after his death, and that if any of his sons contracted habits of vice before the division he thereby forfeited his share, and if any of the sons died before division his share should go to the remaining heirs unless he left children, the devise vested in the sons the fee subject to divestiture or termination on any son contracting habits of vice before division, which is a "condition subsequent," defined by Civ. Code, § 1349, as where an estate is given so as to vest immediately, subject to be divested by some subsequent act or event, or on the death of any son before division; the gift over in such case being a mere executory devise, which takes effect on the happening of some contingent event in substitution for a fee previously devised.

[Ed. Note.—For other cases, see Wills, Cent. Cent. Dig. §§ 1351–1359; Dec. Dig. § 602.*

For other definitions, see Words and Phrases, vol. 2, pp. 1402–1405; vol. 8, p. 7610.]

2. WILLS (§ 742*)—ESTATES DEVISED—TRANSFERRABLE INTERESTS.

A devise in fee of an undivided interest in real estate, which vests immediately at testator's death, subject to termination on the happening of a designated subsequent act or event, is an interest in realty which is transferrable by the devisee.

[Ed. Note.—For other cases, see Wills, Cent Dig. § 1900; Dec. Dig. § 742.*]

3. INSOLVENCY (§ 82*)—SALES BY ASSIGNEE—EFFECT.

Insolvency Act (St. 1880, p. 87, c. 87), § 21, subd. 4, authorizing the assignee to sell all the real and personal estate vested in him as assignee which shall come to his possession and as ordered by the court, does not limit the power to sell any property of the insolvent, simply because it cannot be taken into actual physical possession, either by the insolvent or his assignee; but an insolvent's undivided interest in real estate, created by a will devising in fee to him an undivided interest in real estate, subject to be divested on the happening of a designated subsequent act or event, is a part of his estate, and the assignee may sell the same under order of court.

[Ed. Note.—For other cases, see Insolvency, Cent. Dig. § 118; Dec. Dig. § 82.*]

4. JUDGMENT (§ 518*)—COLLATERAL ATTACK—INSOLVENCY PROCEEDINGS.

An action to quiet title by an insolvent against a purchaser under a sale by the assignee in insolvency, on the ground of the invalidity of the insolvency proceedings, is a collateral attack on such proceedings, and hence only such matters may be considered as go to the jurisdiction of the court in insolvency.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 961, 962; Dec. Dig. § 518.*]

5. INSOLVENCY (§ 21*)—PETITION—SCHEDULES—SUFFICIENCY.

Where the schedule annexed to a voluntary petition in insolvency gave the names of the creditors in a column, headed "Names of Creditors," and opposite each name in another column the residence of the creditor, and placed in another column, headed "Sum Due," sums as "70.00" "441.54" and so on, aggregating "2551.03," and the petition stated that the schedule contained the names of the creditors and the sum due to each, the omission of the dollar mark as a prefix to the figures in the schedule of debts to designate the amount of the debt did not render the petition and schedule insufficient to confer jurisdiction on the court under Insolvency Act (St. 1880, p. 82, c. 87), § 2, limiting the operation of the act to persons owing more than $300.

[Ed. Note.—For other cases, see Insolvency, Dec. Dig. § 21.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

6. Words and Phrases—"Dollar."

The "dollar" is the legal unit of money of the United States, and, when figures are used to denote a sum of money, such figures are understood to represent dollars, unless a different intention is fairly expressed.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, pp. 2160–2164.]

7. Insolvency (§ 16*) — Jurisdiction of Court — Petition and Schedules — Sufficiency.

Where the original petition in insolvency and the schedules annexed thereto purported to contain a full, true, and perfect discovery of all the insolvent's real and personal estate, and on their face complied with the statute, the court acquired jurisdiction to proceed under Insolvency Act (St. 1880, p. 83, c. 87), § 4, providing that the inventory must contain an accurate description of the real and personal estate of the petitioner, though the inventory failed to include property subsequently inventoried in an amended schedule; the omission being due to the fact that the petitioner had been advised by his attorney that such property should be omitted.

[Ed. Note.—For other cases, see Insolvency, Dec. Dig. § 16.*]

8. Insolvency (§ 21*) — Jurisdiction of Court — Petition and Schedules — Sufficiency.

The jurisdiction of the court in insolvency under the insolvency act (St. 1880, p. 82, c. 87) depends on the sufficiency of the averments in the petition and schedules annexed, and not on the truth of such averments.

[Ed. Note.—For other cases, see Insolvency, Dec. Dig. § 21.*]

9. Insolvency (§ 22*)—Notice of Time and Place for Meeting of Creditors—Publication—Sufficiency.

Insolvency Act (St. 1880, p. 83, c. 87), §§ 6, 7, provide that the order adjudicating the insolvency and appointing a time and place for the meeting of creditors shall be published in a newspaper as often as the same is printed before the meeting of creditors, and that the day named shall not be less than 30 days after the making of the order. On Monday, February 4th, the court adjudged petitioner insolvent, and specified March 16th following as the time for the meeting of creditors. The affidavit of publication stated that the order was published in a newspaper for 36 days successively next before March 16th, and as often as the said paper was published, which was on every Saturday. *Held* that, as the 36 days described in the affidavit of publication included every publication day of the newspaper between the adjudication and time fixed for the meeting of creditors, the publication was sufficient.

[Ed. Note.—For other cases, see Insolvency, Dec. Dig. § 22.*]

10. Insolvency (§ 22*)—Order Adjudicating Insolvency and Appointing Time for Meeting of Creditors—Notice—Sufficiency—"Forthwith"—"Immediate."

Under Insolvency Act (St. 1880, p. 83, c. 87), § 7, providing that a copy of the order adjudicating one insolvent and appointing a time and place for a meeting of creditors shall be served "forthwith" by mail on all creditors, proof that the order was mailed four days after its making, but prior to the first publication thereof in a newspaper, and more than 30 days before the time fixed for the creditors' meeting, shows a compliance with the statute; the term "forthwith," like the term "immediate," not being construed as a time immediately succeeding, without an interval.

[Ed. Note.—For other cases, see Insolvency, Dec. Dig. § 22.*

For other definitions, see Words and Phrases, vol. 3, pp. 2916–2925; vol. 8, p. 7665; vol. 4, pp. 3393, 3394; vol. 8, p. 7681.]

11. Wills (§ 560*)—Estates Devised—Property of Testator.

Testator, devising all of his real estate to his sons equally, was at the time of his death in possession of land under a contract for its purchase stipulating for payment in installments. On full payment, after testator's death, the vendor executed a conveyance to the executors in trust for the persons interested in the estate of testator. *Held*, that the conveyance to the executors vested a legal title to the property in the same manner as if the deed had been executed prior to testator's death, and the property was a part of the estate and passed under the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1219; Dec. Dig. § 560.*]

Department 1. Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by Frank H. Newlove against the Mercantile Trust Company of San Francisco. From an order denying a new trial after judgment for defendant, plaintiff appeals. Affirmed.

B. F. Thomas (Henley C. Booth, of counsel), for appellant. Richards & Carrier and Heney & Cobb, for respondent.

ANGELLOTTI, J. This is an action to quiet title to an undivided interest in certain real property in Santa Barbara county. The defendant had judgment, and plaintiff appeals from an order denying his motion for a new trial.

The real property in question is an undivided one-twelfth of what is called the "Newlove ranch." Plaintiff's claim is that he became the owner of this under the terms of the will of his father, John Newlove, who died January 29, 1889. By the fourth paragraph of his will John Newlove gave to his six sons, including plaintiff, all of his real estate, share and share alike; the words of the will in this respect being as follows: "I give to my sons, * * * all my real estate, share and share alike." All his property being community property, and his wife, the mother of plaintiff and his brothers, surviving and being entitled to one-half, the devise to the six sons was effectual only as to an undivided half of the real property. At the time of his death, John Newlove was in possession of said Newlove ranch under a contract for the purchase thereof dated December 28, 1880, from one Kaiser for $10,000, $2,000 of which was paid at the date of the contract, and the remainder of which, bearing interest, was payable in 10 equal annual installments commencing January 1, 1893, with the option to pay the whole purchase price and interest due at any time. Upon full payment being made, a conveyance of the property was to be executed to him. On June 16, 1891, the purchase money having been fully paid, Kaiser executed a conveyance of the property to Joseph H. Newlove and Charles W. Newlove, "as executors of the last will of said John Newlove, deceased, * * * in trust for all the persons interested in the estate of said John Newlove, deceased, according to their respective interests therein." The will of John Newlove provided that none of his real estate should be sold until 10 years after his decease, and it further provided, in the seventh paragraph thereof: "Should any of my sons, or either one of them, contract habits of vice, such as drinking, gambling, etc., before the division of my property, he thereby forfeits his share of the estate, and the same shall be divided among the balance of the heirs, share and share alike. My executor to be the sole judge of the matter. And should any one or more of my sons die before the division of the estate, then his share shall be divided among the remaining heirs, share and share alike, unless he or they should have sons or daughters, in which case it should be set apart for his children as the law provides." Administration of the estate of John Newlove is still pending, and no division of the property has ever been made. Nothing has occurred upon which could be based any claim of forfeiture under the provision of the will already quoted. The undivided one-twelfth of the property in controversy here is the undivided one-twelfth directly given plaintiff, by the devise already referred to. The defendant claims to be the owner of this undivided one-twelfth solely as the successor in interest of plaintiff, by virtue of a sale thereof made on February 24, 1896, by the assignee of his estate in insolvency proceedings had under the act of April 16, 1880 (St. 1880, p. 82, c. 87); it having acquired whatever interest therein was conveyed to the purchaser at the assignee's sale by the assignee's deed.

1. Assuming the validity of the insolvency proceedings to and including the assignee's deed, which deed purported to convey "all right, title and interest of whatsoever kind and nature, either in law or in equity of the said Frank H. Newlove, insolvent debtor, and of the said W. A. Haslam assignee as aforesaid, in and to" the said Newlove ranch, it was earnestly contended on the oral argument that the deed was ineffectual for any purpose for the reason that, under the terms of the will, plaintiff had no assignable interest in said land at the time of the assignee's sale; in other words, that he had only such an expectancy as the law denominates "a mere possibility, not coupled with an interest," which, as declared by section 1045 of the Civil Code, cannot be transferred. It is somewhat difficult to reconcile the position of plaintiff in making this claim with that occupied by him in maintaining this action. He has acquired no additional interest in the Newlove ranch since the insolvency proceedings and the assignee's deed. Whatever interest therein he has now he must have had then. He says in his complaint herein that he is the owner in fee simple of an undivided one-twelfth thereof; but, if his contention that we are discussing be well based, he has no vested interest whatever in the property, but simply "a mere possibility, not coupled with an interest," as, for instance, the expectancy of an heir apparent during the life of the ancestor.

However this may be, the claim is not well founded. In our opinion there can be no serious question as to the proper construction of the will of John Newlove in this regard. The devise to his six sons was absolute in terms, direct, and not by way of trust. There is nothing in the will purporting to limit the effect of this except such provisions as may be held to withhold actual possession and enjoyment of the property until "division" or "distribution," the provision in regard to forfeiture by any son of "his share," should he contract habits of vice, etc., before the "division" of the property, and the provision for a division among the remaining heirs of the share of any devisee dying without issue before the "division" of the estate. Of course, it is not claimed that a mere postponement of the time of enjoyment or possession of the property devised would prevent the vesting of the property devised in a devisee at the testator's death, and there is nothing in the language used that indicates any intent on the part of the testator that the estate given should not vest at his death. The provision as to forfeiture simply establishes a condition subsequent upon the happening of which the estate given shall be divested. The language is not "if" any of my sons abstain from contracting certain habits for a prescribed time, "then I give," etc., or language of similar import, upon which an argument might reasonably be made that the testator intended the estate given to vest only upon compliance by the devisee with the terms prescribed. He first gave the property absolutely to his sons, and then, in a succeeding paragraph, inserted the forfeiture provision: "Should any of my sons * * * contract habits * * * he thereby forfeits his share," etc. This clearly implies the loss of something already acquired by the person who suffers the penalty. As defined by the Standard Dictionary, the term "forfeit" in law means "to lose and surrender to an individual or the state (something that belongs to one) for misconduct, or breach of duty,—lose title to as a penalty." What is it that he is to forfeit if he does the forbidden thing? The testator expressly says that it is "his share of the estate." There can hardly be a clearer example of the "condition subsequent" defined by section 1349, Civ. Code, where it is declared: "A condition subsequent is where an estate or interest is so given as to vest immediately, subject only to be divested by some subsequent act or event." The provision for a division among others of the share of one dying before the division of the estate, commencing, "and should any one * * * of my sons die," etc., is an example of the creation of the most common kind of executory devise, one to take effect upon the happening of some contingent event, "in substitution for and in derogation of" a fee previously devised, and which has no effect upon the precedent estate in fee until the contingency happens upon which the executory devise vests and "terminates prematurely the interest which preceded it." See 2 Underhill, Law of Wills, p. 1329. Construed in the light of the well-established presumption in favor of the vesting of estates, it is very clear to us that plaintiff, by reason of the devise in the will, was vested at his father's death with the fee of an undivided one-twelfth of all his real estate, subject to divestiture or termination upon the happening of some subsequent act or event. We are satisfied that it must be held, in view of the deed made by Kaiser to the executors of the will of John Newlove subsequent to his death in execution of the agreement of sale, that the Newlove ranch must be treated as part of the property of deceased at the time of his death. In view of what we have said, it is clear that whatever may be said as to such interest as plaintiff may have in the shares of the other devisees by reason of the provisions for forfeiture and death before division, his interest in the one-twelfth share directly devised to him, the only property in issue here, was a vested interest which could be transferred by him.

2. It is claimed, assuming the insolvency proceedings to have been otherwise regular, that, in view of certain language of the insolvency act, the assignee had no power to sell any property of the insolvent that had not come into his actual physical possession, that the record shows that the assignee had no such possession of plaintiff's undivided interest, and that the attempted sale was therefore void. This claim is based on the language of subdivision 4 of section 21 of the insolvency act, the section defining the general powers of the assignee, where it is provided that he shall have power "from time to time to sell at public auction all the estate, real and personal, vested in him as such assignee, which shall come to his possession and as ordered by the court." It cannot be doubted that plaintiff's interest in the Newlove ranch was, in the contemplation of the insolvency act, a part of his estate and liable for his debts, and that the same, with all other property of every kind and nature, was vested in the assignee by the assignment made to him by the clerk of the court. Section 17, Insolvency Act. The character of property owned by an insolvent is such in many instances that it is impossible for an assignee to personally have actual physical possession thereof, as is well illustrated in the case of this particular property, an undivided interest in certain real property of deceased, the administration of whose estate is pending in the probate court and whose property is in the actual possession of the executors of the will of deceased for purposes of administration. Another illustration would be the situation existing where the insolvent owned valuable real property subject only to a life estate in another. Plaintiff's construction of subdivision 4 of section 21 would render it impossible to subject such property to the satisfaction of the insolvent's debts, even though it be the only property owned by him. That the Legislature intended any such inequitable result is not to be concluded, unless the terms of the statute necessarily require it. We are satisfied that the statute should not be construed as a limitation upon the power to sell, under order of the court, any property of the insolvent, simply because, in view of the nature of the estate of the insolvent therein, it cannot be taken into actual physical possession either of the insolvent or his assignee. Plaintiff's contention in this regard is based upon the refusal of the trial court to allow a question which, as we read it, went simply to the actual physical possession by the assignee of the Newlove ranch. There was no claim that the ranch was in the possession of any one claiming adversely to the estate of John Newlove or his devisees, or that plaintiff was entitled to possession thereof or any portion thereof as against the executors. We are of the opinion that the objection to the question was properly sustained. The other points made by plaintiff all relate to the validity of the insolvency proceedings. This being a collateral attack on such proceedings, it is manifest that only such matters may be considered as go to the jurisdiction of the court in insolvency.

3. It is claimed that the court never obtained jurisdiction in those proceedings for the reason that the voluntary petition in insolvency filed by plaintiff did not show that he owed debts exceeding in amount $300; the statute (section 2) limiting the operation of that act in cases of voluntary insolvency to persons owing more than that sum. The basis of this claim is the omission to place a dollar mark as a prefix to the figures used in the schedule of debts to designate the amount of debt or "sum due" each creditor named therein. The contention of plaintiff appears unworthy of serious discussion, when considered in the light of the petition and annexed schedules. The petition states that Schedule B thereto annexed contains the names, etc., of his creditors "and the

sum due to each creditor," etc. Schedule B gives the names of the creditors in a column headed "Names of Creditors," and opposite each name in another column is given the residence of the creditor, and then in another column, headed "Sum Due," is placed the sum, as follows: "70.00," "441.54," "830.-43," and so on, aggregating "2551.03." Other columns showing nature of indebtedness, cause thereof, etc., follow. In the connection in which they are used, these terms necessarily denote sums of money. The dollar is the legal unit of money in the United States, and, whenever figures are used to denote a sum of money, "such figures must, of course, be understood to represent 'dollars,' unless a different intention is clearly expressed." See Hunt v. Smith, 9 Kan. 137. As written here, no person of ordinary understanding could doubt that these amounts meant 70.00-100 dollars, 441.54-100 dollars, etc. In addition to this, Schedule C, containing a description of the property of the insolvent and its value, shows very clearly what was meant by such entries as "70.00," "441.54," etc.; the dollar mark being used in the column designated "Value" and as a prefix to the first item therein, "150.00," and also being used as a prefix to the items showing total valuation of personal property. Plaintiff relies on certain decisions in which it was held that mere numerical figures in a tax assessment roll do not express the value of the property as assessed; but as said of these in Dyke v. Bank of Orange, 90 Cal. 401, 27 Pac. 305: "While admitting that the strict rule applied to the assessment cases may be too firmly established to be overruled or disregarded by the courts in that class of cases, * * * there is no necessity for extending it to the class to which this case belongs." The distinction between voluntary proceedings in insolvency and proceedings in invitum for taxes is too obvious to require comment.

4. It is further claimed that the court failed to acquire jurisdiction of the proceedings by reason of the failure of plaintiff to include, in the inventory annexed to his petition, any mention of an interest in the Newlove ranch. The statute required (section 4) that said inventory must contain an accurate description of all the estate, both real and personal, of the petitioner. As appears from the amended schedule subsequently filed by the insolvent, including this property, the omission was due to the fact that he had been advised by his attorney that it should not be included. The original petition and schedules did purport to contain a full, true, and perfect discovery of all his real and personal estate, and, on their face, complied in all respects with the statute. This was all that was essential to give the court jurisdiction to proceed. The requirements as to jurisdiction are stated in Friedlander v. Loucks, 34 Cal. 24, to be: "First, a petition setting forth substantially such a state of facts as will bring the case within the provisions of the statute and show that the petitioner is entitled to the relief therein provided for; and, second, due publication of notice to creditors." See, also, Bennett v. His Creditors, 22 Cal. 42. Under elementary rules, the jurisdiction depends upon the sufficiency of the averments, and not upon the truth of those averments. La Point v. Boulware, 104 Cal. 264, 37 Pac. 927, cited by plaintiff, is not at all in point. There the petition filed by creditors failed to state facts which would sustain an adjudication that the debtor was an insolvent. It was held, in Rued v. Cooper, 109 Cal. 682, 34 Pac. 98, that property not included in the insolvent's schedule or known to the assignee until after his discharge passed to the assignee by virtue of his assignment. See, also, Poehlmann v. Kennedy, 48 Cal. 201. Of course, this could not be, if the mere failure to include the property in the inventory could affect the jurisdiction. As said in Friedlander v. Loucks, supra: "The questions made here relate to movements within the jurisdiction, rather than to the jurisdiction itself."

5. It is claimed that the order adjudicating plaintiff an insolvent and appointing a time and place for the meeting of creditors was not published for the full time required by law, or mailed to the creditors as required by law; the statute providing (section 7) that a copy of said order shall immediately be published by the clerk of the court in the newspaper designated therein as often as the newspaper is printed before the meeting of creditors, and be served by the clerk forthwith by mail upon all creditors. The day named shall not be less than 30 days after the making of said order. Section 6. The petition was filed February 4, 1895, and the adjudication of insolvency made on the same day; the order specifying March 16, 1895, at 10 a. m., as the time for the meeting of creditors and designating the Santa Maria Times, a weekly newspaper, as the paper in which the same should be published. The affidavit of publication stated that the order was published in said newspaper "for 36 days successively next before March 16, 1895, and as often during said period of 36 days as the said paper was published, to wit, on every Saturday." The point in regard to the publication is that, as there were 40 days between February 4th and March 16th, it was not made to appear that the order was published in every issue of the paper between the making of the order and the time fixed thereby for the meeting of creditors; but it was so made to appear. The affidavit fairly showed that the paper was published only on Saturday of each week, and an examination of the calendar for the year 1895 shows that February 4th of that year, the day on which the adjudication was made, was a Monday. The 36 days described in the affidavit of publica-

tion thus included every publication day of the Santa Maria Times between the adjudication and the time fixed thereby for the meeting of creditors. The publication was therefore in full accord with the statute. The affidavit of the clerk as to the service by mail of the notice on creditors shows that he did not mail the notice until February 8th, the fourth day after the making of the order, but prior to the first publication of the notice in the newspaper, and over 30 days before the time fixed for the creditors' meeting. Under the circumstances, this was a sufficient compliance with the statute. The term "forthwith," like the term "immediately," "is not in law to be necessarily construed as a time immediately succeeding without an interval." See Anderson v. Goff, 72 Cal. 73, 13 Pac. 73, 1 Am. St. Rep. 34. "In every case the meaning depends upon the circumstances of the case and the act to be performed." Lewis v. Curry, 103 Pac. 496. We think that under the wording of this statute a mailing that is as early as the first possible publication in the newspaper designated by the court should be held to measure up to the requirement in this regard.

6. As we have before said, the effect of the conveyance of the Newlove ranch by Kaiser to the executors of the will of John Newlove was to vest a legal title to the property in the same manner as if the deed had been executed prior to the death of John Newlove. The property was thenceforth, if not before, a part of his estate, and plaintiff had a legal title to an undivided one-twelfth, subject to the possession of the executors for purposes of administration.

There is no other matter meriting discussion.

The order denying a new trial is affirmed.

We concur: SHAW, J.; SLOSS, J.

(156 Cal. 691)

PIGEON v. W. P. FULLER & CO.

(S. F. 4,731.)

(Supreme Court of California. Dec. 8, 1909. Rehearing Denied Jan. 6, 1910.)

1. Master and Servant (§ 258*)—Injuries to Servant—Failure to Warn—Complaint—Sufficiency.

Under the rule that it is sufficient to allege negligence in general terms, specifying, however, the particular act alleged to have been negligently done, a complaint in a servant's action for injuries alleging that defendant negligently failed to warn plaintiff of the dangers of the work sufficiently averred that defendant knew, or should have known, that plaintiff needed warning.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 816–836; Dec. Dig. § 258.*]

2. Trial (§ 352*)—Submission of Special Interrogatories.

Under Code Civ. Proc. § 625, before it was amended, making it compulsory on the court, on the written request of a party, to direct the jury to find in writing on any or all of the issues, the court was justified in refusing to submit the issues where the question was not so framed as to admit of a plain and direct answer, or where an answer favorable to the party preferring the request would be inconsistent with a general verdict for his adversary.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 840–845; Dec. Dig. § 352.*]

3. Appeal and Error (§ 1070*)—Harmless Error.

Though a special issue has been given to the jury, a failure to answer it is not prejudicial if the answer would be inconsistent with the general verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4233; Dec. Dig. § 1070.*]

4. Master and Servant (§§ 217, 219*)—Assumption of Risk.

A servant does not assume the risk unless he thoroughly comprehends the danger, and voluntarily undertakes such danger and risk, and he does not assume the risk of hidden dangers which are to the master's knowledge not apparent to him.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574–624; Dec. Dig. §§ 217, 219.*]

5. Master and Servant (§ 288*)—Assumption of Risk.

A servant in a white lead manufactory could not be held as a matter of law to have known that the inhalation of the fumes and dust had a tendency to produce lead poisoning, with loss of teeth, paralysis, and derangement of the digestive organs, so as to be charged with assumption of the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068–1088; Dec. Dig. § 288.*]

6. Pleading (§ 375*)—Issues—Matters to be Proved—Unnecessary Allegations.

That plaintiff in a personal injury action alleged more than necessary did not obligate him to prove anything beyond the facts essential to constitute his cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1224; Dec. Dig. § 375.*]

7. Trial (§ 350*)—Questions to be Submitted.

That an immaterial issue is raised by the pleadings does not require the jury to specially find on it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 828; Dec. Dig. § 350.*]

8. Master and Servant (§ 150*)—Dangerous Employment—Failure to Warn Servant.

Where the business is a dangerous one, the master, who with actual or constructive notice of the servant's ignorance of the danger fails to properly warn him, cannot escape responsibility because of having used the utmost care to reduce the danger as much as possible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 297–307; Dec. Dig. § 150.*]

9. Trial (§ 343*)—General Verdict—Scope.

A general verdict imports a finding in favor of the prevailing party on every material issue not specially submitted or requested to be submitted to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 809–812; Dec. Dig. § 343.*]

10. Trial (§ 350*)—Submission of Issues.

The refusal to submit a question not addressed to any material issue in the case is proper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 828–833; Dec. Dig. § 350.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

11. MASTER AND SERVANT (§ 151*)—WARNING SERVANT—DELEGATION OF DUTY.

A master may not delegate to subordinates the duty of warning a servant of the dangers of the employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 298; Dec. Dig. § 151.*]

12. MASTER AND SERVANT (§§ 101, 102*)—INJURIES TO SERVANT—INSTRUCTIONS.

In a servant's action for injuries through lead poisoning while working in defendant's factory, an instruction that the exercise by defendant of due care in ventilating the rooms would not relieve it from liability for negligence in failing to provide plaintiff with proper appliances to protect his mouth and nose was proper.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 178–192; Dec. Dig. §§ 101, 102.*]

13. MASTER AND SERVANT (§ 286*)—WARNING AND INSTRUCTING SERVANT—DUTY OF MASTER—QUESTION FOR JURY.

Whether a master owed a servant the duty of instructing as to the risk of possible injury from working in a white lead factory *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1044–1050; Dec. Dig. § 286.*]

14. MASTER AND SERVANT (§ 276*)—INJURIES TO SERVANT—SUFFICIENCY OF EVIDENCE.

In a servant's action for injuries through lead poisoning while working in defendant's factory, evidence *held* sufficient to sustain a verdict for plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 276.*]

15. APPEAL AND ERROR (§ 1078*)—WAIVER OF ERROR—FAILURE TO URGE OBJECTION.

Alleged errors in admitting and excluding evidence which are not argued by counsel, who merely call attention to exceptions reserved at certain folios of the transcript, will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256–4261; Dec. Dig. § 1078.*]

In Bank. Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Action by Albert Pigeon against W. P. Fuller & Co. (a corporation). From a judgment for plaintiff and from an order denying a motion for a new trial, defendant appeals. Affirmed.

Franklin P. Bull and L. A. Wittenmyer, for appellant. Stanley Moore (Edw. A. Foley, of counsel), for respondent.

SLOSS, J. Action to recover damages for personal injuries. The plaintiff had judgment for $5,000, and defendant appeals from the judgment, and from an order denying its motion for a new trial.

The amended complaint alleges that on July 8, 1903, and for some eight months previous thereto, plaintiff was in the employ of defendant and engaged in the melting of pig lead into buckles and assisting as a laborer in the manufacture of white lead at defendant's factory near the town of Baden, in San Mateo county. In consequence of such work, the plaintiff on said 8th day of July became lead poisoned, and thereby paralyzed on the right side of his body, including his right arm and leg, and seriously injured internally. Said employment was, as is averred, "an extremely dangerous one, as was well known to the defendant, and liable to cause lead poisoning and paralysis, but at all the times herein mentioned plaintiff was entirely in ignorance of such danger, and would not have assumed or engaged in such employment if he had been warned of such danger." The "defendant negligently failed at the time it employed this plaintiff to warn him or inform him in any way of the danger of said employment, and defendant at all times herein mentioned negligently omitted to warn plaintiff of said danger and carelessly allowed him to remain in ignorance of the same." There are further allegations to the effect that the defendant did not attempt to make the rooms in which plaintiff was working safe; that it negligently failed to equip them with any means of ventilation; and that it negligently failed to provide plaintiff with any muzzle or device to prevent the dust from said white lead, or the fumes and smoke arising from the melting of said buckles, from entering plaintiff's nostrils and mouth, as it was defendant's duty to do. It is alleged that the injuries sustained by plaintiff were permanent in their character. No demurrer was interposed to this pleading. The defendant filed an answer denying many of the material averments, and upon the issues so raised the case went to trial. It is now claimed that the amended complaint fails to state a cause of action, in that it does not allege that the defendant had knowledge that plaintiff was not cognizant of the danger incident to his work. We may assume, as is contended by appellant, that, in so far as plaintiff's case rested upon the failure to warn, it was necessary for him to allege and show that the defendant knew, or should in the exercise of reasonable care have known, that plaintiff was not fully informed of the dangerous character of the employment. But, granting this, the amended complaint under the rules of pleading frequently announced by this court sufficiently stated the necessary fact. It alleged the defendant's knowledge of the dangerous character of the employment, the plaintiff's ignorance of such danger, and the fact that the defendant negligently failed at the time it employed plaintiff or thereafter to warn or inform him of the danger of such employment. It is the settled rule in this state that it is sufficient to allege negligence in general terms, specifying, however, the particular act alleged to have been negligently done. Stephenson v. S. P. Co., 102 Cal. 143, 34 Pac. 618, 36 Pac. 407; House v. Meyer, 100 Cal. 592, 35 Pac. 308. In other jurisdictions in which the same rule applies, it has been held that an allegation that a defendant did a certain thing negligently carries with it the averment that he had, or was at fault in not having, the knowledge which was necessary to make his act a negligent one. Chicago R. R. Co. v. Kellogg, 55 Neb. 748, 76 N. W. 462; Crane v. Railway Co., 87 Mo. 588; Louisville, etc., Railroad Co. v. Utz, 133 Ind. 265, 32 N. E. 881; O'Connor v. I. C. Ry. Co., 83 Iowa, 105, 48 N. W. 1002. The allegation that defendant negligently failed to warn plaintiff was therefore an averment that defendant knew, or should have known, that plaintiff stood in need of warning.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

A point most strongly urged by appellant is that a reversal must be ordered by reason of the action of the court and the jury with regard to certain special issues. Nine of such issues were, at appellant's request, submitted to the jury. A tenth the court declined to submit. Of the nine six were answered. No answer was returned to the other three. The three not answered were the following: "(6) Was plaintiff entirely in ignorance of such danger (i. e., the danger incident to the employment)?" "(8) Did defendant, W. P. Fuller & Co., make the rooms in which plaintiff was working safe and equip them with means of ventilation, and did they adopt and use the best methods and appliances known for the protection of their employés?" "(9) Did the defendant, W. P. Fuller & Co., in the construction of its white lead department where Albert Pigeon, the plaintiff, worked, exercise such care as men of ordinary intelligence ordinarily exercise under like circumstances and conditions, taking into consideration the character of the work?" The trial court, in acting upon appellant's request for the submission of special issues, made certain remarks which, it is claimed, the jury might well have interpreted as a direction that answers to the questions were not required. We may, for the purposes of this case, treat this action of the court as a refusal to submit such issues as were not in fact answered. At the time this case was tried (in October, 1905), section 625 of the Code of Civil Procedure had recently been amended so as to take from the trial court the discretion which had been theretofore (St. 1905, p. 56, c. 62), and has now, by an amendment of 1909 (St. 1909, p. 193, c. 121), again been vested in it with respect to directing special findings. The provision then in force made it compulsory upon the court, upon written request of a party, to direct the jury to find in writing upon all or any of the issues. But even under this state of the law the court, although deprived of discretion in the matter of whether or not to submit special interrogatories to the jury at all, was still to determine whether or not a question propounded was proper for submission. The test of its propriety was stated by this court in Plyler v. Pacific Portland Cement Co., 152 Cal. 125, 92 Pac. 56, to depend "upon two conditions: (1) Is the question so framed as to admit of a plain and direct answer; and (2) would an answer favorable to the party preferring the request be inconsistent with a general verdict for his adversary?" If either of these queries can be answered in the negative, the court is justified in refusing to submit the issue. And, even if a special issue has been given to the jury, a failure to answer it will not be deemed prejudicial, if the answer does not comply with the second of the tests above mentioned. Clementson on Special Verdicts, 109; 20 Ency. Pl. & Pr. 30; Schneider v. C., etc., R. R. Co., 42 Minn. 68, 43 N. W. 783; C. & N. W. Ry. Co. v. Dunleavy, 129 Ill. 132, 22 N. E. 15; Town of Wakefield v. Wakefield Water Co., 182 Mass. 429, 65 N. E. 814. If therefore, there would have been no inconsistency between the general verdict in favor of plaintiff and an answer in favor of defendant to the sixth, eighth, and ninth interrogatories, the result will be the same whether it be said that the court declined to submit these interrogatories or that the jury failed to answer them. Taking, first, question 6: "Was plaintiff entirely in ignorance of such danger?" An answer to this question most favorable to the appellant would have been "No." A finding, however, that plaintiff was not entirely ignorant of the danger, would not have been inconsistent with the general verdict. A servant is not precluded from recovery against a master who, without proper warning or instruction, puts him to work in a dangerous place by the fact that he may have some degree of knowledge or comprehension of the danger. He will not be held to have consented to assume the risk unless there is "a thorough comprehension on his part of the danger and the risk and a voluntary undertaking by him of that risk and danger." Brooke v. Ramsden, 63 L. T. (N. S.) 287. In Thomas v. Quartermaine, L. R. 18, Q. B. Div. 685, the rule was thus stated: "It is plain that mere knowledge may not be a conclusive defense. There may be a perception of the existence of the danger, without comprehension of the risk, as, where the workman is of imperfect intelligence, or, though he knows the danger remains imperfectly informed as to its character or extent." So in Mundle v. Hill Mfg. Co., 86 Me. 400, 30 Atl. 16, the Supreme Court of Maine said: "One does not voluntarily assume a risk within the meaning of the rule that debars recovery when he merely knows there is some danger without appreciating the danger." See, also, Fitzgerald v. Paper Co., 155 Mass. 155, 29 N. E. 464, 31 Am. St. Rep. 537; Jarvis v. Coes Wrench Co., 177 Mass. 170, 58 N. E. 587; Labatt on Master and Servant, § 320. In Nofsinger v. Goldman, 122 Cal. 609, 55 Pac. 425, an action by a laborer employed about a threshing machine to recover damages for injuries received by him through the explosion of the boiler, the court said that an instruction declaring that the plaintiff could not recover if he knew of the alleged defects of the machinery, or had equal opportunity with the defendants of knowing such defects, was rightfully refused. "The instruction," it was said, "omits the important element that the employé must not only know of the defects, but must know the dangers and risks attending the operation of the machinery by reason of the defects." Entire ignorance of the danger on the part of plaintiff was not therefore essential to a recovery. He was entitled to a verdict and judgment if he satisfied the jury that he had some degree of knowledge of the dangerous character of the employment, but did not understand or appreciate its full nature or extent. He may, for example, have observed that the melted pig lead gave off fumes, and that dust arose from the white lead in the process of manufacture, and that this involved the possibility of some degree of discomfort or injury, without realizing or understanding that the very serious disorders from which he claims to be suffering were a probable consequence. In the face of appellant's contention, strongly urged even on appeal, that there is no danger in the employment in question, it can hardly be claimed that the plaintiff must, as matter of law, be held to have known that the inhalation of the fumes and dust had a tendency to produce lead poisoning, with its accompaniments of loss of teeth, paralysis, and derangement of the digestive organs. This is not a fact of universal knowledge, nor was it necessarily apparent to one employed even for a long time, in defendant's works. The risks assumed by a servant are only the ordinary risks of the employment. He does not assume the risk of hidden dangers which are, to the knowledge of the master, not apparent to him. Ingerman v. Moore, 90 Cal. 410, 27 Pac. 306, 25 Am. St. Rep. 138; Tedford v. L. A. Elec. Co., 134 Cal. 76, 66 Pac. 76, 54 L. R. A. 85. There was ample evidence to warrant a finding that plaintiff, by reason of his prior experience, knew that some risk attached to work in a white lead factory, but that, until he was suddenly stricken down, he had no conception of the real character or extent of the danger which he incurred. Such partial knowledge on his part would have necessitated a negative answer to the question whether he was entirely ignorant of the danger.

There is no force in appellant's contention that, because plaintiff alleged in his complaint that he was entirely ignorant of the danger, he cannot now be heard to say that an issue framed in the precise words of his own pleading did not require an answer. The fact that plaintiff may have alleged more than was required of him does not impose upon him the obligation of proving anything beyond the facts essential to constitute his cause of action. If an immaterial issue is raised by the pleadings, the fact that it is so raised does not require a jury to specially find upon it.

Of special issues 8 and 9 it may be said that an affirmative answer to each would not have helped appellant's cause, in view of the general verdict and of the answers given by the jury to the six questions on which an agreement was reached. The eighth and ninth interrogatories dealt with the question of the care exercised by the defendant in making safe the rooms in which plaintiff worked, and the methods and appliances in use. The complaint alleged negligence in three respects: (1) The failure to warn plaintiff of the dangerous character of the work; (2) the failure to properly construct the shops; and (3) the failure to furnish proper appliances. If the business was a dangerous one, and the defendant, with actual or constructive notice of plaintiff's ignorance of its danger, put him to work without giving him proper warning, it is not relieved of responsibility because it has used the utmost care to reduce the danger as much as possible. The jury found, in answer to special interrogatories 1, 2, 3, 4, 5, and 7 that the plaintiff was lead poisoned and thereby paralyzed; that these injuries were the result of plaintiff's working at defendant's factory in the manner described in his complaint; that this employment was an extremely dangerous one; that plaintiff's physicial condition was in no degree caused by any prior employment; that the defendant knew that plaintiff's employment was an extremely dangerous one and liable to cause lead poisoning and paralysis; and that the defendant was not entitled to believe, nor did it believe, that the plaintiff had such a degree of intelligence and experience as to apprise him of the danger incident to the business in which he was engaged. A finding that plaintiff did not understand or appreciate the danger to which he was subjected was not necessary, because, as we have seen in discussing issue No. 6, this question was not put to the jury. A general verdict imports a finding in favor of the prevailing party on every material issue; that is to say, at the least, on every material issue not specially submitted or requested to be submitted to the jury. The jury, then, found every fact necessary to establish the defendant's negligence on the first ground asserted, viz., the failure to warn of danger not apparent. This is enough to sustain the judgment. An answer to questions 8 and 9 in favor of the defendant would merely have meant that it was not negligent in the two particulars of construction of the buildings and furnishing of appliances. This, of course, would not relieve it from responsibility for its negligence in failing to warn the plaintiff of the dangerous character of the employment. Regardless of other grounds urged by respondent, the failure to put or to answer questions 8 and 9 could not have been prejudicial.

As has been said, the defendant requested the submission of a tenth issue to the jury, and this was refused by the court. This interrogatory read as follows: "(10) Did W. P. Fuller & Co., the defendant, use ordinary care in the selection of its superintendent and the employés in charge of the factory who employed plaintiff?" This question was not addressed to any material issue in the case. It was not charged in the complaint that the defendant had failed to exercise proper care in the selection of its employés. If it be claimed that this question had a bearing on the issue of negligence in failing to warn plaintiff of the danger of his employment, the answer is that, where the duty to warn exists, it is a personal duty of the employer—one that cannot be delegated by it to subordinates. Tedford v. L. A. Elec. Co., 134 Cal. 76, 66 Pac. 76, 54 L. R. A. 85, and cases cited.

We see no error in the instructions 7 and 8 given by the court at the request of plaintiff. Without quoting them, we may say simply that they give general definitions of negligence in terms which have frequently had the approval of courts. Indeed, the appellant advances no reason for its contention that they are erroneous. Of instructions Nos. 10, 11, 12, 13, and 17 it is said by appellant that they assume that the defendant had been apprised of plaintiff's alleged ignorance of the dangers lurking in his employment. But an examination of the instructions discloses that they contain no such assumption. Instruction 10 states the obligation of the master where the servant is known to be without experience in such work, or without any knowledge of the danger connected therewith. There is no implication that this plaintiff was known to be ignorant or inexperienced. No. 11 deals with defendant's knowledge of the dangerous character of the employment, and declares that it is immaterial whether defendant actually knew of its dangerous character, provided the employment was in fact dangerous, and defendant could have become aware of such danger by the exercise of ordinary care—a proposition that is obviously correct. No. 12 and No. 13 contain no reference whatever to defendant's knowledge of plaintiff's ignorance of the dangers of the employment. No. 17 expressly conditions the master's obligation to warn upon his knowledge of the servant's ignorance or inexperience in the work.

Instruction 14 is also complained of. It instructs the jury that the exercise of due care by the defendant in ventilating the rooms would not relieve it from liability for negligence in failing to provide the plaintiff with proper appliances to protect his mouth and nose, if it was negligent in this regard, and such negligence caused plaintiff's injury, without fault on his part. No valid ground of objection to this instruction is stated.

There was no error in refusing instruction 2, requested by the defendant, to the effect that no duty rested on the defendant to give the plaintiff instructions in reference to the risk of possible injury as a consequence of his employment. Whether or not this duty rested on the defendant was under the evidence clearly a question for the jury, and it was submitted to the jury under proper instructions. It is asserted in the brief that the court erred in modifying instructions 3, 5, and 6, requested by defendant. No argument is advanced in support of this contention, and it is sufficient to say that an examination of the modifications does not make apparent any reason for holding that they were improper.

The point of the insufficiency of the evidence to sustain the verdict is very briefly presented by appellant. It will not be necessary to detail the evidence at length. There was abundant testimony tending to show that the process of the manufacture of white lead, as conducted by the defendant, was dangerous to those assisting in the work; the danger arising from the inhalation of fumes and vapor thrown off from the melted pig lead, and of particles of dust coming from the metal after it had been corroded in the process of converting it into white lead. The jury was fully warranted in finding that the plaintiff was ignorant of this danger when he entered defendant's employ. It is not pretended that the defendant ever gave him any warning or instruction with regard to the matter, nor that it ever made any inquiry as to whether or not he had had any prior experience which would give him any knowledge concerning the danger. As we have already suggested, it certainly cannot be said that the danger of lead poisoning arising from the melting of pig lead or handling of white lead is so obvious and apparent to the ordinary mind that the plaintiff must be held to have known of it, and, for this reason, the defendant was not justified in assuming that he had the requisite knowledge. There was some conflict of testimony as to whether plaintiff's injuries were in fact the result of lead poisoning or of disease to which he had been subject before entering the employ of the defendant, but this conflict was one for the jury to resolve.

The alleged errors of the court in admitting and excluding evidence are not argued; counsel merely calling attention to the exceptions reserved by the defendant at certain folios of the transcript. A point so presented to this court will not be considered. Duncan v. Ramish, 142 Cal. 686, 76 Pac. 661; Bell v. S. P. R. R. Co., 144 Cal. 560, 573, 77 Pac. 1124.

The judgment and order appealed from are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; MELVIN, J.; HENSHAW, J.; LORIGAN, J.

(156 Cal. 510)

COOLEY v. MILLER & LUX et al.

(S. F. 4,950.)

(Supreme Court of California. Nov. 22, 1909. On Rehearing, Dec. 20, 1909.)

1. Specific Performance (§ 44*) — Parol Sale of Land.

A parol sale of land without delivery of possession, though the price is fully paid, is void, and gives no right to specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 126; Dec. Dig. § 44.*]

2. Judgment (§ 682*)—Persons Bound by Decree of Distribution—Purchaser From Heir.

A purchaser by a parol sale of an heir's interest in land should appear, and, under a power of attorney from the heir authorizing him to receive his interest, claim distribution on final settlement, and, failing to do so, he is bound by the decree.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1203; Dec. Dig. § 682.*]

3. Judgment (§ 682*)—Persons Bound by Decree of Distribution — Subsequent Grantees.

A decree of distribution of a decedent's estate, made in proceedings initiated after a written grant by distributees of a part of their interests, does not bar the right of the successor of their grantee, if their grant is otherwise valid.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1203; Dec. Dig. § 682.*]

4. Mortgages (§ 32*)—Construction of Instrument as Mortgage or Absolute Conveyance.

Pursuant to Civ. Code, § 1652, requiring repugnancy in a contract to be reconciled, if possible, so as to give some effect to the repugnant clauses, subordinate to the general intent, in construing an instrument expressing on its face an absolute present grant to an attorney of a part of the interest of distributees in an estate, in consideration of "services already rendered and to be rendered" in the administration and also of a release by him of all interest held by him under a prior executory agreement for a grant, but containing a clause providing that whatever compensation should be allowed him by the court, as attorney for absent heirs, should first be applied to reimburse him for all his outlays, and the balance credited to the distributees in the final settlement, must be held to mean that the balance should be credited to them in final settlement to avoid double payment, and, so construed, the instrument was not a mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 60-64; Dec. Dig. § 32.*]

5. Pleading (§ 382*)—Evidence Admissible Under Pleading—Denial of Allegation of Ownership.

Where it is sufficient for plaintiff to allege merely that he is the owner of property, denial of this allegation authorizes admission of evidence that title under which he claims is absolutely void, and not voidable merely, or any evidence to show he had no title.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1292; Dec. Dig. § 382.*]

6. Trial (§ 395*) — Finding of Ultimate Fact—Title or Ownership.

Where it is sufficient for plaintiff to allege merely that he is the owner of property, a finding on the fact of title or ownership is good without a finding of particular facts on which title or want of title depends.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 931; Dec. Dig. § 395.*]

7. Attorney and Client (§ 123*)—Contracts Between Attorney and Client—Presumption of Undue Influence.

The relation of attorney and client is confidential, and in view of Civ. Code, § 2235, declaring that all transactions between trustee and beneficiary, while the influence acquired by the trustee remains, by which he obtains any advantage over his beneficiary, are presumed to be entered into by the latter without sufficient consideration and under undue influence, any contract between an attorney and client while the relation continues, whereby the former obtains an advantage, is presumed to have been made under his undue influence.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 240; Dec. Dig. § 123.*]

8. Attorney and Client (§ 123*)—Contracts Between Attorney and Client—Presumption of Undue Influence.

The presumption of an attorney's undue influence in case of a contract with his client does not apply where he openly assumes a hostile attitude to his client, nor to a contract creating the relation and fixing the attorney's compensation, as in the latter case the relation does not exist till the contract is made, and in agreeing on its terms the parties deal at arm's length.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 240; Dec. Dig. § 123.*]

9. Cancellation of Instruments (§ 53*) — Findings to Support Judgment.

To lay a foundation for affirmative relief of cancellation of an instrument on which an action is based, asked for in connection with a separate defense of undue influence in procuring its execution, it is necessary that a finding be made on the facts therein averred.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 111; Dec. Dig. § 53.*]

10. Appeal and Error (§ 1071*)—Harmless Error—Ruling on Effect of Decree.

Where, in an action based on a grant to plaintiff for services as an attorney, cancellation of the grant was asked by defendants solely on the ground that it was a mortgage, and undue influence in procuring its execution, if averred as a defense, was in support of the claim that it was only a mortgage, which it is held not to be, and was apparently abandoned, as no finding was made in relation thereto, error in construing a decree as a bar to plaintiff's claim under such grant is harmless because a presumption of undue influence against the validity of the grant would arise from the relation of the parties shown on the face of the instrument.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4235; Dec. Dig. § 1071.*]

Melvin, J., dissenting.

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Suit by Thomas Ross Cooley against Miller & Lux (a corporation) and others. There was a judgment for defendants, and from an order denying a new trial plaintiff appeals. Reversed.

Sullivan & Sullivan, Theo. J. Roche, and John J. Barrett, for appellant. L. M. Hoefler, Loewy & Gutsch, Edward F. Treadwell, and W. B. Treadwell, for respondents.

SHAW, J. In the court below, after a trial upon the merits, judgment was given in favor of the defendants. Plaintiff appeals from an order denying his motion for a new trial.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The plaintiff sued to obtain partition of certain lands, alleging that he was the owner of an undivided three-hundredths thereof as tenant in common with the defendants, and that the respective interests of the defendants were unknown to him. The defendants divided into groups and filed five separate answers; each denying the interest of plaintiff and stating their respective interests. The land formerly belonged to Miller & Lux, a partnership of two persons, namely, Henry Miller and Charles Lux. Lux died testate on March 15, 1887. The corporation defendant is the successor in interest of Henry Miller and of a number of the devisees of Lux. The interest which the plaintiff claims in the land was obtained by his grantor, James H. Campbell, after the death of Lux and before distribution of his estate, under an instrument executed on July 14, 1890, by Campbell and certain of the defendants, or their predecessors in interest, who were devisees and legatees of Lux or successors of such devisees and legatees. These defendants will be here designated as the "German heirs." The instrument is called "Exhibit B." It was preceded by another instrument executed by the same parties on January 6, 1888, called "Exhibit A," which was expressly canceled by "Exhibit B." Plaintiff claims that Exhibit B was, in effect, a conveyance to Campbell of an undivided three-hundredths of the interests of the German heirs in the estate, real and personal, of Charles Lux. Campbell afterwards conveyed to John H. Campbell, who conveyed to the plaintiff. Under the terms of the will of Lux, the German heirs were given the entire residue of one-half of the estate of Charles Lux, after certain bequests were satisfied, all of which have been discharged. A one-half interest in Lux's share of the land in controversy is therefore to be disposed of according to the respective rights and interests of the plaintiff and the German heirs. Upon the trial the defendants, over plaintiff's objection, introduced in evidence the record of the proceedings in the superior court in the administration proceedings, distributing the estate of Charles Lux, including the decree of final distribution thereof, entered on July 3, 1890. Neither the petition, nor the decree, mentioned or referred to the conveyance of any interest in the estate to Campbell, nor disclosed any claim by him thereto. He did not appear in the proceeding or in any way assert therein that he had or claimed any such interest. He was not cited or summoned to appear, and only the usual general notice by posting was given of the hearing. The decree purported to distribute to the German heirs by name, to each his respective share, the whole of the interest given to them by the will, entirely ignoring the claim or share transferred to Campbell.

1. It is claimed by the defendants that, because the proceedings in distribution of the estate of Charles Lux were initiated after the execution of the alleged grant to Campbell, the decree constitutes a bar to his claim and operated to divest the plaintiff of any interest he may have had as grantee or successor of Campbell. We think the decree of distribution had no such effect as the defendants claim. The decisions of this court on the question of the effect of a decree of distribution of the estate of a decedent upon transfers by heirs or devisees of their shares or interests in the estate, made by them after the death of the ancestor and prior to such distribution, have not been entirely consistent. It is claimed that there are cases which hold that a decree distributing the share to an heir or devisee bars a grantee of such heir or devisee, although there was no express issue or contest involving such transfer, and the rights of grantee were never actually considered or passed on by the court. This the respondents assert to be the correct principle applicable to the present case.

The first case on the subject was Freeman v. Rahm, 58 Cal. 111. That case decided that a purchaser from an heir of his interest in the estate consisting of land, who has fully paid the purchase money, the sale being in parol, but who has not received a deed nor taken possession under his purchase, and who has no evidence of his purchase except a power of attorney from the heir authorizing him to receive distribution of the heir's interest on final settlement of the estate, is absolutely barred by a subsequent decree distributing such interest to the heir, and that a creditor who has attached the interest of the heir, after distribution and before the execution of a deed to the purchaser by the heir, has a lien on the land superior to any right of such purchaser. A parol sale of land, without delivery of possession, although the price is fully paid, is wholly void, gives no right to specific performance, and vests no right, title, or interest in the buyer. Forrester v. Flores, 64 Cal. 26, 28 Pac. 107; Edwards v. Estell, 48 Cal. 194; Fulton v. Jansen, 99 Cal. 590, 34 Pac. 331; Salfield v. Sutter, etc., Co., 94 Cal. 549, 29 Pac. 1105. The power of attorney did not purport to be, and was not, a transfer of any interest. The opinion correctly states the law when it declares that the purchaser should have appeared and claimed distribution upon final settlement, and that, having failed to do so, he was bound by the decree. He had no valid, legal or equitable claim to or transfer of the land, and his only right, if he had any right at all, was that given by the power of attorney, namely, the right to receive the share of the heir on distribution. There are some statements in the opinion to the effect that he would have been barred even if he had received a valid transfer from the heir; but they are mere dicta and have been ever since so regarded.

Justice Harrison, in Martinovich v. Marsicano, 137 Cal. 359, 70 Pac. 459, remarked that Justice Myrick's opinion in Freeman v. Rahm was not authority because it was concurred in by only two justices. From the fact that four judges participated in the decision he evidently supposed it was a decision by the court in bank. Investigation shows that the case was heard and decided in Department 2 at the May session of 1881, that Chief Justice Morrison sat with Department 2 at that session, and that he participated with the other justices in many of its decisions, so that four justices appear to have rendered the same. The case was never transferred to the court in bank, and it is really a department decision, and properly made by three justices. The reasoning of Justice Myrick on the point now involved was disapproved by the court in bank in Martinovich v. Marsicano, and also in Chever v. Ching Hong Poy, 82 Cal. 68, 22 Pac. 1081, and it cannot now be regarded as authority.

In Bath v. Valdez, 70 Cal. 360, 11 Pac. 727, the court held that a decree of distribution, made in the usual way, does not in any manner affect the title of one who has held by adverse possession against the heirs a sufficient time to gain title by prescription. The court says: "It is the estate of the deceased upon which the probate court administers. It is the title which the deceased had in and to the real property at the time of his death, or which has inured to the estate after death and before distribution, which passes to the heirs and devisees." This language was quoted and approved in Barnard v. Wilson, 74 Cal. 517, 16 Pac. 307; but, as the right there in issue was an adverse claim against the ancestor, the latter case is not strictly applicable here.

The case of Chever v. Ching Hong Poy, 82 Cal. 68, 22 Pac. 1081, is precisely in point. A son conveyed to his mother his interest in remainder, as devisee, in the estate of his deceased father; the mother being the devisee of a life estate therein. Afterwards distribution was had of the father's estate. The mother was given the life estate, and the share in the remainder, which had been conveyed to the mother by the son, was distributed to the son, disregarding the conveyance. This decree became final, and the case before this court involved a collateral inquiry as to the effect and binding force of the decree of distribution. The contention was that "the subsequent decree of distribution entirely destroyed the effect of that deed and conclusively established the title in" the son, as of the date of the decree. The court held the contrary, saying that under section 1666 of the Code of Civil Procedure a decree of distribution "is conclusive as to the right of heirs, legatees, or devisees; but it is conclusive against them only as heirs, legatees, or devisees—only so far as they claim in such capacities. * * * Its determination of such matters does not create any new title. It merely declares the title which accrued under the law of descents or under the provisions of the will. * * * An heir may contract about or convey the title which the law had cast upon him by the death of his ancestor, and the validity or force of such contract is not affected by the fact that a probate court afterwards, by its decree of distribution, declares his asserted heirship and title to be valid." The opinion expressly discredits Freeman v. Rahm and practically overrules it so far as it declares a contrary doctrine. It should be here remarked that, in approving the decision in the Chever Case as we do, it is not necessary to approve the intimation in the opinion that section 1678 of the Code of Civil Procedure applies only where partition of the lands is made under sections 1675 et seq., and not where a mere distribution is made under section 1665 of the same chapter. Section 1678 in terms authorizes distribution to a grantee, as well as partition. In the subsequent case of the Estate of Vaughn, 92 Cal. 192, 28 Pac. 221, written by the same justice, this intimation was stated to be dictum. In the latter case the heirs had granted all their interest in the entire estate to Martha A. Bradford. The petition for distribution alleged these grants and prayed for distribution of the entire estate to the grantee. No objection or opposition thereto was made in the lower court; but it nevertheless distributed the estate to the heirs, believing that the decision in Chever v. Ching Hong Poy required that course. The Supreme Court held that this was error and reversed the decree, saying: "In the Chever Case, the appellant, William J. Chever, had, pending the administration of the estate of his deceased father, conveyed to his mother all his interest in the real property of said estate. Upon final distribution, the claim of the mother as grantee of William J. for some reason was not set up, and was not before the court; and the court very properly, upon the facts before it, distributed the interest in question to the heir, William J., who was still apparently the owner of it. He afterwards claimed that the decree of distribution conclusively estopped the mother from setting up title under the prior conveyance; but this court held that such was not the law, and that was the only point decided in the case." In Estate of Burton, 93 Cal. 461, 29 Pac. 36, the court, referring to the Chever Case in argument, says: "In the ordinary mode of distribution, the grantee of the heir is not a party to the proceeding, and there is no issue as to his title presented for determination. This being so, of course, the court would have no jurisdiction to try or determine anything as to the title of the grantee." In Estate of Burdick, 112 Cal. 392, 44 Pac. 735, the court again, in the course of its argument, says: "The probate court, in the matter of the administration of estates, has jurisdiction of the estates of dead men and can distribute only to heirs, devisees, or legatees, or to those claiming through them, and the decree of distribution is conclusive as to the succession or testamentary rights." In Estate of Crooks, 125 Cal. 461, 58 Pac. 89, it is again declared that "the decree of distribution is only conclusive upon the matter of succession, or as to the rights under a will—at least, where the estate is distributed without an actual contest to the heirs, devisees, and legatees. The title dates back to the death of the testator, or of their ancestor, and a distribution directly to them does not affect rights acquired from them since it accrued." In this case the court held that distribution should not be made to a mortgagee of an heir.

These indorsements and approvals of the doctrine declared in Chever v. Ching Hong Poy would appear to be sufficient to settle the question as to the paramount authority of that case over Freeman v. Rahm, with which it is in apparent conflict, and which it expressly refused to follow. It is claimed, however, that the doctrine of Freeman v. Rahm was again adopted by the court in the case of William Hill Co. v. Lawler, 116 Cal. 359, 48 Pac. 323. It is this case upon which the respondent chiefly relies, and upon the authority of which it is said the court below based its ruling. The case expressly recognizes the soundness of the decision in the Chever Case; but there are some expressions in the opinion which, taken alone and without the proper consideration of the facts to which they relate, appear to be in conflict with the doctrine of the Chever Case. There is, however, a difference between the facts of the two cases which clearly distinguishes the latter from the former. In the Chever estate the son had conveyed to his mother, the interest so conveyed was distributed to the son, and the subsequent controversy arose directly between them over the title to the identical property. In the Lawler estate the mother had conveyed to one son, John, her undivided one-half interest in a certain described tract constituting a part of the father's estate. The decree of distribution did not give this tract, or a one-half interest therein, to the grantor, as happened in the Chever Case, but did give the entire interest in that tract, in severalty, to the two other sons, James and Patrick, giving to the mother other lands in severalty, and to her and the last-named sons still other tracts in undivided shares. The proceeding was a partial partition as well as a distribution. The grantees of James and Patrick sued John to quiet title to the tract conveyed to John by the mother. The mother was not a party to the suit. No appeal had been taken from the decree of distribution or partition, and it had become final. The court said: "As no appeal was taken from this decree, it became conclusive upon Bridget Lawler and upon her grantee, respondent herein. The question of an estoppel by virtue of her grant does not arise in the present case, *as the property distributed to her is not the same as that which she conveyed to the respondent*." (The italics are ours.) The court seems to have considered that the mother, in the distribution proceedings, was the representative of her grantee for the purpose of securing distribution of the granted property to feed the grant, and that as she failed to obtain this relief, in a proceeding wherein she was an actor and where the court had jurisdiction to give it, she was concluded by the decree, and that her grantee, claiming only under her, was likewise concluded. That this is the true ground of the decision is further demonstrated by reference to the briefs in the case, wherein counsel for the plaintiffs, in distinguishing it from the Chever Case, say: "If Bridget Lawler had received as distributee the land in controversy here, it would be the property of the defendant (John); but, when the land goes to another heir with whom the defendant does not connect himself, he is not in the position of Mrs. Chever." And in the opinion the court distinguishes it from the Chever Case in the same way, saying that what was decided in the Chever Case was that the grantor who receives in distribution the property granted by him to another "is estopped from claiming the property under the distribution, as against his grantee." The general statements in the opinion in the Lawler Case, to the effect that the decree of distribution binds all the world, that every person who may assert any interest in the estate is required to appear and claim it, and that a grantee of an heir is as fully bound by the decree as the heir himself, are to be understood in the light of the fact that, although the grantee did not appear in that case, the grantor did appear, and in view of the all-important fact that the land granted was not distributed to the grantor, but to third persons. So understood, the case is not in conflict with the Chever Case, nor contrary to sound principles of law. It must be conceded that if, upon distribution and partition, the court decides and decrees that a particular heir is not entitled to a particular part of the estate, the decree, if not reversed on direct appeal, is conclusive both upon the heir and all persons claiming under him by grant or otherwise. This is the result of the principles declared in the Chever Case and in all the other cases on the subject, and this appears to be all that was really decided in William Hill Co. v. Lawler. That this was the view taken of that decision by its author, Justice Harrison, is clear from his reference to it in the subsequent opinion of Martinovich v. Marsicano, supra, where he distinguishes the Lawler Case by saying that in that case the land which the widow had conveyed to John was, by the decree of distribution, assigned to others and not to the widow. The Lawler Case therefore has no application to the case at bar, for here the property assigned by the decree of distribution to the German heirs includes the property alleged to have been granted by them to Campbell.

The decision in Martinovich v. Marsicano, supra, holds that a decree of distribution to the grantee of a devisee does not affect the lien of a judgment rendered against the devisee before the grant and prior to the decree. It also approves the principle of the case of Chever v. Ching Hong Poy, supra. The case of Crew v. Pratt, 119 Cal. 149, 51 Pac. 38, has no bearing upon the precise question here involved. What was decided in that case was that a decree of distribution could not be disregarded or set aside upon the ground that it had erroneously declared and enforced a trust of a character which this court, in other cases, had held to be forbidden by law, and that such a judgment, although erroneous and reversible upon direct appeal, was conclusive upon all parties thereto after it became final; no appeal having been taken. Our conclusion is that the decree of distribution of the estate of Charles Lux, deceased, made in the manner we have stated, does not bar the right of the plaintiff, as successor of Campbell, to the property granted by the German heirs to Campbell before that decree was rendered, if that grant is otherwise valid.

2. Another question presented is that of the meaning and effect of the instrument referred to as "Exhibit B." It is claimed by the respondent that, when considered in connection with the previous agreement between the same parties, it is not a conveyance, and that, at most, it is only a mortgage by the German heirs to Campbell to secure to him the payment of his fees for the services which he agreed to render for them as attorney.

The first agreement, Exhibit A, was executed on January 6, 1888, nine months after the will of Lux was admitted to probate, and at a time when the estate could not have been ready for settlement or distribution. By its terms Campbell agreed that he would represent the German heirs and act as their legal adviser throughout the administration of the estate, that he would institute all actions and proceedings necessary for the enforcement of their rights and defend them against all suits and resist all measures likely to prove injurious to them, that he would hasten by all lawful means the close of the administration of the Lux estate and secure as beneficial a distribution to them as the will and the law would permit, and that he would do all other acts during said administration that might be deemed of benefit to their interests. In consideration of these covenants on his part, the German heirs agreed to grant to him three-hundredths of their respective shares of the estate, subject to the condition that if he should violate his part of the agreement, or neglect to perform the same fully and in good faith, the agreement should be immediately annulled, he should cease to be their attorney, and should at once release to them all benefits to be derived by him from the terms of the agreement. It is to be noted that this agreement does not purport to be a present grant of a three-hundredths interest in their shares of the estate, that it is in terms only an executory agreement for a grant, and that it was to be annulled upon the happening of the condition. It also provided that Campbell should bear his own traveling and other personal expenses in performing his duties.

The second agreement, Exhibit B, was made on July 14, 1890, two years and six months after the first agreement. In the ordinary course of administration, of an ordinary estate, the administration would have then advanced far toward final settlement. The decree of distribution was not made, however, until June 28, 1900, almost ten years thereafter. The terms of Exhibit B, omitting the formal parts and substituting "German heirs" for "parties of the first part," and "Campbell" for "party of the second part," are as follows: "The German heirs for and in consideration of the reconveyance and agreement hereinafter contained, and of the services already rendered and to be rendered by Campbell, hereby grant to said Campbell an undivided interest in all the property of the estate of Charles Lux, deceased, equal to three-hundredths ($^3/_{100}$) of the shares and interests therein devised to the German heirs by said decedent in his last will and testament. In consideration of the foregoing grant to him, Campbell, the said Campbell hereby grants and reconveys to the German heirs all the interest in said estate held by him under any previous agreement or conveyance, and especially a certain agreement and conveyance dated January 6, 1888, which is hereby by agreement of all the parties hereto rescinded and annulled. It is agreed that whatever compensation shall be allowed to Campbell by the superior court of the county of San Mateo, as attorney for absent heirs, shall be first applied to reimburse him for all outlays made by him in rendering his services to the German heirs, and the balance shall be credited to the German heirs in final settlement. It is fully understood that the compensation herein provided for shall embrace all services rendered in the administration of said estate by Campbell up to and including the final distribution thereof."

This instrument, on its face, expresses an absolute, present grant to Campbell. There is certainly no presumption of law that such an instrument is to be construed as a mortgage rather than as a deed or assignment. There is no evidence in the record, aside from its terms, to indicate that the parties understood that the German heirs were to remain the debtors of Campbell for the value of the services he had rendered and should render. The terms of the instrument do not show or express such understanding or intention. To the contrary, it declares that it is made "in consideration" of "services already rendered and to be rendered," and that "the compensation herein provided for" embraced all services to be rendered up to final distribution, thus showing that it was considered as payment in advance for services rendered and to be rendered, and that such payment was made by the conveyance, not that it was merely secured thereby. The release by Campbell of all interest held by him under the previous agreement and the cancellation of that agreement show also that the intention was to make the second conveyance absolute and not conditional, as it would be in effect if it were held to be only a mortgage. The German heirs thereby accepted Campbell's promise to render the services specified and divested themselves of the right to annul or revoke the grant if he failed to do so.

It is claimed that the conveyance is shown to be a mortgage by the clause relating to the settlement of allowances to Campbell by the court as attorney for absent heirs. The grant is absolute in terms, and it clearly negatives the idea that any debt remained to be secured. To give the clause the effect claimed would, by mere construction, make it antagonistic to and destructive of the grant. "Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the whole contract." Civ. Code, § 1652. A repugnant clause will even sometimes be wholly rejected in order to accomplish the positive and obvious general purpose. Jackson v. Puget S. L. Co., 123 Cal. 100, 55 Pac. 788. This clause is capable of a reasonable explanation and interpretation not inconsistent with the other parts of the agreement. A payment of fees to an attorney for absent heirs is not made for the general benefit of the estate, but solely for that of the absent heirs. It is in the nature of a partial distribution in advance to them, and on final settlement such payments are charged to them as advancements on their shares. The grantors were evidently the absent heirs whom Campbell had been appointed to represent. The services for which the allowances were to be made were evidently the same services for which he was paid by the grant of three-hundredths of their shares by these same heirs. If no adjustment were made between them of the court allowance he would be twice paid for the same service. It was necessary that he should in some way turn over these allowances to them. The obvious and proper way would have been for him to do so as fast as he received them. Apparently for his benefit and convenience, another plan was adopted. This plan was that he should retain the allowances, pay therefrom his outlays, and adjust the balance on final settlement of the estate, by considering the same as an advancement solely upon the $^3/_{100}$ going to him, or, as between him and them, "crediting" the same to them. As the grant included the personal property and money of a very large estate, this would seem entirely practicable. This is what is meant by the provision that these balances should "be credited to the German heirs in final settlement," and thus a double payment would be avoided. So understood, the clause carries out the main purpose of the agreement, and does not destroy the previous absolute grant, nor involve the absurdity that an obligation which the grant discharged was nevertheless to be kept alive.

3. It is further claimed that, at the time the agreement was made, Campbell was their attorney, that an agreement between them, made while this confidential relation existed, is presumed to have been obtained by undue influence on his part, that it is incumbent on him to rebut this presumption by evidence, and that, as no evidence was given on the subject, the court was justified in holding that the grant was void, and that the plaintiff had no title thereunder. On the other hand, the plaintiff claims that this was alleged in the answer as an affirmative defense, that the court made no finding on the issue, and that for that reason the decision is against law, and the motion for new trial should have been granted.

The rule seems to be that in cases where it is sufficient for the plaintiff, suing in regard to property, to allege merely that he is the owner thereof, a denial of this allegation is sufficient to authorize the admission of evidence that the title under which plaintiff claims was absolutely void and not voidable merely, or any evidence to show that plaintiff had no title, and that in such cases a finding upon the fact of title or ownership is good without a finding of the particular facts upon which such title or want of title depends. Cooper v. Miller, 113 Cal. 238, 45 Pac. 325; Montecito V. Co. v. Santa Barbara, 144 Cal. 594, 77 Pac. 1113; Adams v. Crawford, 116 Cal. 499, 48 Pac. 488.

The rule is well established that the relation of attorney and client is confidential in character, and that any contract entered into between them while that relation continues, whereby the attorney obtains an advantage from the client, is presumed to have been made by the client under the undue influence of the attorney. Kisling v. Shaw, 33 Cal. 440, 91 Am. Dec. 644; Civ. Code § 2235; 1 Story, Eq. Jur. §§ 310, 311; 2 Pom. Eq. Jur. § 390. In the section cited Mr. Pomeroy says: "The presumption always arises against the validity of a purchase or sale between the client and attorney made during the existence of the relation. The attorney must remove that presumption by showing affirmatively the most perfect good faith, the absence of undue influence, a fair price, knowledge, intention, and freedom of action by the client, and also that he gave his client full information and disinterested advice.

* * * If all these circumstances are proved, the contract will stand; if not, it will be defeated or set aside." The presumption does not apply to a transaction in which the attorney openly assumes a hostile attitude to his client. Johnson v. Fesemeyer, 3 DeG. & J. 22. Nor is it applicable to a contract by which the relation is originally created and the compensation of the attorney fixed. The confidential relation does not exist until such contract is made, and in agreeing upon its terms the parties deal at arm's length. Elmore v. Johnson, 143 Ill. 513, 32 N. E. 413, 21 L. R. A. 366, 36 Am. St. Rep. 401.

The record does not contain the answer in full, but merely states its substance. It recites: That a separate affirmative defense was presented averring that Campbell was attorney for the German heirs at the time of the execution of Exhibit B; that it "was without consideration and was obtained by said Campbell by the undue use of his influence as such attorney; that the same was intended only as a mortgage to secure the payment to said Campbell of his compensation as such attorney; that said compensation had been fully paid"; and that they offered in this separate defense to pay Campbell or the plaintiff any sums the court should find to be due from the German heirs for such compensation, and asked "that said mortgage be adjudged to be satisfied and that the same be delivered up and canceled." This is all that appears on the subject of undue influence. It is not claimed or asserted that the grant was void because obtained by undue influence. Its cancellation was not asked on that ground, but solely upon the ground that it was really a mortgage. Undue influence seems to have been averred in support of the claim that it was only a mortgage and as a fact tending to show the intention, rather than as a separate and independent defense. No evidence was given by the defendants in support of such a defense. They here rely wholly on the bare presumption aforesaid. The agreement of January 6, 1888, was introduced by the plaintiff. It created the relation of attorney and client between Campbell and the German heirs and fixed his compensation. It declared that for his services, when completed, he should receive the identical three-hundredths interest which the second agreement, Exhibit B, conveyed to him. It is admitted that all the services contracted for have been performed by him. The first agreement, to which no undue influence attaches, constitutes an admission by the German heirs that the value of the services to be performed equaled the value of the interest they afterwards granted to him, and it goes far to remove the presumption of undue influence in obtaining the grant. In order to lay a foundation for the affirmative relief of cancellation asked for in connection with this separate defense, it was necessary that a finding be made upon the facts therein averred. The fact that no such finding was made indicates that the defense was abandoned. In view of all these circumstances and this condition of the record, we do not think it would be fair to the plaintiff to hold that the error in considering the decree of distribution as a bar was harmless because a presumption against the validity of the grant would arise from the relations of the parties shown upon the face of the instrument, a presumption not pleaded as a cause for declaring the grant void. Justice requires that the case be remanded for a new trial so that the parties can intelligently state and meet the issue of undue influence if they so desire.

In view of the necessity of a new trial, it may be well to add that the part of the second agreement providing for the reimbursement to Campbell of his "outlays" did not materially change the obligations of the clients in respect to such outlays. The language should not be construed more liberally toward the attorney than its ordinary meaning requires. In the absence of a special agreement to the contrary, a client is bound to repay his attorney for all outlays made by him in the payment of the expenses of carrying on the litigation, and an attorney is bound to bear his own personal and traveling expenses. The word "outlays," when used in that connection, does not ordinarily mean the personal or traveling expenses of the attorney, but refers to costs of suit and other expenses paid to third persons for similar purposes. It should be so construed in this agreement.

The order denying a new trial is reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.

MELVIN, J. I dissent from the second proposition advanced by Mr. Justice SHAW. I think the instrument Exhibit B was a mortgage.

On Rehearing.

PER CURIAM. The petitions for a rehearing are denied. In response to the points urged therein, we will say: That the opinion in the case upon the question of the construction and effect of the instrument referred to as "Exhibit B," and upon the question of undue influence, is predicated upon the facts stated in the opinion; that it appears that the case was tried and decided in the court below upon the theory that the plaintiff was barred by the decree of distribution; and that the facts, aliunde, shown in the record, bearing upon the construction and effect of that instrument and undue influence in relation to it, are such facts only as were incidentally shown in the course of the trial of the other question. If the case is to finally rest upon the questions last mentioned, it is more in consonance with the correct administration of justice in a case involving, as this case does, large properties, that the questions be determined upon a new trial, devoted directly to the examination thereof. Upon such a trial all the evidence bearing upon such questions can be introduced, and new pleadings may be filed if necessary. The record now before us omits many facts which might be relevant to these propositions; at least we surmise that it does, from that which does appear. If upon such a trial it should be claimed that the aforesaid instrument should be construed as a grant of a share in value, only, of the estate, and not of the specific property, and that Campbell has already received all, or a large part of it, in money, thus satisfying the grant, or a due proportion of it, or if it should be asserted that he has elected to take the whole, or part of it, in money by retaining such sums as he may have received under the orders of the court as attorney for absent heirs, and, that the plaintiff is thereby estopped from now claiming any of it, or the ratable part of it, as a share of the real estate, or that the grant was obtained by undue influence, there is nothing in the opinion rendered which precludes such inquiries. No such questions have been heretofore presented, either here or in the court below, nor does the record here show that Campbell received any money as attorney for absent heirs.

MEMORANDUM DECISIONS.

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PARMELEE et al. v. DIXON et al. (Civ. 647.) (Court of Appeal, Third District, California. Oct. 22, 1909.) Appeal from Superior Court, Placer County; John F. Ellison, Judge. Action by Elmer E. Parmelee and others against Fred Dixon and others. From a judgment for plaintiffs, and an order denying a motion for new trial, defendants appeal. Affirmed. Tuttle & Tuttle and Tabor & Tabor, for appellants. John M. Fulwiler, for respondents.

CHIPMAN, P. J. Action to quiet title to a certain ditch and the water flowing therein. Plaintiffs had judgment, from which, and from the order denying their motion for a new trial, defendants appeal. The ditch in question, known as the "Bradford Ditch," taking its water from what is known as "Grouse Cañon," has been in use for over 40 years in operating the mines now owned by plaintiffs. Defendants allege the ownership of mines adjacent to the Bradford Ditch intermediate its head and plaintiff's mines. In September, 1904, defendants posted a notice of location of the waters of Grouse Cañon and appropriated and took possession of a portion of the Bradford Ditch, claiming that plaintiffs for more than 12 years immediately preceding said location "have failed and neglected to cause any water to run through the said Bradford Ditch as described in their complaint, and have failed and neglected, for said period, to keep said ditch in repair so that water could flow through the same, and have abandoned said water right and the said ditch." The court made findings in favor of plaintiffs and negativing the averments of the answer. There was evidence of the use of the water of Grouse Cañon by means of the Bradford Ditch as early as 1860 by plaintiffs and their predecessors in estate, down to 1904, when defendants initiated their claim, took possession of the ditch, and deprived plaintiffs of the use of the water. There were years when all the water flowing in the cañon was used by plaintiffs, and other years when they did not use all of it. Some years the full flow at low water was all required for hydraulicking, and others only a part, when the mine was operated by drifting; but it was all claimed and used, and there was no evidence of abandonment or disuse for such period as would justify the inference that plaintiffs or their predecessors had surrendered their rights to the water or the ditch, or intended so to do. The case presents no question of law requiring notice. Upon some points there is conflict in the evidence; but a careful reading of the record discloses ample support for the findings. No useful purpose would be subserved by stating the evidence. The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.